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INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

THE CENTER FOR FINANCIAL PLANNING INC.

Petitioner,

To review under Section 101 of the New York State Labor Law: An Amended Order to Comply with Article 6 of the Labor Law, dated August 11, 2006

-against-

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR-06-059

RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on September 25, 2006. Upon notice to the parties a hearing was scheduled and held on June 28, 2007 in the Board's Albany office before Khai H. Gibbs, then Associate Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner Center for Financial Planning, Inc. was represented by its president, Louis Morizio appearing *pro se*, and Respondent, Commissioner of Labor (Commissioner), was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro, Esq., of counsel. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Order to Comply under review in this proceeding was issued by the Commissioner on August 11, 2006 and directs compliance with Article 6 of the Labor Law. The Order directs payment to the Commissioner for wage supplements due and owing to one named Claimant in the amount of $462.50 for vacation pay owed from August 8, 2004 to August 12, 2005, with

interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $73.79, and assesses a civil penalty in the amount of $115.00, for a total amount due of $651.29.

SUMMARY OF EVIDENCE

At the hearing in this matter, Louis Morizio was the only witness to testify on behalf of the Petitioner. The Complainant and Senior Labor Standards Investigator Clement Dacier testified for DOL. There is no dispute that the Petitioner employed the Complainant as an administrative assistant during the time period covered by the Order. Likewise, the parties agree that the Complainant voluntarily resigned her position with the Petitioner effective August 12, 2005. The sole dispute centers on whether the Petitioner had notified its employees that under its vacation leave policy they would forfeit unused accrued vacation time at the end of their employment with the Petitioner.

Morizio testified that the Petitioner's then office manager, Sean Classgens, provided a written vacation policy to all of the Petitioner's employees, including the Complainant, at a meeting held sometime in 2004. Morizio was not present during that meeting. The written leave policy produced by the Petitioner states in its entirety that:

> The CFP provides as a benefit to all of its employees vacation and sick time.
>
> The CFP provides 2 weeks or 10 calendar days of vacation time per year. This time is per annum and doesn't carry over one calendar year to the next. We encourage our employees to use fully the vacation time throughout the year. The time may be taken in single days or ½ days or may be combined to a maximum of 5 calendar days at anytime. The CFP will consider with advance notice longer consecutive vacation. Vacation days are earned throughout the year at 3.077 hours of vacation time per two week pay period (3.077 X 26 pay periods = 80hrs.)
>
> The CFP also provides sick/personal time of up to 1 week or 5 days of sick/personal time. This also is not carried over. This time is used on an as needed basis, and doesn't require advanced notice, nor is it to be used intentionally, but rather in the case of illness, mental health or an emergency. If all of the sick time is used and more days are required then vacation time will be used.
>
> It is the responsibility of the employee to track and report the use of this time. Since all are salary employees. The total hours are not the objective. The objective is to report any of your regularly scheduled work hours that you missed and for what reason. (eg. Due in at 9:00 am arrived at 12:00 pm due to child being late for school. 3 hours of sick/personal time is reported and 5 hours of regular time). Please use the attached form and hand it in each pay period to the administrative assistant by Wednesday of the payroll week. Normal hours are 8:00 am – 5:00 pm with a 1 hour lunch break.

> The CFP does not pay employees for any days that they are on jury duty. The court does pay a daily stipend to jurors and that shall be your compensation.

Morizio testified that this written policy had been in effect since 2004 without any change other than to the section applicable to jury duty.

The Complainant testified that at the time Morizio hired her, he explained to her that personal days and sick days should be used first because they would not be paid for if unused at the time of an employee's separation from employment. Morizio never told the Complainant that the Petitioner would not pay for unused vacation time. Furthermore, the Complainant testified that she never received a written leave policy from the Petitioner or attended any meeting where the leave policy was explained.

The Complainant testified that at the time she left her employment with the Petitioner, she had a balance of 37 hours of unused vacation time. She knew this was the amount because she was the employee responsible for preparing the Petitioner's payroll. When the Complainant was working on her last payroll, she had a discussion with Morizio concerning how she should enter her unused leave balance. At that time, the Complainant told Morizio she had 37 hours of vacation leave and 3 hours of sick leave and asked if she could be paid for all 40 hours of accrued leave. According to the Complainant, Morizio informed her that the Petitioner does not pay for sick leave, and it was agreed that she would enter only the 37 hours of unused vacation time into the payroll.

When the checks arrived, Morizio called the Complainant into his office and told her that there must have been a misunderstanding concerning the unused vacation time, and that he would not pay for the 37 hours of unused vacation time.

Senior Labor Standards Investigator Clement Dacier testified that during the course of DOL's investigation of the Petitioner, he had several conversations with Morizio. On October 14, 2005, Morizio informed Dacier that the Petitioner has a written leave policy stating that unused vacation time is not paid, but admitted that he does not give employees this written policy. Dacier further testified that on November 7, 2007, Morizio sent an email to DOL with the Petitioner's written leave policy attached. Dacier did not consider this to be credible evidence because it had not been provided earlier. Accordingly, DOL issued the order under review in this proceeding based on the Complainant's allegation that she was owed 37 hours of vacation pay.

GOVERNING LAW

Standard of Review

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101).

The Board shall presume that an order of the Commissioner is valid. Labor Law § 103(1) provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to the Board's Rules of Procedure and Practice § 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

The Commissioner's Authority to Issue an Order to Comply and Assess Civil Penalties

If the Commissioner determines that an employer has violated Article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

> "If the commissioner determines that an employer has violated a provision of article six (payment of wages) . . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest based on the amount owing. The civil penalty is in addition to or concurrent with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Labor Law § 218 provides, in pertinent part:

> "1. In no case shall the order direct payment of an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty . . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . . the failure to comply with recordkeeping or other non-wage requirements.
>
> . . . .
>
> 4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter."

Payment of Benefits and Wage Supplements

Labor Law § 198-c (1) requires "any employer who is party to an agreement to pay or provide benefits or wage supplements to employees . . . to provide such benefits or furnish such wage supplements within thirty days after such payments are required to be made . . . ." Under Labor Law § 198-c (2) benefits or wage supplements include vacation pay.

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony and documentary evidence, and all of the papers filed herein, makes the following findings of fact and law pursuant to the provision of the Board Rule 65.39 (12 NYCRR 65.39).

The only dispute in this proceeding is whether under the Petitioner's vacation policy, the Complainant forfeited her accrued vacation leave hours when her employment with the Petitioner ended. Based on the evidence before the Board, we find that the Petitioner's vacation leave policy at the time relevant to this proceeding did not adequately notify employees that accrued vacation leave would be forfeited upon termination of employment.

At the outset, we note that there is no legal requirement in New York for an employer to provide vacation pay to employees. However, once an employer undertakes to provide paid vacation leave to its employees, Labor Law § 198-c requires such employer to provide this benefit in accordance with the terms of whatever leave policy it has established (*Gennes v. Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2005]; *Matter of Glenville Gage Co. v. State Industrial Bd. of Appeals*, 52 NY2d 777 [1980], *affg* 70 AD2d 283 [1979]).

There is no dispute that the Petitioner is a party to an agreement to provide vacation leave, and therefore must abide by the terms of such agreement (*Glenville Gage Co.* at 777).

We find credible the Complainant's testimony that she was informed by the Petitioner that she would receive a total of 5 sick days and 10 vacation days per year with only the sick days forfeited when leaving employment with the Petitioner. We also find the Complainant's testimony that she never received a written leave policy from the Petitioner or attended a meeting where a written leave policy was discussed to be credible particularly as the Complainant was the individual responsible for preparing the Petitioner's payroll and therefore would have known of the existence of any written policies related to her duties.

While we are mindful that the Petitioner claims that there was a written leave policy in place during the time period relevant to this proceeding, we do not find that claim persuasive because of the contradictory statements Morizio made to Senior Labor Standards Inspector Dacier, and because no witness with first hand knowledge of the creation and distribution of this written policy testified at the hearing to corroborate Morizio's claim.

Morizio's original correspondence to DOL contesting the Complainant's claim for unpaid vacation leave was dated September 22, 2005. No mention of a written leave policy was made in that letter. On October 15, 2005, Morizio called Dacier to explain that a written vacation policy existed but that the Petitioner did not give the written policy to its employees. On November 7, 2005, several weeks after his initial correspondence, Morizio emailed Dacier a written leave policy that had purportedly been created in May 2004 by a manager whom the Petitioner no longer employed. According to Morizio's email, the written policy was explained to the Petitioner's employees, including the Complainant, at a staff meeting that Morizio did not attend.

Although we do not give any weight to the Petitioner's written leave policy because there is no credible testimony demonstrating either that the written policy existed during the relevant time period or that the Complainant was aware of the existence of such written policy, we note that even if we did credit the written leave policy produced by the Petitioner, it does not support the Petitioner's position because it contains no express provision that employees forfeit their vacation, sick and personal leave when their employment with the Petitioner ends (*see Gennes v. Yellowbook*, 23 AD2d at 522).

It is the Petitioner's burden to prove that the Order is invalid or unreasonable (Labor Law § 103 [1]; 12 NYCRR § 63.30). The Petitioner has failed to meet this burden because it has not established that a policy existed, written or otherwise, that employees forfeited their accrued vacation leave upon termination of their employment with the Petitioner (*see Glenville Gage v. State Industrial Bd. of Appeals*, 70 AD2d 283 [1979], *affd* 52 NY2d 777 [1980]).

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order additionally assessed a civil penalty, in the amount $115.00. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

INTEREST

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, dated August 11, 2006, under review herein, is affirmed; and

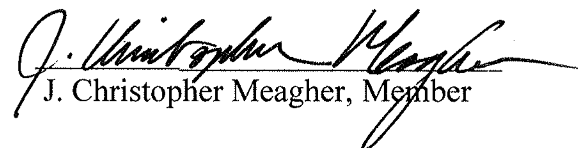
2. The Petition for Review filed, be and the same hereby is, denied.

Anne P. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 23, 2008.

Filed in the Office of the
Industrial Board of Appeals
at Albany, New York on
January 28, 2008.

DAR