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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MICHAEL E. FISCHER (D/B/A MEFCO BUILDERS), Petitioner, To review under Section 101 of the New York State Labor Law: An Order to Comply with Articles 6 and 19 of the Labor Law, dated November 3, 2006, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-06-099 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on January 3, 2007, pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66).

Petitioner Michael Fischer (D/B/A MEFCO Builders) asks the Board to review an Order to Comply with Articles 6 and 19 of the Labor Law (Order) issued by the Respondent Commissioner of Labor (Commissioner) against Petitioner on November 3, 2006.

The Order directs payment to the Commissioner of wages due employee John R. Harmon (Complainant) in the amount of $1,865.00, with interest continuing thereon at the rate of 16% calculated to the date of the Order in the amount of $854.32, and assesses a civil penalty in the amount of $3,730.00, for a total amount due of $6,449.32.

The Petition challenges the validity and reasonableness of the Order, alleges that Petitioner was denied due process when he was denied the opportunity to be present and confront the Complainant at a conference that the Commissioner held with the Complainant, and demands a hearing where Petitioner could confront and cross-examine the Complainant over each and every element of his claim.

The Commissioner filed an Answer to the Petition on February 12, 2007, denying its material allegations. The Answer interposed as affirmative defenses that: (1) Petitioner was not denied due process, and (2) because Petitioner failed to produce sufficient records showing the daily hours worked by Complainant, the Order is valid and reasonable in all respects.

Upon notice to the parties, the Board held a hearing on June 14, 2007 before Mark S. Perla, former member of the Board and the designated Hearing Officer in this case. Petitioner was represented by Reid A. Whiting. Respondent Commissioner was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro of Counsel. Each party was offered a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. Testifying in support of the Petition were Michael Fischer (Petitioner), David Lemley, Michael Clarke, and Brian Ganzhorn. Testifying for the Commissioner were John Harmon (Complainant), and Senior DOL Investigator Paul Kubiak.

SUMMARY OF EVIDENCE

Petitioner is a self-employed building contractor. For all relevant purposes, he is an employer governed by Labor Law Articles 6 and 19.

On or about January 7, 2004, Complainant filed a claim for unpaid wages with DOL, alleging that he had been employed as a carpenter by Petitioner from October 13, 2003 through December 23, 2003 at the rate of $20.00 per hour, and that Petitioner had failed to pay him wages due and owing in the amount of $1,865.00. Some $1,575.00 of this amount was alleged to represent both regular and overtime wages for the last two weeks of the claim period, for which Complainant claimed that he received no gross wages whatsoever. The remainder was alleged to be unpaid overtime during the preceding nine weeks. On or about January 15, 2004, Complainant filed a second claim with DOL alleging that Petitioner had also failed to pay him an agreed-upon bonus of $3,000.00 for a project on Ellicott Road, and $241.24 for expenses on the same project.

DOL requested that Petitioner respond to the claim and provide the records that he is required to keep pursuant to Labor Law § 661 and 12NYCRR 142-2.6 (a) (4) showing the number of hours that Complainant worked on a daily basis.

In response, Petitioner stated that there was no agreement with Complainant to pay a bonus or expenses; that Complainant worked a 40 hour week; and that there was never overtime for Petitioner or any of the employees on his work crew. Petitioner admitted that there were no time cards kept. Instead, he submitted weekly payroll records from his accountant showing that, from October 11, 2003 through December 5, 2003, Complainant was weekly paid $800.00 in gross wages for 40 hours of work, at the rate of $20.00 per hour,. As to the alleged subsequent period of unpaid wages, Petitioner stated that on Friday, December 5, 2003, he had agreed with Complainant to advance him his net pay for the next two weeks so as to allow Complainant to

repair his truck that had broken down. The agreement was that the Complainant would "work off" the $1,200.00 cash advance over the next two weeks. According to Petitioner, the Complainant did so, but there were numerous problems with his work. Petitioner alleged that Complainant's last day of work was the following Monday, December 22, 2003. Petitioner said that Complainant showed up for work that day, but quit after an hour and a half. Complainant had alleged in his claim that his last day of work was Tuesday, December 23, 2003, and that he worked 8 ½ hours that day.

On September 28, 2005, DOL held a Compliance Conference with Petitioner, his foreman Michael Clarke, and Petitioner's attorney. Complainant did not attend because he was out of the country. At the conclusion of the conference, Compliance Case Officer Donald Pembleton recommended that the wage supplements claim be dismissed because there was no written agreement to pay Complainant either a bonus or expenses. Pembleton also tentatively recommended that the overtime case be dismissed, based on Petitioner's statements that no overtime was worked. However, DOL should keep the claim open to obtain Complainant's response to Petitioner's statements before taking any final action.

On December 15, 2005, the Complainant and a witness met with Pembleton to respond to Petitioner's contentions. At the conference, Complainant produced a journal he said he had made of his daily hours and the work sites he worked at for Petitioner throughout the claim period. Complainant alleged that he had constructed his initial claim and a summary of his hours and wages owed from that journal.

Following the meeting, Pembleton recommended dismissal of the claim for unpaid wage supplements, but that a final Order to Comply be issued for the full $1,865 on the claim for unpaid wages. Thereafter, on August 14, 2006, DOL Investigator Paul Kubiak issued final reports recommending issuance of an Order to Comply for the full $1,865 in unpaid wages, together with a 25% penalty. The penalty recommendation stated:

> Taking into consideration the size of the firm, the good faith of the employer, the gravity of the monetary violations and non-wage and recordkeeping violation(s) disclosed during the course of the investigation, I recommend [a 25% penalty] be assessed...

Accordingly, on November 5, 2006, the Commissioner issued Petitioner the instant Order to Comply directing that Petitioner pay Complainant the sum of $1,865.00, together with interest at 16% calculated to the date of the Order in the amount of $854.32, and a 200% civil penalty of $3,730.00, for a total of $6,449.32. . No explanation was provided for the increase in penalty from the 25% originally recommended to the 200% in the final order.

At the hearing, Petitioner for the first time produced records purporting to show Complainant's daily hours during the Fall and early Winter of 2003. The records purport to demonstrate that Petitioner's hours never exceeded forty during the claim period. Petitioner testified that he compiled the records at the end of each week from a daily job log of the hours he knew his employees worked, or that his foreman reported to him. We do not credit these records, however, since Petitioner did not previously produce them during DOL's investigation, despite DOL's repeated requests.

Petitioner's witnesses focused their entire testimony on a project the crew worked on in

the Fall and Winter of 2003 framing a log cabin home on Ellicott Road in Caledonia, New York for homeowner Dave Lemley. Petitioner, Clarke, Ganzhorn, and Lemley each testified about the general hours of work at the site. According to these witnesses, the crew would arrive at 7:30 or 8:00 AM, break down at 5:00 or 5:30 PM, and occasionally work Saturday for a few hours to make up for hours lost during the week because of rain, snow, or work missed for personal reasons. According to them, neither the Complainant nor any member of the crew worked more than 40 hours per week; there was never overtime, except occasionally during the summer.

Notwithstanding this general testimony about the Ellicott Road job, however, Complainant's journal shows that Complainant worked for several weeks on sites other than Ellicott Road. Petitioner admitted to these other worksites. Yet Complainant's hours at these other sites were never specifically addressed by any of Petitioner's witnesses. Moreover, although foreman Clarke testified that he worked full-time alongside Complainant for 90% of the time during the claim period, Petitioner's payroll records show that Clarke was not on payroll during several weeks of the claim period, and was less than full-time during several other weeks. Finally, Petitioner's witnesses admitted that the crew sometimes worked Saturday mornings. Lemley testified that the crew worked a couple Saturday afternoons. We note that Complainant claimed overtime hours on some Saturday mornings, Saturday afternoons, and a few Sundays. Sundays were never specifically addressed by Petitioner's witnesses.

We find Petitioner's evidence at the hearing was incomplete, and too general and conclusory to establish the specific hours worked by the Complainant during the claim period. In the absence of contemporaneous time records required by 12 NYCRR 142-2.6 (a) (4) particularizing the Complainant's actual daily and weekly hours, such testimony was insufficient to overcome the presumption favoring DOL's determination based on the Complainant's claim. We note, however, Petitioner and Clarke's testimony that Petitioner made a $1,200.00 cash advance covering Complainant's last two full weeks of work and that Complainant was not paid regular salary after December 5, 2003. This amounts to some $1,600.00 gross wages that Petitioner admittedly owes under DOL's Order. Petitioner's admission narrows his real overtime dispute with the Complainant in this case considerably.

Finally, on the issue of penalty, Petitioner credibly testified that he ran a small business with few employees; that he never had a prior labor problem with DOL; and that he submitted payroll records from his accountant in a good faith belief that they were adequate. DOL's senior investigator Kubiak could provide no explanation at the hearing for why the final penalty was increased from the 25% he and Pembleton originally recommended to the 200% penalty in the final Order. Kubiak testified that Pembleton believed 25% was the appropriate penalty in light of Petitioner's good faith.

GOVERNING LAW

Standard of Review and Burden of Proof in Proceedings Before the Board.

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 commissioner under the provisions of this chapter," (Labor Law § 101 [1]), but also states that an order of the Commissioner "shall be" presumed valid. (Labor Law § 103 [1].)

A petition filed with the Board that challenges the validity or reasonableness of the Commissioner's order must state "in what respects [the order on review] is claimed to be invalid or unreasonable." (Labor Law § 101 [2].) It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order on review is invalid or unreasonable: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it" (Rules 65.30 [12 NYCRR 65.30]; *Angello v Natl. Fin. Corp.*, 1 A.D.3d 850, 854 [3d Dept 2003].)

It is therefore Petitioner's burden in this case to prove the allegations in his Petition that (1) he was denied due process of law when he was denied the opportunity to be present and confront the Complainant at a conference that the Commissioner held with the Complainant, and(2) the Order is otherwise invalid and unreasonable.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Adequate Employer Records.

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid. (12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or her designated representative. (Labor Law § 661.)

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (Labor Law § 196-a.), *Angello v. National Finance Corp.*, 1 AD3d 850 (3d Dept 2003). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate.... [t]he solution... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp.*, *supra*, agreed: "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

The Regular Rate of Pay and Premium Pay.

Labor Law § 190 defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis" and defines "manual worker" to include a workingman or laborer. An employer must make weekly wage payments to its manual workers for each hour he or she has worked. (Labor Law §§ 191, 652.)

Employers are also required to pay covered employees overtime pay equal to one and a half times the worker's hourly rate for each hour worked in excess of 40 hours in a work week. (12 NYCRR 142-2.2.) It must be stressed that premium pay due an employee for time worked in excess of 40 hours a week is based on that employee's regular or hourly rate even when that rate exceeds the statutory minimum rate. (*Cayuga Lumber, Inc. v Commissioner of Labor*, PR 05-009 [Decision of the Board on Reconsideration September 26, 2007]; *see also Overnight Motor Transp. Co. v Missel*, 316 US 572, 578 [1942] [reversing lower court ruling that so long as a salary meets the minimum wage rate and overtime pay is based on the minimum wage rate, the employer is in compliance with FLSA, the Supreme Court held that the FLSA "was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum"].)

FINDINGS

At the outset, we reject Petitioner's contention that he was denied due process of law for having been deprived of the opportunity to confront Complainant at the conference held by DOL on December 15, 2003. The Commissioner is not required to conduct conferences or hearings, take testimony from any persons, or afford rights to confront and cross-examine witnesses before issuance of an order pursuant to Articles 6 or 19 of the Labor Law. Due process and notice requirements are met through Petitioner's opportunity to contest the Order before the Board.

We affirm the Commissioner's Order directing payment to Complainant of $1,860.00 in unpaid wages. Having failed to produce accurate time and payroll records required by Labor Law § 661 and 12 NYCRR § 142-2.6, DOL's calculation of the regular and overtime wages owed must be credited unless Petitioner met its burden to prove that the employee was paid the disputed wages. (*See, e.g, Angello v. National Finance Corp., supra*). The burden is not an impossible one. However, in this case, Petitioner's evidence was simply incomplete, too general and conclusory to shift such burden. DOL's determination is therefore affirmed. We note that the bulk of these wages represent regular salary Petitioner admittedly did not pay Complainant for two weeks of his employment, in any event. Petitioner's deductions from Complainant's wages for repayment of a loan are not permitted by Labor Law § 193. Petitioner is free to avail himself of his normal civil remedies but cannot use salary withholding for such purposes, no matter how benevolent the motive.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

If the Commissioner determines that an employer has violated Article 19 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].)

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. 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."

In this case, DOL provided no explanation for the increase in penalty from the 25% originally recommended to the 200% penalty in the final Order. However, there is no statutory basis for such "double" penalty, which is normally reserved for repeated violations, because Petitioner does not have any prior Labor Law violations. Nor is there any record evidence supporting a "willful" or "egregious" violation. Rather, investigator Kubiak recommended a 25% penalty based on application of the statutory criteria, as did the Compliance Officer who recommended final disposition of the case. This being the only record evidence on the issue, we reinstate a 25% penalty on the unpaid wages due and modify the final Order accordingly.

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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Articles 6 and 19 of the Labor Law, dated November 7, 2006, is affirmed insofar as it directs payment to Complainant the sum of $1,865.00 in unpaid wages together with interest at 16% calculated to the date of the Order in the amount of $854.32; and

2. The Order is modified to substitute a 25% penalty in the amount of $466.25, for a total due of $3,180.57; and

2. The Order is remanded to the Commissioner to substitute an amended Order to Comply consistent with the Board's resolution; and

3. The Petition be and the same hereby is dismissed in all other respects.

Anne P. Stevason, Chairman

ABSENT
Gregory A. Monteleone, Member

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member*

Mark G. Pearce, Member

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

Filed in the Office of the Industrial Board of Appeals, at Albany, New York, on April 25, 2008