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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: GARY YORKE AND/OR PRISTINE PLUMBING & HEATING, INC., Petitioners, To review under Section 101 of the New York State Labor Law: Two Orders under Article 6, dated May 4, 2007, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-07-035 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 28, 2007 and amended July 30, 2007. The Answer was filed on September 11, 2007. Upon notice to the parties a hearing was held on March 14, 2008 before Anne P. Stevason, Chairperson of the Board and designated hearing officer in this matter. Petitioners Gary Yorke and Pristine Plumbing & Heating Inc. (Pristine) were represented by Gary Yorke, *pro* se, and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry 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 Commissioner issued the two Orders to Comply (Order) under review in this proceeding on May 4, 2007. The first Order is based on the non-payment of wages due to Complainant William Elliott (Elliott) for the period of June 18, 2005 through September 30, 2005 and demands payment of $5,000.00 in unpaid wages, $1,273.42 in interest and a civil

penalty of $1,250.00, for a total due of $7,523.42. The second Order consists of a demand for payment of $300.00 in civil penalties for failing to establish, maintain and preserve payroll records as required by Labor Law § 195.4.

The Petition disputes the reasonableness of the Orders, alleging that Elliott is a partner and executive in Pristine Plumbing and not an employee as defined in Labor Law § 190.7 and, therefore, not entitled to the protections of Article 6. It also contests the reasonableness of the civil penalties. Respondent answers the Petition, alleging that Elliot is a plumbing mechanic and was paid and treated as an employee. The answer also alleges that the Order erroneously demanded payment of $5,000.00 instead of $4,000.00 because it failed to account for Elliott's one week vacation. At the hearing, Respondent moved to amend its answer to go back to the original Order of $5,000.00. The motion was granted but Petitioner was given time and the opportunity to present evidence in response to this amendment. The Petitioner submitted all of the paychecks issued to Elliott to the Board after the hearing. Respondent did not respond to this submission.

After preparation of the transcript of the hearing, the parties were asked to brief the following issues, by June 16, 2008:

1. "Can an employee engaged in a bona fide executive, administrative or professional capacity file a claim for unpaid wages with the Commissioner of Labor under Article 6 of the Labor Law?

2. "Was William Elliott an employee engaged in a bona fide executive, administrative or professional capacity[1] while employed by Pristine Plumbing?"

On June 10, 2008, in response to the certification of two questions by the United States Court of Appeals for the Second Circuit, the New York State Court of Appeals issued its decision in *Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609 (2008), "concerning the scope of protections afforded by article 6 of the Labor Law." The time for filing briefs in this case was extended to June 30, 2008, in response to a request from Respondent to be given additional time to prepare a closing brief so that the significance of the decision in *Pachter* could be addressed.

SUMMARY OF EVIDENCE

In 2002 Gary Yorke formed a corporation entitled Concord Plumbing and Heating, Inc. In 2004, after both Yorke and William Elliott were performing work for another company, On-Call Plumbing, they discussed going into a partnership. Eventually, Elliott went to work for Concord, which was later renamed Pristine Plumbing and Heating, Inc. There was no written agreement and the terms of the agreement between Yorke and Elliott are in dispute, but both agree that the intent in 2004 was to form a partnership. Elliott introduced himself to others as partner of the business. Elliott received 49% of the corporation's shares of stock for $1.00.

[1] In its Memorandum of Law, Respondent objects to the consideration of whether Elliott is a bona fide administrative or professional employee because these issues were not raised in the Petition or litigated at the hearing. Respondent makes a valid point. Therefore, the Board will only consider whether Elliott was a bona fide executive.

Shortly after Elliott started with Pristine, it was determined that Elliott would handle the field work and Yorke would handle the office and paper work. Yorke had sole control over the bank accounts and monies. All monies received from any jobs were given to Yorke. Elliot did not have authorization to write any checks. Elliott ordered supplies, estimated jobs, did plumbing work and acted as foreman on the plumbing jobs. In addition, Elliott personally loaned over $25,000 to Pristine Plumbing.

From 2004 to October 2005 both Yorke and Elliott received paychecks from Pristine, with deductions taken for payroll taxes, etc. and were paid as employees. Yorke received gross wages of $600 per week Elliott maintained that he was to receive gross wages of $1,000 per week and did receive gross wages of $1,000 per week for every week of his employment with Pristine except for 5 weeks. Yorke maintained that Elliott was to be paid only if there was enough money available.

In October 2005, Elliott acted as foreman at a job installing boilers at Dowling College. During that job Elliott supervised two employees. The same month, Peter Cestare was hired by Yorke, given some shares out of Elliott's shares of stock and told that he would become a partner of Pristine. In October 2005 , Elliott quit his job with Pristine after some disputes over not being paid his weekly wages, while Yorke was being paid, and Yorke underbidding a project. Three weeks later, Yorke terminated Cestare's employment with Pristine. The only monies that Elliott received from Pristine were his wages. There was never a division of assets or profits between Yorke and Elliott.

Since leaving, Elliott has filed a lawsuit against Yorke and Pristine for reimbursement of the monies loaned to the corporation to kept the business going. In addition, Elliott filed a complaint with DOL for unpaid wages. His original claim was for $13,000 based on his own records but after DOL reviewed Pristine's payroll records, the claim was reduced to $5,000. Yorke maintains that Elliott took a one week vacation and therefore, would only be due $4,000 if found to be an employee.

DISCUSSION

Standard of Review and Burden of Proof

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 is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). 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 Definition of Employee Under Article 6 of the Labor Law

Article 6 of the Labor Law regulates the payment of wages by employers. "It protects the right of a worker to receive the wages he has earned and authorizes the Labor Department to assist him in collecting unpaid wages. The article sets the standards as to the frequency and method of wage payment." (Sponsor's Mem, Bill Jacket, L 1984, ch 476.)

Labor Law § 190 (2) defines "employee" for purposes of Article 6 to mean "any person employed for hire by an employer in any employment." The section further defines different categories of employees. For example, § 190 (7) defines "Clerical and other worker" as including "all employees not included in subdivisions four, five and six of this section, except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of six hundred dollars a week."[2] Until the decision in *Pachter v. Bernard Hodes Group, Inc., infra,* there was a split of authority on whether bona fide executives are covered by Article 6 of the Labor Law.

Pachter v. Bernard Hodes Group, Inc.

On June 10. 2008, the New York Court of Appeals decided the case of *Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609 (2008) in response to the United States Court of Appeals certifying two questions regarding the scope of Labor Law Article 6 protections. The first question, which is relevant to this case, is whether an "executive" is entitled to the protections extended to employees in Article 6 of the Labor Law.[3] The court held that "executives are employees for purposes of Labor Law article 6, except where expressly excluded." (*Id.* at 616.) Therefore, for example, executives are covered by Labor Law § 193 which prohibits illegal deductions, since it applies to all employees and executives are not specifically excluded. However, executives are excluded from the protections of § 191 regarding the frequency of the payment of wages because the section only applies to certain classes of employees: manual workers, railroad workers, commission salesman and clerical and other workers. Since § 190 (7) expressly excludes "bona fide executives" from the definition of clerical and other worker, executives are excluded from the protections of § 191.

The issue in the case at hand pertains to Labor Law § 191 and the payment of wages. Therefore, if Elliott is a bona fide executive, his claim for unpaid wages must be pursued through a civil action in court and the Order is invalid.[4]

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[2] As of January 14, 2008, the exception has been amended to provide that the earnings of a bona fide executive, etc. must exceed nine hundred dollars a week.

[3] The other certified question of law was "when, in the absence of a written agreement between employer and employee, a commission is 'earned' and becomes a 'wage' subject to the prohibition on deductions in Labor Law § 193." *Pachter*, 10 NY3d at 614.

[4] In enacting Article 6, the Legislature indicated that DOL enforcement should concentrate on the state's most vulnerable workers and therefore, the highly paid workers would be required to file their claim for unpaid wages (other than claims for illegal deductions, etc.) in court as opposed to filing a claim with DOL. (*See, e.g.* Sponsor's Mem, Bill Jacket, L 1984, ch 476.)

Definition of "Bona Fide Executive"

Only employees *who* work in a "bona fide executive capacity" are excluded from certain Article 6 protections under the executive exemption. Nowhere in Article 6 is "bona fide executive" defined. Likewise, cases decided under Article 6 have not contained a definition. Petitioner and Respondent have both argued, in their closing briefs, that the term "bona fide executive" is to be construed in accordance with the standards set forth in the regulations regarding exemptions from the Minimum Wage Act.[5] In construing the term we must apply the basic rules of statutory construction. First and foremost, remedial statutes, such as wage and hour statutes, are to be liberally construed and exemptions are to be narrowly applied. (Statutes § 322) Secondly, words or phrases used in the same or related statutes will be presumed to be have the same meaning. (Statutes § 236)

The phrase "employed in a bona fide executive, administrative or professional capacity" mirrors the phrase in the federal Fair Labor Standards Act of 1938 at Section 213(a)(1) which excludes from its requirements "any employee employed in a bona fide executive, administrative, or professional capacity..." Similarly, the New York State Minimum Wage Act excludes from its definition of "employee" "any individual who is employed or permitted to work:. . . (c) in a bona fide executive, administrative, or professional capacity." [Labor Law § 651 (5) (c)]. The applicable regulation, 12 NYCRR 142-2.14 (c) (4) (i), defines "bona fide executive":

> "Executive. Work in a *bona fide executive . . . capacity* means work by an individual:
>
> (a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
> (b) who customarily and regularly directs the work of two or more other employees therein;
> (c) who has the authority to hire or fire other employees on whose suggestion and recommendations as to the hiring or firing and as to the advancement or promotion or any other change of status of other employees will be given particular weight;
> (d) who customarily and regularly exercises discretionary powers; and
> (e) who is paid for his services a salary not less than . . . $450.00 per week on or after January 1, 2005, inclusive of board, lodging, other allowances and facilities."

All of the factors must be present to establish an exemption since they are listed in the conjunctive. The only difference between Articles 6 and 19 is the salary threshold necessary to establish the exemption. An employee is not exempt as a bona fide executive under § 190 unless he earns more than $900 per week.

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[5] Petitioner mistakenly refers to 12 NYCRR 137 which are the regulations which pertain to the restaurant industry. The applicable wage order in the present case is found at 12 NYCRR 142 which pertains to Miscellaneous Industries. The standards are virtually the same.

An employer bears the burden of establishing that an employee is subject to the executive exemption (*Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 [1974]), and such exemptions are narrowly construed to be applied only where "it plainly and unmistakably comes within the statute's terms and spirit" (*Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388, 390 [1960]; *see also Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 [1959]).

In applying the factors in 12 NYCRR 142-2.14(c) we find that Elliott was not a bona fide executive.

a) *Primary duty*

Elliot's primary duty was as a plumber. Pristine was a very small company, and Elliott did most, if not all, of the plumbing work performed under contract during the relevant period. Therefore, his primary duty was not management of the business but to work as a plumber.

b) Customarily and regularly direct the work of two or more other employees

Petitioner admits in its closing brief that Elliott "did not always have two or more employees to supervise." Petitioner had the burden of proving this element and the only evidence that Elliott supervised more than one person was the testimony of Cestare that Elliott supervised two people during the Dowling College job which took place in October 2004 and after the period in question. Thus, Petitioner failed to prove that Elliott "customarily and regularly" directed the work of two or more employees.

c) *Authority to hire and fire*

The record lacks evidence that Elliott had the authority to hire and fire employees or that he ever did hire or fire employees. The only evidence is that Yorke did the hiring and firing.

d) Customarily and regularly exercise discretionary powers

The factors to consider when determining whether an employee regularly exercises discretionary powers include, but are not limited to:

> "Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the

> employee represents the company in handling complaints, arbitrating disputes or resolving grievances" (29 C.F.R. 541.202 [b] [2005]).

The evidence indicates that Elliott did have some discretion as regards to estimating jobs and buying materials and supplies. The significance of the discretionary decisions made by Elliott as far as the business is concerned is a matter of conjecture. However, even if Elliott did regularly and customarily exercise discretion over matters of importance to the business, Petitioner failed to prove the other necessary elements of the exemption.

e) Earn a salary in excess of $600 a week

It is undisputed that the Complainant earned $1,000 a week. Again, however, in order to qualify as a bona fide executive employee exempt from Labor Law § 191 the Petitioner must show that all of the factors set out at 12 NYCRR 142 (2003) applied to the Complainant.

Elliott was not a bona fide executive and therefore, he is covered by Labor Law § 191 and the Commissioner's Order demanding unpaid wages on his behalf is within her statutory authority.

Definition of Partnership

Petitioners also contends that the Order is invalid because Elliott was a partner of Petitioner. A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit. . . . ." (Partnership Law § 10). Four elements must be present to prove the existence of a partnership:

> "(1) the parties' sharing of profits and losses; (2) the parties' joint control and management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties intention to be partners."

(Kidz Cloz, Inc. v. Officially for Kids, Inc., 320 FSupp2d 164, 171 [SDNY 2004]; *see also Kyle v. Ford*, 184 AD2d 1036, 584 NYS2d 698 [4th Dept 1992]; *Scharf v. Crosby*, 120 AD2d 971, 502 NYS2d 891 [1986]. Where the parties never discuss losses or have no agreement to share losses, it has been found that an essential element of a partnership agreement is not present. (*Kidz Cloz, Inc., supra* at 175.)

Elliott was an employee of Pristine Plumbing.

Although the intent in 2004 may have been that Elliott was to be a partner of Pristine Plumbing, he was treated and paid as an employee. Yorke was the prime decision-maker and referred to Pristine as "his company." Yorke determined who was to be paid and was the sole person authorized to write checks. He controlled the company. The decision not to pay Elliott his wages was made by Yorke. No profits or losses were shared by the parties. In fact, Yorke made it clear that he had no intention of sharing any losses with Elliott. Although the parties represented themselves as "partners," that is only one element in proving a partnership. Therefore, the partnership between Elliott and Yorke never materialized.

Elliott is due $4000 in unpaid wages.

The Board finds that the payroll records and checks produced by Petitioner establish that Complainant was paid $1000 per week for every week of his employment except for the five weeks ending June 24, 2005; August 12, 2005; August 19, 2005; September 23, 2005; and September 30, 2005. However, Elliott was paid for the week ending October 8, 2005, which, according to the evidence, is when he took a vacation, for which he was not expecting payment. Therefore, it is reasonable to assume that the check for October 8 was for the week ending September 30. Therefore, Elliott is due $4,000 in unpaid wages.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. 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 are proper and reasonable in all respects. However, since the amount due in unpaid wages is reduced from $5,000 to $4,000, the civil penalty assessed is modified to 25% of $4,000, or $1,000.

CIVIL PENALTIES FOR FAILURE TO KEEP REQUIRED RECORDS

The Commissioner's Order under Article 19 of the Labor Law which assessed $300 in civil penalties is also upheld. Petitioner failed to prove that it kept the required time and payroll records. The Board further finds that the considerations and computations required to be made by the Respondent in connection with the imposition of the civil penalty amounts set forth in the Order are 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 Orders to Comply with Article 6 of the Labor Law, dated May 4, 2007, are hereby modified as provided for herein, and otherwise affirmed; and

2. The Petitioner is hereby denied in its entirety.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 24, 2008