

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

SHARON RUMLEY AND QUEENS :
COMPREHENSIVE PERINATAL COUNCIL, INC., :

Petitioners, :

DOCKET NO. PR 10-008

To Review Under Section 101 of the Labor Law: An :
Order to Comply with Article 6, and an Order under :
Article 19 of the Labor Law, both dated January 8, :
2010, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Proskauer Rose LLP (Nathaniel M. Glasser of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Sharon Rumley and Pamela Davis, for petitioners.

Samantha Williams, claimant, and Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On March 1, 2010, petitioners Sharon Rumley and Queens Comprehensive Perinatal Council, Inc. filed a petition with the Industrial Board of Appeals (Board) seeking to annul two orders issued by the Commissioner of Labor (Commissioner) on January 8, 2010.

The first order (wage order) requires compliance with Article 6 and demands payment of \$729.57 in unpaid wages due and owing claimant Samantha Williams, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of \$152.23, and a civil penalty of \$729.57, for a total amount due of \$1,611.37. The second order (penalty order) requires compliance with Article 19 and demands payment of a civil penalty of \$500.00 for

failure “to keep and/or furnish true and accurate payroll records for each employee” for the period September 8, 2008 through September 19, 2008.

The petition argues that the wage order is invalid and unreasonable because petitioners submitted accurate time and payroll records during the Commissioner’s investigation reflecting the “accrual time worked” by the claimant and the “employee cannot prove that she worked at the organization” during the period of her claim. Petitioners clarified their petition and asserted at hearing that claimant was suspended without pay from September 8, 2008 through September 15, 2008, and then terminated, and is not entitled to wages for the period of her suspension. The petition also argued that the penalty order should be annulled because their record keeping complied with all requirements of the Division of Labor Standards.

Upon notice to the parties, a hearing was held on August 7, 2012 in New York, New York before J. Christopher Meagher, Member of the Board and the Board’s designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner Sharon Rumley (Rumley) is Executive Director of Queens Comprehensive Perinatal Council, Inc. (QCPC), a community based health organization that addresses maternal and infant mortality and illness in underserved communities in Queens, New York. Her duties include administrative oversight of the organization, personnel, staff development and training, and the hiring and firing of staff. Deputy Director Pamela Davis (Davis) works under Rumley’s supervision and is responsible for the day-to-day technical assistance and supervision of staff.

QCPC employs staff in four community projects, including the Domestic Violence Empowerment Initiative (DOVE) where claimant Samantha Williams (Williams) was employed as a project coordinator from March 31, 2008 until her discharge on September 15, 2008. Her duties included conducting educational workshops, client advocacy and crisis intervention, and providing referrals to community resources for women in need of domestic violence services. She worked at two off-site locations in South Jamaica and Rockaway Beach and was provided additional office space at QCPC’s administrative office to perform her duties.

On September 17, 2008, Williams filed a claim for unpaid wages with the Department of Labor (DOL) stating that she worked 41.5 hours over 6 days during the payroll period September 8, 2008 to September 19, 2008 and was owed \$729.57 wages for the period of her claim.

Testimony of Petitioner Sharon Rumley

Rumley testified that on Williams’ first day of employment she submitted all documents required for her personnel file, including W-4 and I-9 forms, with the exception of corroborating information for the I-9. Williams provided a copy of her passport with the I-9 and said there were immigration documents she would submit that would give her authorization to work. She was awaiting receipt of those documents from the US Customs and Immigration

Service (USCIS).¹ Williams was given release time to obtain the follow-up information but as of August had not submitted the documentation.

Rumley testified that on August 25, 2008, she received a memo from Williams stating that upon her employment with QCPC she had submitted a tax identification number but had now received a permanent social security number and wished to change the information for record keeping purposes. Rumley spoke with her about the issue, and advised her they would discuss it at their next monthly meeting and she would be required to go into her follow-up at that time. At the meeting on Monday, September 8, 2008, however, she did not produce a social security card and seemed to not know what papers she was supposed to provide to confirm her work eligibility: "So I stated to her that I would check with USCIS myself and she would be suspended pending my receiving from her the appropriate documents, and we were scheduled to meet a week later on the 15th of September." The suspension was without pay and was "verbally" conveyed to the claimant.

Rumley added that she informed Davis of the suspension that day and gave her a written memo the next morning stating that Williams was suspended without pay effective September 9, 2008 until she submitted her work documents to the organization. She also took Williams' schedule for the week and wrote "Suspended" across the face of it. Staff members submit their schedule of activities for the next week to her each Friday, with a copy to Davis, and one kept by the employee. The originals are kept in her office. She made the notation because it is her practice to update schedules whenever there are any changes: "So that's my own paper trail for all the employees, so it's not just Samantha but anytime there is a change, they are out sick, whatever."

Rumley maintained that Williams did not work the next week. At the meeting held the following Monday, September 15th: "There was a memo I had prepared outlining the issues; in the event she did not submit to me the required documents for her personnel file, I would terminate her. And so we reviewed the memorandum. I gave it to her, she signed for it, and when I asked her again for the personnel documents that had been requested, her social security card and the work authorization, she did not produce those documents and so she was terminated."

The memo details the prior events in the dispute, including the request that Williams submit her work documents; her schedule adjustment and failure to submit them while Rumley was on leave; her social security number change; petitioner's directive that she discuss her work eligibility follow up at the meeting on September 8th; and her statements concerning the documents at that meeting. No reference is made to the suspension without pay.

Petitioners submitted an earlier memo to Williams and a "Personnel Memorandum Record" listing the two memos placed in her personnel file and her signature acknowledging their receipt. Rumley testified that the purpose of the Record "is to document all personnel memos generated to employees and staff and their signature corroborates that they were in receipt of the memorandum and it was discussed with them."

¹ Federal law requires employers to verify the identity and employment eligibility of all individuals hired in the U.S. by an "Employment Eligibility Verification Form I-9" (8 USC § 1324a[b]; 8 CFR § 274a.2). Employers determined to have knowingly hired or continued to employ unauthorized workers may be subject to civil or criminal sanctions for employment related violations (8 USC §§ 1324a[a][1][a] or [a][2]).

Petitioners submitted Williams' time sheets and other payroll records demonstrating that she was fully paid for each week through Friday, September 5, 2008. Rumley explained that staff members submit their time sheets to her on Friday each week, with a copy to Davis, and one kept by the employee. She reviews them with Davis and then signs and submits them for payment. Employees are paid on a bi-weekly basis on Thursday for the preceding two weeks.

Petitioners submitted copies of time sheets and schedules for all staff for the weeks of September 8-12 and September 15-19, 2008. Rumley said she did not receive time sheets from Williams for either week, or a schedule for the week of the 15th to the 19th.

Testimony of Pamela Davis

Deputy Director Davis testified that she was responsible for program support and direct supervision of five employees, including the claimant. The two met for a supervisory meeting once a month and informally at the administrative office or in the field several times a week. The purpose of the monthly meeting was to discuss: "Project implementation; they are responsible for providing an update on all of their project activities and we also talk about technical assistance issues and if there's any additional information that I need to provide to them regarding the project, I share it, at that time."

Davis testified that Rumley informed her on September 8th that Williams had been suspended and the next morning gave her the confirming memo. After receiving the memo, she phoned the contact persons at two activities listed on Williams' weekly schedule, a workshop on Tuesday, September 9th and a training session at the NYC Department of Health on Friday, September 12th, and cancelled Williams' attendance. A third activity, the monthly supervisory meeting on Wednesday, September 10th, did not occur. Davis maintained that Williams did not work during the time she was suspended and she did not see her at the administrative office or in the field.

Davis added that she keeps a calendar of her activities in her office: "Anytime I schedule an activity for myself, I always log it in on a calendar. This helps me keep track of my daily and weekly activities. If there is ever a change in my schedule, I make a notation on my calendar." On Tuesday, September 9th, she crossed off and wrote, "cancelled" across the entry for the DOVE supervisory meeting the next day.

Testimony of Claimant Samantha Williams

Williams explained that at the time she began her employment she was in the process of becoming a permanent resident. She advised Rumley at the orientation that she was in the process of getting her work documents but had encountered a delay from Immigration and had not yet received the documents to start work. "She told me, if I have a passport? I said yes. She said to bring it in, she'll photocopy it, put it in the file and whenever the documents became available, I would just bring them to her to add to the file." Williams said she entered a tax ID number on the W-4 form because she had inquired and been told before she got the job to use her tax ID number, and when she got a social security number her employer could just change it for their file.

Williams testified that as of August 25, 2008 she had received her social security number and other work documents and sent Rumley a memo to change her tax ID to her permanent social security number for record keeping. Rumley then scheduled a meeting with her on Monday, September 8, 2008 at 3:00 PM to discuss her verification documents and the furthering of her program for the next fiscal year. Williams said she did not recall that Rumley requested her to bring any documents. At the meeting, "... Ms. Rumley explained to me that my verification documents were due to her, but from what she was telling me, I wasn't sure she was still talking about the same documents, so she said she had to speak to a lawyer and come back to me and let me know. So we scheduled an appointment for the 15th of September where I'd walk in with these documents." Rumley advised her that she needed to bring in her working papers on that date to continue working, or she would be terminated. There was no mention of any suspension.

Williams testified that she worked each day from Monday, September 8 to Monday, September 15, 2008. Her schedule for the 8th through the 12th reflects the activities she performed that week, not just those that were planned. The schedule includes work at the South Jamaica (SJO) office each day, travel, meetings, and workshops. Williams said she attended a workshop at a high school (Ocean Bay) on Tuesday, a DOVE supervisory meeting with Davis on Wednesday, and a workshop at the Department of Health (DOH) on Friday. The workshop at DOH discussed the issue of sexually transmitted infections (STI) amongst victims of domestic violence. She attended the workshop with a coworker.² On Monday, September 15th, she worked at the South Jamaica office doing prep' for a workshop the next day and then went to the meeting with Rumley at 4:00 PM. At the meeting, Rumley told her that she was being terminated for failure to submit her work documents and asked her to sign a memorandum about the issue. She brought her documents to the meeting but was not given the opportunity to present them before she was let go.

Williams testified that she contemporaneously recorded notes of all meetings held with her supervisors during the course of her employment, including those with Rumley and Davis on September 8, 10, and 15, 2008. The original and complete log of notes was produced and copies of notes of the three meetings submitted into evidence. Williams explained that at the meeting with Davis on September 10th, the two discussed her program and the referrals and contacts she was to do to keep the program going. Her notes describe "Key Result Areas", including specific activities dealing with community outreach, education workshops, referrals and links to various organizations, a crisis intervention, client advocacy, agency site visits, training on STI on Friday September 12, and a monthly narrative to be handed in by Friday.

DOL submitted copies of Williams' time sheets for the weeks of September 8 to 12 and September 15 to 19, 2008 that she submitted during the investigation. Williams initially testified that she was not sure if she submitted the first one, but later said she did. She did not submit the second. On cross examination, she acknowledged that she told the investigator she had been terminated on September 15th, was banned from the office, and was never able to submit her final time sheets.

² Williams added that she handed in a letter of resignation on Thursday and met with Davis on Friday at 2:00 PM to talk with her about it. Her last day was to be September 25th. On rebuttal, Davis denied that claimant met with her and told her she was resigning. Davis said she received a copy of a resignation letter from Williams, but could not recall the date.

DOL submitted a copy of the last wage statement that Williams said she received from QCPC, dated September 5, 2008. The original was produced and shown to counsel and the Hearing Officer. Williams testified that it was enclosed with her final paycheck and she brought it to the hearing because there was a discrepancy with the copy submitted by petitioners, dated September 11, 2008.³

Testimony of DOL Investigator Jeremy Kuttruff

On October 27, 2008, DOL issued petitioners a notice advising them of the details of the claim, and that if they agreed with it they should remit payment within ten days. The notice further advised that if petitioners disagreed, they should submit a full statement of their reasons, together with any payroll record(s), policy, contract, etc. to substantiate their position.

Senior Labor Standards Investigator Jeremy Kuttruff (Kuttruff) testified that on October 31, 2008, he received a phone call from Rumley responding to the claim. Referring to notes of the conversation he entered in DOL's contact log, Kuttruff testified:

"The employer stated the reason she didn't pay was because the Claimant never gave a valid social security number. I advised the employer that even if the claimant didn't provide a valid social security number, she would have to be paid for all the hours that she worked. The employer stated that she disputed the amount of the claim because the Claimant never submitted time sheets so that the employer could sign-off on those hours. I asked the employer if there was any way she can determine what hours were worked by the Claimant? The employer stated she could research and find out what days and hours the claimant worked. I advised the employer she can put her position in writing and send documentary evidence to substantiate her position and send a check for the amount that is owed."

On November 7, 2008, Kuttruff received a letter from Rumley asserting that Williams was not entitled to the wages claimed because she had been "suspended without pay" on September 8, 2008, pending submission of required I-9 documents to corroborate her authorization to work. She was rescheduled to meet with Rumley on September 15, 2008 to submit those documents, did not submit them, and was terminated summarily. The letter stated that Williams' last workday was September 5, 2008, and she had received a paycheck covering the payroll period August 28 to September 5, 2008. She was not entitled to additional wages. Rumley enclosed various documents in support of the assertions in her letter. The documents did not make reference to the suspension without pay.⁴

³ On rebuttal, Rumley testified that the wage statement submitted by Williams is inaccurate because QCPC issues payroll on a bi-weekly basis on Thursdays for the previous two weeks. Her two prior statements were issued on August 14 and 28, 2008. According to Rumley, the September 11, 2008 statement submitted by petitioners is accurate because it represents wages earned through the previous Friday, September 5, 2008.

⁴ Enclosed were a form submitted to DOL stating that Williams was not eligible for UIB benefits because she had been terminated for failure to submit work documents; the memo of September 15, 2008 and Personnel Memorandum Record; Williams' W-4 tax form and memo requesting the Social Security Number change; her time sheets from August 25 to September 5, 2008; and copies of her last paycheck and wage statement, dated September 11, 2008.

Kuttruff testified that he reviewed the employer's submission and contacted the claimant for a response. On October 19, 2009, claimant related that she had met with the employer on September 8, 2008, and was told she needed her I-9 documents. Claimant told the employer she was not sure what documentation was needed, and the employer responded that she would speak to a lawyer and meet with her again on September 15, 2008, to discuss the documents needed. Claimant said she continued to work through the 4:00 PM meeting on September 15, 2008, was terminated at that meeting, and was banned from the office and never able to submit her final two time sheets. Claimant added that she had the time sheets and would send them to DOL. Kuttruff said that DOL would send them to the employer and demand payment.

On October 21, 2009, Kuttruff issued a letter to Rumley summarizing the employer's written response, reporting the conversation he had with Williams, and enclosing copies of her final time sheets and schedules for the period of the claim. Kuttruff advised that petitioner's response was contrary to statements she made on October 31, 2008, where she stated that claimant was not paid due to her failure to submit a social security number, and the amount of the claim was disputed because she failed to submit time sheets. Furthermore, there was no entry in claimant's Personnel Memorandum Record supporting her statement that on September 8, 2008 she had suspended claimant without pay. In light of petitioner's response, DOL had no choice but to take the position that the employer owed claimant the \$729.57 claimed because petitioner failed to provide credible evidence that claimant is not owed the wages claimed. Kuttruff further advised that petitioner should remit payment of the wages due by November 11, 2009, or the matter would be referred for an Order to Comply, entailing additional interest and penalties. No further response was received.

Kuttruff testified that petitioner never submitted copies of her memo to Davis stating that Williams was suspended without pay effective September 9, 2008; Williams' schedule with the notation "Suspended"; or Davis' calendar with the notation "cancelled", throughout the course of DOL's investigation.

On January 8, 2010, the Commissioner issued the orders under review. In support of the civil penalties assessed in both orders, DOL submitted an "Issuance of Order to Comply Cover Sheet" recommending that a 100% civil penalty be assessed in the wage order and a "Labor Law Articles 6, 19, and 19-A Violation Recap" recommending a \$500 civil penalty for the employer's failure to maintain and/or furnish payroll records.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor law provides that "any person ... may petition the board for a review of the validity or reasonableness of any ... order issued by the commissioner under the provisions of this chapter" (Labor Law § 101[1]). It also provides that an order of the Commissioner shall be presumed "valid" (*Id.* §103 [1]).

Pursuant to Rule 65.30 of the Board's Rules, "The burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

It is therefore petitioners' burden in this case to prove by a preponderance of evidence that claimant was suspended without pay from September 8, 2008 to September 15, 2008, and is not entitled to the wages owed for the period of the suspension.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 and the Commissioner's implementing regulations in 12 NYCRR § 142-2.6. The regulations applicable during the claim provided:

“(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:

- [1] name and address;
- [2] social security number;
- [3] wage rate;
- [4] the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- [5] when a piece-rate method of payment is used, the number of units produced daily and weekly;
- [6] the amount of gross wages;
- [7] deductions from gross wages;
- [8] allowances, if any, claimed as part of the minimum wage...”

FINDINGS

Petitioners Violated Article 6 of the Labor Law by Failing to Pay Claimant Wages Due

We find that petitioners failed to meet their burden of proof to establish by credible evidence that claimant was suspended without pay from September 8, 2008 to September 15, 2008 and was not entitled to wages for the period of her claim.

Petitioner did not issue claimant any written notice corroborating the suspension and the memo placed in her personnel file over the dispute does not mention the issue. Petitioner testified that she maintains a record of personnel memos generated to staff to be placed in their file and their signature corroborates that it was received and discussed with them. After the meeting on September 8th, she prepared a memo for Williams' file, outlining the “issues” in the event she did not submit her work documents and she would have to terminate her. The memo details the prior events leading to the termination, including the various directives that claimant submit her work documentation and the meeting on September 8th. However, no reference was made to the suspension without pay. It is unlikely this issue would have been left out if such a serious employment action had been taken.

Investigator Kuttruff testified that in response to DOL's collection notice, petitioner contacted him on October 31, 2008 to discuss the claim. Petitioner stated that she did not pay the wages due because claimant had not submitted a valid social security number and disputed the amount of the claim because claimant had never submitted time sheets. No reference was made

to the suspension without pay. Kuttruff requested that petitioner determine the hours worked by the claimant, put her position in writing and substantiate it with documentary evidence, or remit payment. On November 7, 2008, petitioner responded in writing stating for the first time that claimant had been "suspended without pay". It is unlikely that petitioner would fail to recall the suspension in her initial conversation with the investigator if the action had in fact been taken.

We do not credit the testimony or documents submitted by petitioners concerning the memo of September 9, 2008, claimant's schedule with the notation "Suspended", or Davis' calendar with the notation "cancelled" as corroboration of the suspension. Petitioner and Davis said that petitioner informed her of the suspension on September 8th, issued her a confirming memo the next day, and the schedule and calendar notations were made. In response to the investigator's request that petitioner submit documentary evidence substantiating her position, petitioner enclosed numerous records with her November 7, 2008 letter to support her assertions. The records did not make reference to the suspension. Kuttruff testified that petitioners did not submit the memo, the schedule, or the calendar during DOL's investigation. Petitioners' failure to produce them until the hearing suggests they were not contemporaneously recorded.

We also do not credit Deputy Director Davis' testimony that she took steps to implement the suspension and did not meet with claimant during that time. To implement the suspension, Davis said she called the contact persons at a workshop and training session listed on claimant's schedule and cancelled her attendance. Petitioners did not submit proof from the organizations that held the activities or other independent evidence showing that claimant did not attend. We credit her more specific and direct testimony that she did. Davis also testified that the monthly supervisory meeting with Williams scheduled for Wednesday, September 10, 2008 did not occur. We credit claimant's testimony that she met with her supervisor that day, as she described the topics discussed at the meeting and contemporaneous notes corroborate her testimony.

We find that claimant provided specific and credible testimony that she was not suspended and worked each day from September 8, 2008 to September 15, 2008. Williams testified that Rumley told her at the meeting on September 8th that she would check with a lawyer on the work documents that were needed and the two would meet again on September 15th to discuss them. Petitioner told her she would have to bring in her documents to continue working, but there was no mention of any suspension. Williams testified that she performed each of the activities listed on her schedule that week, including a workshop at a high school, the monthly supervisory meeting with Davis, and a training session with a coworker at the Department of Health. On Monday, September 15th, she did prep' work at the South Jamaica office before the meeting with Rumley at 4:00 PM. At the meeting, petitioner told her she was terminated for failure to provide her work documents and asked her to sign the memorandum over the issue. She brought the documents to the meeting, but was not afforded the opportunity to provide them before she was let go.

In resolving the conflict in testimony in this case, we find claimant's testimony and notes concerning the meeting with Davis on Wednesday, September 10th critical to crediting her testimony that she was not suspended. Davis testified that the purpose of the meeting was for the employee to provide "an update on their project activities" and to discuss technical assistance issues and information necessary to implement the project. Williams testified that the two discussed her program and the referrals and contacts she was to do to keep the program going. Her notes of the meeting describe in detail "Key Result Areas", including specific activities

dealing with community outreach, upcoming education workshops, referrals and links to various organizations, a crisis intervention, client advocacy, agency site visits, training on STI on Friday, September 12, and a monthly narrative to be handed in by that Friday.

Petitioners argued in closing that the notes of the meetings reflect different handwriting and dates. Our review shows no irregularities that would suggest they were not contemporaneously made. The notes of the meeting with Davis are crucial in resolving the conflict in testimony, as it is undisputed that claimant and Rumley held meetings on September 8th and 15th. The specificity and manner in which the “project activities” are described in that meeting corroborate claimant’s testimony that she met with her supervisor that day, was not suspended, and worked each day during the period of her claim.

Petitioners argued that claimant’s credibility was undermined by her inconsistent testimony on handing in her time sheet for the week of September 8 to 12, first stating she wasn’t sure if she submitted it, then stating that perhaps she didn’t. Williams testified consistently on the central issue in this case, that she was not suspended and worked each day during the period of her claim. Her inconsistent statement about one of her time sheets does not undermine her testimony.

Petitioners further argued that the evidence concerning time sheets proves claimant didn’t work, as their payroll system requires her to submit a time sheet in order to be paid; she had been paid in that manner through September 5th; and she did not submit time sheets for the periods ending September 12 and September 19, 2008. Petitioners argue that claimant did not submit time sheets because she did not work during those times.

Petitioners’ argument that claimant’s failure to submit time sheets is proof that she didn’t work is misplaced. The federal Fair Labor Standards Act and the Labor Law similarly define “employ” to include “suffer or permit to work” (29 USC § 2[g]; Labor Law § 2[7]). If an employer is on actual or constructive notice that an employee performs work on its behalf, the hours worked must be compensated (*Matter of Givens*, PR 10-076 [2013]). The Labor Law requires that employers maintain records of the daily and weekly hours worked by employees. While petitioners may utilize a system of employee self-reporting as a convenient method to record those hours, they may not use it to avoid responsibility to pay employees for work performed (*Goldberg v Cockrell*, 303 F2d 811, 812 n.1 [5th Cir. 1962] [“while there is nothing to prevent an employer from delegating to his employees the duty of keeping a record of their hours, the employer does so at his peril. He cannot escape the record keeping provisions of the Act by delegating that duty to his employees.”]). The record in this case establishes that petitioners did not suspend claimant from September 8 to September 15, 2008 and that she performed work each day during the period of her claim. As such, she was suffered or permitted to work and must be compensated for those hours.

Finally, petitioners argued that claimant’s credibility is flawed because she submitted a wage statement that is inconsistent with the other wage statements produced in this case. DOL argued that the discrepancy is evidence of petitioners’ less than clear recordkeeping. Claimant produced the original at hearing and the document does not appear to have been altered on its face. As the document is irrelevant to our determination of the central issue in the case, whether claimant worked during the period of her claim, we need not address the collateral issue of its authenticity.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the “best available evidence” drawn from employee statements (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]). We find petitioners failed to meet their burden of proof to establish that claimant was suspended without pay from September 8 to September 15, 2008, and we affirm the Commissioner’s determination that she is entitled to be paid wages for the period of her claim.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment”. Banking Law § 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Petitioners did not challenge the assessment of interest made by the wage order. The Board finds that the considerations and computations to be made by the Commissioner in connection with the interest set forth in the order are valid and reasonable in all respects.

Civil Penalties

Petitioners did not challenge the 100 % civil penalty assessed in the wage order. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty are valid and reasonable in all respects.

Petitioners asserted in their petition that the penalty order should be annulled because their record keeping complied with all requirements of the Division of Labor Standards. However, they did not submit evidence at hearing challenging the penalty beyond submitting payroll records showing that claimant was paid through September 5, 2008. As no records were submitted showing that claimant was paid wages for the period of the claim, we affirm the Commissioner’s determination that petitioners failed “to keep and/or furnish true and accurate payroll records for each employee” for that period. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty are valid and reasonable in all respects.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.




Anne P. Stevason, Chairperson

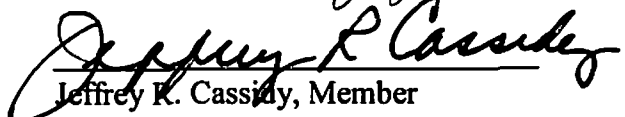
J. Christopher Meagher, Member



Jean Gramet, Member



LaMarr J. Jackson, Member



Jeffrey K. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
November 20, 2013.