STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JAY BARANKER AND USI SERVICES GROUP, INC.,	
Petitioners,	
	DOCKET NO. PR 11-115
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, issued April 4, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Jay Baranker, petitioner *pro se* and on behalf of petitioner USI Services Group, Inc..

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

WITNESSES

Jay Baranker, Jeremy Kuttruff.

WHEREAS:

On April 14, 2011, Petitioners Jay Baranker and USI Services Group, Inc. (Petitioners) filed a petition with the Industrial Board of Appeals (Board) to review two orders to comply that the Commissioner of Labor (Commissioner or DOL) issued against them on April 4, 2011. The first Order to Comply with Article 6 of the New York State Labor Law (vacation pay order) directs payment of $680.00 in vacation pay due and owing to Pedro Montoya (Claimant) together with interest at 16% per annum calculated to the date of the order at $171.70, and a civil penalty in the amount of $680.00, for a total amount due of $1,531.70. The second Order Under Article 6 of the New York State Labor Law (penalty order) directs payment of $500.00 in civil penalties for failing to notify employees in writing or to post notice of fringe benefits for the period January 1, 2007 to September 5, 2009.

The petition alleged that the Claimant was hired by Petitioners in December 2007 and was ineligible for a vacation in 2008 because he was not consecutively employed and did not meet the one year eligibility period as required by the employee handbook. Claimant was laid off in August 2008, was rehired in September 2008, when his eligibility for benefits began anew, and his employment ended on August 13, 2009, short of the one year eligibility period. The petition also alleged that Claimant signed an acknowledgement showing that he read and understood the employee handbook. Respondent filed an answer on August 4, 2011.

Upon notice to the parties, a hearing was held on June 14, 2013 in Hicksville, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues and to file post-hearing briefs.

SUMMARY OF EVIDENCE

Claimant's sworn claim in Spanish[1] dated August 26, 2009 states that he worked for Petitioner USI as a cleaner at Macy's department store in Valley Stream, New York. His hire date was January 2007, his last date of work August 5, 2009, and he was paid $8.50 per hour. The claim avers that Claimant is owed $680.00 for two weeks of vacation pay for the period 2008-2009 and that "there is no written agreement, but other employees receive this benefit."

Testimony of Petitioner Jay Baranker

Petitioner USI provides Macy's department stores with janitorial services. Baranker is USI's Director of Human Resources. Claimant worked as a janitor in the Macy's store in Douglaston, New York from at least May 10, 2007[2] until he was laid off in August 2008, when USI lost the account for that store. Claimant was rehired in December 2008 to work at Macy's Valley Stream, New York store, where he worked until August 13, 2009. The claimant's hourly wage was $8.50 and his hourly overtime rate was $12.75. Claimant did not average 35 hours per week, although there were weeks when he worked more, including when employees called in sick or there was additional work .

Baranker testified that USI's vacation policy is stated in an employee handbook which is updated every year and which all employees are asked to read, "sign and acknowledge that they read it.... [u]sually every six months or so." This handbook "should have been out at every site," in a space made available by each Macy's for USI to keep cleaning supplies and use as an office. Baranker introduced in evidence a document titled "Acknowledgement and Agreement" signed on July 27, 2007 by four employees at the Douglaston store including Luis Montoya, ID number 160112, stating, "I have personally read and understand the Employee Handbook located at the job site that I report to for work."[3] Baranker stated that Claimant's employment application gave

[1] Both the claim form and most of the handwritten responses are in Spanish.

[2] Baranker stated that Claimant's employment application confirms a May 10, 2007 employment date but this was not necessarily his first day of employment; the application form also indicates "he was a rehire."

[3] The four-paragraph, English-language document also states agreement "to abide by the rules and regulations contained therein, including the agreement to arbitrate any and all employment related claims" and to "waive my rights to sue USI in Court.;" understanding "that the rules, policies, and benefits as outlined in the Employee

his name as "Pedro L. Montoya," and employees "sometimes... go by their middle names." The employment application lists Claimant's ID number as 124463 and contains a florid, cursive signature different from Luis Montoya's printed signature on the Acknowledgement and Agreement.

Petitioners entered in evidence the cover and three pages from an employee handbook effective January 1, 2009, which states that USI's "employee benefit package" includes: "health insurance, personal days, vacation, and holidays. The benefits are available to all regular, full-time employees and most of these benefits are provided to regular, part-time employees" The vacation pay provision states: "Regular full-time employees are eligible for paid vacation based upon length of service." An employee with one year of service is entitled to one week's paid vacation, and an employee with three years of service to two weeks' paid vacation; the benefit "accrues on the January 1 following the employee's anniversary date." Vacation time must be approved by the employee's supervisor and "may not be carried over and accumulated in subsequent calendar years. In the event your employment is terminated, you will not be paid for any accrued vacation." A different section of the handbook defines "regular, full-time employee" as one "who works at least 35 hours each week," and "regular, part-time employee" as one "who is regularly scheduled on a consistent basis, but less than 35 hours each week." The handbook is in English and there was no Spanish translation. Baranker does not know whether Claimant speaks English, and testified that 90-95 percent of Petitioners' janitorial staff, including "everybody" who worked in Douglaston, was of "Hispanic descent."

Baranker stated that Claimant was ineligible for vacation pay under this policy for several reasons, including that he did not work 35 hours a week consistently or on average, did not work consecutively because he was laid off for four months from August to December 2008 (although Baranker later acknowledged the layoff was of three weeks' duration from late August to mid-September 2008),[4] and that Claimant was terminated for taking unapproved vacation.

Petitioners' Record Evidence

Baranker introduced into evidence bi-weekly payroll journals for the period January 7, 2008 through August 13, 2009, but did not produce the time sheets used to create the payroll records, and Baranker did not know if they were retained by USI. Because these bi-weekly payroll journals did not include the daily and weekly hours worked, a USI administrative assistant during the DOL investigation, prepared a list of Claimant's weekly hours for the weeks ending 12/14/2007 through 8/14/2009, using the bi-weekly payroll journals, from which she extrapolated the number of hours worked by Claimant each week by dividing his gross wages earned by his hourly wage rate. This list of weekly hours indicates that while there were many weeks in which Claimant worked over 35 hours, sometimes much more than 35 hours, in most weeks he worked fewer than 35 hours.

Handbook may be updated, modified, or deleted at any time at the discretion of management;" and that the handbook "is not an employment contract and is not intended to create contractual obligations of any kind.... While USI expects to abide by the policies and procedures described in this handbook, regardless of what the handbook states, it does not constitute or contain a contract or a promise of any kind. USI may change the policies...."

[4] The relevant period in this matter is January 1, 2007 through September 5, 2009.

Each of the bi-weekly payroll journals for 2008 lists Claimant's name as Pedro Montoya and his ID number as 124463, as does the Payroll Change Notice concerning his August 2008 layoff, and his August 13, 2009 Separation Notice.[5]

Testimony of Senior Labor Standards Investigator Jeremy Kuttruff

Kuttruff, a DOL investigator for eleven years, conducted the bulk of the investigation in this matter. He noted that Montoya's sworn claim states that he worked from January 2007 to August 5, 2009, that he is owed $680.00 for two weeks of vacation pay for the period 2008-9, and that "there is no written agreement, but other employees receive this benefit." Attached to the claim were wage statements for the payroll periods July 5 -18 and July 19-August 1, 2009 indicating that in those periods Claimant respectively worked 97.25 hours for gross wages of $891.44 and 83.75 hours for gross wages of $732.06. DOL notified Petitioners of the claim, and Baranker responded in a letter dated October 15, 2009 stating that Claimant was ineligible for vacation and averaged 24.55 weekly hours in 2008 and 29.64 in 2009. Baranker enclosed: the vacation pay policy from the 2009 Employee Handbook, payroll journals, and summary list of weekly hours discussed above; Claimant's Separation Notice dated August 13, 2009, and a September 25, 2009 Notice of Determination denying Claimant unemployment benefits based on his having quit his job by taking an unapproved vacation.

After reviewing the claim, Kuttruff responded with a March 3, 2011 letter to Baranker. The letter noted that Claimant had stated he knew of no written policy and had based his understanding on what he observed of benefits paid to other workers; Petitioners had provided no evidence that Claimant received a written policy; and a handbook effective January 1, 2009 would in any event not apply to vacation earned before that date. Kuttruff's letter further noted that Petitioners' list of Claimant's hours worked was incomplete. For example, while Petitioners listed only the last three weeks of 2007 as weeks worked, Claimant's Form W-2 for 2007 showed he was paid almost $7,000 that year, making it clear he worked much longer. Kutreff stated that in the absence of conclusive documentary evidence from Petitioners, the DOL would accept Montoya's claim and issue an Order to Comply. Baranker stated in a telephone conversation that Petitioners would appeal, and Kutruff referred the case for an Order to Comply, recommending a 100 percent penalty.

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 made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]). A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). The petitioner has the burden at the hearing of proving that the Commissioner's order under review is invalid or unreasonable (Board Rules of Procedure and Practice (Board Rule) § 65.30 at 12

[5] Later print-outs do not list a name or ID number.

NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"); State Administrative Procedure Act § 306; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners' burden to prove by a preponderance of the evidence that the Orders under challenge are invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

The Vacation Pay Order is Affirmed

New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy, Labor Law § 198-c requires that the employer provide this benefit in accordance with the established terms. *(Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2nd Dept 2005]; *Matter of Glenville Gage Co., v State Indus. Bd. of Appeals*, 52 NY2d 777 [1980], *affg* 70 AD2d 283 [3rd Dept 1979]; *In the Matter of the Petition of Nathan Godfrey [TIA A.S.U.]*, PR 09-024 [January 27, 2010]; *In the Matter of the Petition of Center for Fin. Planning, Inc.*, PR 09-059 [January 28, 2008]; *In the Matter of the Petition of Joel D. Fairbank and 2nd Nature, LLC*, PR 09-052 [April 27, 2011]).

Labor Law § 195[5] requires an employer to "notify his employees in writing or by publicly posting the employer's policy on . . . vacation." Forfeiture of vacation pay upon termination must be specified in the employer's vacation policy or in an agreement with the employee. *(Matter of Petition of Marc E. Hochlerin and Ace Audio Video, Inc. [T/A Ace Audio Visual Co., and Ace Communication]* PR 08-055 [March 25, 2009]). Forfeiture provisions must be explicit (*Fin. Planning, Inc, supra*; *see also Paroli v Dutchess County*, 292 AD2d 513 [2nd Dept 2002] [worker was entitled to vacation pay upon termination as the employer's benefit plan contained no language limiting the benefit only to employees in "good standing"]).

We find that Petitioners failed to meet their burden of proving that a written vacation pay policy was provided to Claimant or posted as required by Labor Law § 195 [5]. The July 27, 2007 Acknowledgement and Agreement was signed by Luis, not Pedro Montoya, whose signature was completely different. The signature bearing the name Pedro Montoya, which appears on the claim (DOL's exhibit) and on the employment application (Petitioners' exhibit) are identical and completely different from Luis Montoya's printed signature. Additionally, Pedro Montoya's employee ID number 124463 differed from Luis Montoya's ID number 160112.

Baranker testified that the employee handbook is updated every year and employees are asked to read and sign an acknowledgment of having read the handbook every six months, yet there was no evidence Claimant was ever shown any handbook, still less the supposed vacation policy on which Petitioners rely. Even if Claimant had acknowledged reading an employee handbook in 2007 (long before the effective date of the 2009 handbook excerpts introduced into the record), that would not be evidence of what the policy stated in the 2007 handbook. Petitioners did not enter the handbook in effect on July 27, 2007 into the record. Baranker's

testimony that a copy of the handbook "should have been" available at each Macy's does not prove that the vacation pay policy was publicly posted, as required by Labor Law 195[5].

A comparison of the bi-weekly payroll journals to the summary list of Claimant's hours prepared by the administrative assistant shows many discrepancies between the payroll journals and the summary list of hours. These discrepancies consistently result in fewer work hours being listed in the summary list than the payroll journals, including many instances in which the payroll journal but not the summary list, shows over 35 weekly hours. For example, the payroll journal for the two-week period ending 1/18/2008 shows a total of over 85 hours worked, while the summary list shows 73.75. The payroll journal for the period ending 4/11/08 shows 38.25 and 35.50 – a total of 73.75 – hours worked, while the summary list shows 34.75 hours worked the week ending 4/4/2008 and 29.75 the week ending 4/11/2008. The payroll journal shows 36.5 hours worked the week ending 5/2/2008; the summary list shows 34.75 hours. For the two weeks ending 5/23/08, the payroll journal shows 45.75 hours worked; the summary list shows 4.75. Both the summary and the print-out indicate that after being laid off in August 2008, Claimant resumed work in mid-September. The payroll journal for September 12, 2008 shows 26 hours worked, the summary list shows 0. And the payroll journal for September 18, 2008 shows 56 hours worked, the summary shows 20.

We find that it was reasonable and valid for the DOL to find that Claimant, who had worked for Petitioners for more than two full years, was entitled to two weeks' vacation pay.

CIVIL PENALTIES

The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects.

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NOW , THEREFORE IT IS HEREBY RESOLVED THAT:

1. The Order to Comply With Article 6 of the New York State Labor Law dated April 4, 2011 (Supplemental Wage Order) is affirmed.

2. The Order Under Article 6 of the New York State Labor Law dated April 4, 2011 (Penalty Order) is affirmed.

3. The petition be, and the same hereby is, denied.

Anne P. Stevason, Chairperson

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 New York, New York,
on October 2, 2013.