STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ABE MENDLOWITZ AND BRIARCLIFF ESTATES, LLC,	:	
Petitioners,	:	DOCKET NO. PR 10-240
To Review Under Section 101 of the Labor Law: An Amended and Reissued Order to Comply with Article 6 of the Labor Law and an Order under Article 19 of the Labor Law, both dated May 27, 2010,	:	INTERIM RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Woods, Oviatt, Gilman, LLP, Lorisa D. LaRocca of counsel, for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Larissa C. Wasyl of counsel, for Respondent.

WHEREAS:

The Commissioner issued an Amended and Reissued Order to Comply with Labor Law Article 6 (Wage Order) and an Amended and Reissued Order under Labor Law Article 19 (Penalty Order) (together, Orders), against Petitioners Abe Mendlowitz and Briarcliff Estates, LLC (Petitioners) on May 27, 2010.[1] The Board received Petitioners' Petition and Amended Petition (together, Petitions) for review of the Orders on July 20, 2010 and August 5, 2010, respectively and served them on the Commissioner.

[1] The Wage Order finds that Petitioners made unlawful wage deductions from Claimant for the period August 17, 2008 through June 11, 2009, and directs that $4,923.84 be paid to the Commissioner for the wages due, with $887.10 continuing interest thereon at the rate of 16%, calculated to the date of the Wage Order. The Wage Order also assesses a civil penalty of $10,734.78, for a total of $10,734.78 due and owing. The single count of the Penalty Order finds that Petitioner violated Labor Law § 661 and 12 NYCRR part 142-2.6 by failing to keep and/or furnish true and accurate employee payroll records for the period August 17, 2008 through June 11, 2009 and assesses a penalty of $500.00.

The Petition alleges that the Orders are invalid and unreasonable because they find Petitioners liable for wage deductions that are allowed under Labor Law § 193. There is no dispute that the Petitioners deducted rent payments and rent arrears from the Claimant's wages. Petitioners assert that these deductions were for the Claimant's benefit and were authorized by Claimant, and were therefore, permissible.

The Commissioner moved to dismiss the Petitions because they fail to state a claim that the Orders are invalid or unreasonable. The motion is made pursuant to Board Rules of Procedure and Practice § 65.49 (12 NYCRR 65.49) which states that "[a] proceeding may be dismissed for cause upon motion of a party or the Board." The Commissioner asserts that the Board has "cause" under Rule § 65.49 to dismiss the petition because it fails "to set forth any legally recognized grounds for a finding that the Order sought to be reviewed is invalid or unreasonable . . . ." The Commissioner argues that Labor Law §193 does not permit deductions for rent, even if authorized.

Labor Law § 193 in relevant part states:

1. No employer shall make any deduction from the wages of an employee, except deductions which:
   a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
   b. Are expressly authorized in writing by the employee and are for the benefit of the employee . . . . Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.

Petitioners assert that Claimant rented an apartment at below market rate from Petitioners at their place of business, and that Claimant was behind in his rent payments. According to Petitioners, Claimant authorized rent deductions in the amount of $200.00 per week in order to satisfy his past unpaid rent, as well as for ongoing rent payments. Petitioners argue that the rent deductions benefited Claimant because the alternative was to evict Claimant and to obtain a judgment against him, which would have adversely affected his credit rating and are similar to the payments enumerated in Labor Law § 193. Further, according to Petitioners, the rent deduction benefited Claimant as his "personal property or vehicle [might] be seized to enforce a judgment in the full amount of the outstanding debt."

In *Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579 (2006), the Court of Appeals held that Labor Law § 193 prohibits an employer from charging its employees a fee to receive their wages in cash from a cash dispensing machine even though the employees had the option to receive their wages by check and not pay a fee. The Court found that the convenience of receiving wages in cash was not a benefit to the employees similar to those set forth at Labor Law § 193 (1) (b). We find that, likewise, deductions for rent, are not the type of deduction from wages allowed by the Labor Law.

Even if Petitioners' prediction of the consequences to Claimant if the deductions were not made are accurate, the legality of such deductions can not be determined by whether adverse consequences to the employee may occur if the deductions are not made. This is especially so here where the claimed consequences are entirely speculative. Further, the rent deductions primarily benefited Petitioners as the deductions enabled Petitioners to collect rent without having to seek a judgment. As the Court recognized in *Labor Ready*, an employer cannot make wage deductions for its own benefit:

> "The history of Labor Law § 193 manifests the legislative intent to assure that the unequal bargaining power between an employer and an employee does not result in coercive economic arrangements by which the employer can divert a worker's wages for the employer's benefit" (Id. at 586.)

Petitioners maintain that the rent deductions are permissible because Claimant does not dispute the debt, nor did he withhold any part of the rent due because of a dispute with the employer/landlord. Petitioners also contend that "[t]his situation is no different than if the employee had entered into a Confession of Judgment, which the Courts routinely accept as evidence of a debtor's agreement to a debt which are fully enforceable against the debtor. . . ."

Petitioners, rely on *Department of Labor Opinion Letter RO-07-0099* (2007), which, in part, states:

> "...one of the purposes of [Labor Law § 193] is to prevent a creditor from bypassing examination of a disputed debt by a court merely because the creditor happens to be the employer of the debtor. There may be many reasons for a tenant to default on a rental payment, among them the belief that the rent has already been fully paid, or that the landlord has committed some breach of the warranty of the payment."

In this opinion letter, the Department of Labor, relying on *Labor Ready*, opined that employee authorized wage deductions for reimbursement of rent paid by an employer of an employee's residence are not permissible deductions as such deductions are neither one of the enumerated deductions under Labor Law § 193(1)(b) nor are they "similar to one of those purposes." The Department of Labor wrote that "while you may not collect the money allegedly due from this employee . . . you may, *after obtaining a court judgment that such money is owed* collect such money through wage deduction pursuant to Labor Law § 193(1)(a) and CPLR §5231" (emphasis added).

There is no judgment in this matter – in fact, Petitioners argue that the rent deductions should be held permissible as such deductions would avoid the necessity of obtaining such a judgment. Moreover, in *Labor Ready*, the Court of Appeals held that "the Legislature passed laws requiring employers to pay employees in cash, not company scrip that could be used only at the 'company store,' and prohibiting charges for provisions as

offsets to wages," (*Labor Ready* at 585). It also recognized that that the Legislature's intention was to prohibit employers from selling, upon credit, later to be reconciled by wage deductions, such items as groceries or clothing. Rent payments are similar to these prohibited deductions.

Finally, in *Matter of Taylor Made Funding*, Docket No. PR 26-98 (February 24, 1999), the Board affirmed an order to comply with Article 6 of the Labor Law issued for unlawful rent deductions. We see no reason to depart from our prior holding that deductions from wages for rent are prohibited by the Labor Law.

We find that all paragraphs, other than those challenging the civil penalty, must be dismissed.

For the reasons stated above, we grant the motion in part, and deny it in part.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. Paragraphs 4, 6, 7, 8, 9, 10, and 11 of the amended petition are stricken from the amended petition.

2. Paragraph 12 of the amended petition, with the exception of the allegation that the civil penalties are "inequitable and unjust," is stricken from the amended petition. Paragraph 13, with the exception of the challenge to the civil penalties, is stricken from the amended petition.

3. The petition is deemed amended in accordance with this Decision; and

4. The Respondent Commissioner of Labor shall serve and file an Answer to the petition, as modified by this decision, in accordance with Rule § 66.5 (a).

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
December 15, 2010.