New York State
Industrial Board of Appeals

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Application of: UNCLE SAM'S HOUSE, INC., Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated August 3, 2007, and Two Orders to Comply with Article 19 of the Labor Law dated August 3, 2007 - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 07-041 RESOLUTION OF DECISION

WHEREAS:

Uncle Sam's House, Inc. (Petitioner) commenced this proceeding on August 15 2007 by filing a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66). An Amended Petition was filed on October 1, 2007 in response to the Board's instructions. The Petitioner asks the Board to review an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued on August 3, 2007 and two Orders to Comply with Article 19 of the Labor Law also issued on August 3, 2007. The Respondent filed her answer on November 9, 2007.

The Order to Comply with Article 6 (Deductions Order) finds that the Petitioner made unlawful deductions from the wages of its employees and directs payment to the Commissioner of deductions due and owing in the amount of $122,335.69, together with continuing interest at 16% calculated to the date of the Order in the amount of $45,847.22, and a civil penalty in the amount of $30,584.00, for a total amount due of $198,766.91. The first Order to Comply with

Article 19 (Wage Order) finds that the Petitioner failed to pay all wages due to one named employee from November 1, 2002 to February 26, 2003 and directs payment to the Commissioner of wages due and owing in the amount of $410.00, together with continuing interest at 16% calculated to the date of the Order in the amount of $290.98, and a civil penalty in the amount of $103.00, for a total amount due of $803.98. The second Order to Comply with Article 19 (Penalty Order) finds that the Petitioner failed to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours, and failed to give each employee a complete wage statement with every payment of wages from on or about January 1, 2002 through August 30, 2006 and directs payment of a civil penalty in the amount of $1,000.00 for each violation for a total amount due of $2,000.00.

The Amended Petition alleges that it operates a Community Based Rehabilitation Program (CRP) for disabled workers and that the persons working pursuant to the Petitioner's contracts are program participants and not employees. The Amended Petition further alleges that the Petitioner's CRP program is an approved rehabilitation program under DOL's Guidelines for Rehabilitation Programs and therefore is allowed to withhold from each program participant's payroll check a reasonable amount of money for the operation of the program. The Amended Petition alleges in the alternative that the program participants are excluded from the definition of "employee" by 12 NYCRR § 142-3.12 (12). Finally, the Petition alleges that even if the deductions are improper, DOL has no authority under the Guidelines for Rehabilitation Programs to retroactively recover such deductions.

Respondent answered that her investigation determined that the Petitioner's rehabilitation program was not approved or previously approved by any state agency authorized to approve such program.

The Board held a hearing in Albany, New York on February 28, 2008 before Board member Susan Sullivan-Bisceglia, the assigned hearing officer in this case. The Petitioner appeared *pro se*, and the Respondent Commissioner was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Jeffrey G. Shapiro of counsel. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments. In addition, the Petitioner was permitted to submit certain documents in support of its claim by mail after the conclusion of the hearing. The Respondent in her reply to these documents contended that they are not relevant.

SUMMARY OF FACTS

The Petitioner provides services to homeless veterans including housing and employment services. It is not clear from the record exactly what employment services the Petitioner offers, but apparently program participants work in janitorial and similar jobs at government agencies that contract with the Petitioner for such workers. DOL received complaints alleging that the Petitioner unlawfully deducted money from the program participants' wages for various expenses such as transportation expenses, program fees, and key deposits. Numerous "authorization forms" signed by program participants allowing the Petitioner to make deductions from their wages were presented by the Petitioner. The Petitioner does not contest making these deductions, but instead contends that it is a "rehabilitation program" and as such not subject to

the Labor Law. The Petitioner did not produce any document at the hearing or in its post-hearing submission proving that it operates a program that has been approved by the Commissioner or any other state agency, nor did it show that it is not an "employer" under Articles 6 and 19 of the Labor Law. Accordingly, for the reasons set forth below, we affirm the Orders.

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 Petitioner is not an Approved Rehabilitation Program

12 NYCRR 142-2.13 provides that "for an individual employed as part of a rehabilitation program approved by the commissioner, the payment of compensation under such program shall be deemed to meet the requirements of this part." The Petitioner has produced no evidence to show that it is an approved rehabilitation program under this regulation. Specifically, the Petitioner has produced no document from the Department of Labor demonstrating approval of the Commissioner. Furthermore, the Respondent's investigator credibly testified that DOL has no record of any such approval. For these reasons we find that the Petitioner's program is not covered by 12 NYCRR 142-2.13.

The Petitioner Violated Labor Law § 193

DOL determined that the Petitioner is an employer as defined in Labor Law §§ 190 (3) and 651 (6). DOL further determined that the Petitioner employed the persons named in the Orders. The Petitioner carries the burden of proving that the Orders are invalid or unreasonable. Because the Petitioner presented no evidence that it is not an employer or that it did not employ the persons listed in the Orders, we find, as we must, that DOL's determination that the Petitioner is an employer employing the persons listed in the Orders valid and reasonable.

The Amended Petition also alleges in the alternative that the program participants are not employees because their earning capacity is impaired as set forth at 12 NYCRR 142-3.12 (12) which provides an exemption from the definition of "employee" for a person in a nonprofit making institution whose earning capacity for the work to which he or she is assigned is impaired by . . . physical or mental deficiency or injury." There is no evidence in the record to support this contention.

Labor Law § 193 states in relevant part:

"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; provided that such authorization is kept on file on the employer's premises. 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."

The deductions at issue in this case were for program fees, transportation fees, and key deposits. These deductions are unlawful because they are not made pursuant to any law, rule or regulation issued by any governmental agency; and although authorized in writing by the employee, are not 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, or similar payments for the benefit of the employee. We find that the program fees, transportation fees, and key deposits charged by the Petitioner to its employees are unlawful deductions from wages under Labor Law § 193 and affirm the Deductions Order.

The Petitioner violated Article 19 of the Labor Law

At the outset we note that the Amended Petition does not appear to challenge the two Orders to Comply with Article 19 of the Labor Law although they were attached to the Amended Petition. Nonetheless, for the reasons set forth below and because the Amended Petition does not set forth why the Wage Order and Penalty Order are invalid, we affirm those Orders.

The Wage Order finds that the Petitioner failed to pay wages in the amount of $410.00 from November 1, 2002 to February 26, 2003 to a named employee. The Petitioner had the burden of proof to show that it did not owe the wages in question, but failed to produce any evidence that the wages were paid. We affirm the Wage Order because the Petitioner failed to meet its burden.

Additionally, DOL found that the Petitioner violated Article 19 of the Labor Law by failing to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours; and by failing to give each employee a complete wage statement with every payment of wages from on or about January 1, 2002 through August 30, 2006. The Petitioner had the burden of proof to show that it maintained payroll records and provided its employees with wage statements conforming to the requirements of Article 19 of the Labor Law. We affirm the Penalty Order because the Petitioner failed to meet its burden.

CIVIL PENALTIES

The Deductions and Wage Orders additionally assessed a civil penalty, in the amounts of $30,584.00 and $103.00 respectively. 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 each of these Orders is proper and reasonable in all respects.

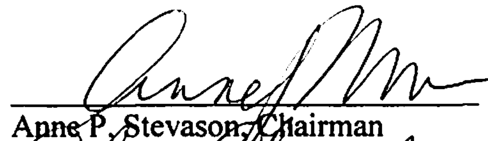
INTEREST

Labor Law § 219 provides that when the Commissioner determines that wages are due, 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."

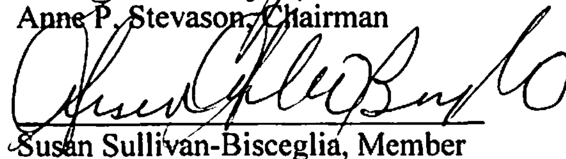
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders to Comply with Article 6 and 19 of the Labor Law dated, August 3, 2007, under review herein are affirmed; and

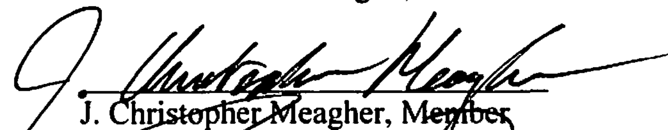
2. The Petition for Review be, and the same herein is, denied.



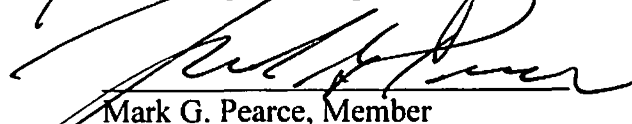
Anne P. Stevason, Chairman



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