STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RICK MERCENDETTI AND RAINMASTER IRRIGATION SYSTEMS, INC.,	:	
Petitioners,	:	DOCKET NO. PR 07-104
To Review Under Section 101 of the Labor Law: An Order to Comply under Article 19, and an Order to Comply with Article 6 of the Labor Law, both dated October 26, 2007, Amended June 5, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Rick Mercendetti, *pro se* for Petitioners.

Maria L. Colavito, Counsel to the New York State Department of Labor, Mary E. McManus of Counsel, for Respondent.

WITNESSES

Rick Mercendetti; Joseph Ryan, Labor Standards Investigator; and Anne Marie Culberson, Labor Standards Investigator, via telephone.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 24, 2007. The Answer was filed on January 17, 2008. Upon notice to the parties a hearing was held on October 21, 2008 before Mark Gaston Pearce, Member of the Board and designated hearing officer in Rochester, New York. 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 of Labor (Commissioner) issued the Order to Comply (Order) under review in this proceeding on October 26, 2007 against Petitioners Rick Mercendetti and Rainmaster Irrigation Systems, Inc.

An Amended Notice and Order to Comply (Amended Order), adjusted downward to reflect credit for a partial payment by Petitioner, was issued on June 5, 2008. The Amended Order is based on the finding that wages were due to one named Complainant for the period June 18, 2007 through June 30, 2007. The Amended Order demands payment of $248.05 in unpaid wages, $91.05 in interest and a civil penalty of $62.00, for a total due of $401.10. At the hearing, the Commissioner acknowledged that the Petitioners paid the second week of wages, but at minimum wage rate of $7.15 a rate of $11.00 to which the Commissioner found that the Complainant and Petitioners had agreed.

The Petition alleges that the Order is unreasonable and/or invalid for the following reasons: (1) Complainant's wages were reduced from the hire rate of $11.00 per hour to minimum wage ($7.15) after the Petitioners determined that Complainant "oversold" his qualifications and after Petitioner notified Complainant of the wage reduction; (2) Complainant's contention that he was not paid overtime is invalid; (3) Petitioner Mercendetti believed that his communications with the Department of Labor (DOL) investigator had resolved the matter; and (4) Petitioner did not receive a request to provide payroll records for the period "on or about June 18, 2007 through February 24, 2007."

SUMMARY OF EVIDENCE

Petitioner Rainmaster Irrigation System LLC is a corporation based in Rochester, New York, engaged in the business of installing ground irrigation systems for lawns and gardens as well as performing landscaping for residential and small commercial properties. Petitioner Rick Mercendetti is the sole owner and has operated the business for 14 years. Petitioners employ approximately four to five workers on a seasonal basis.

Complainant filed a claim for unpaid wages with DOL on July 24 2007. The Complainant was hired by Petitioners on June 18, 2007 as a supervisor trainee. Petitioners' intention was to have Complainant take charge of a second crew of employees. Complainant worked for the Petitioners for two weeks, June 18, 2007 to June 30, 2007. Mercendetti could not recall whether or not he advised the Complainant that his wages were to be $11.00 per hour. It is undisputed, however, that at the outset of Complainant's employment, Petitioners paid Complainant at the rate of $11.00 an hour. Such was reflected in the first paycheck issued to Complainant on June 29, 2007.

Complainant's last day of work was Friday June 30, 2007. According to Mercendetti, the Complainant called him by telephone and resigned on Monday, July 2, 2007.

Petitioners had a practice of holding back one week of each employees' pay and Mercendetti testified that after Complainant resigned, Petitioners paid Complainant wages for his final week worked. Mercendetti testified further that the employees neither sign timesheets nor punch a time clock. To keep track of the employees' hours, Petitioners rely on a comparison of the weekly records kept by the crew chief with the records kept by the employees themselves. This data is supplied to the service contracted to prepare Petitioners' payroll. Mercendetti maintained that the Complainant never turned in his hours for the week

that he quit so he based Complainant's pay solely on the crew chief's record that Complainant worked 47 hours. Complainant however submitted records to DOL indicating that he worked 50.25 hours during his final week. At the hearing, Mercendetti stated that he would not have disputed that calculation had he been aware of it. He maintained that he might owe the Complainant the 3.25 hour difference in calculation of the final week and is willing to pay this amount.

Mercendetti testified that he reduced the Complainant's hourly rate from $11.00 per hour to $7.15 per hour because he "was not real happy with the way things turned out and the way [Complainant] quit his job, just calling me on the Monday morning saying I can't do this anymore…." Mercendetti admitted that he reduced Complainant's pay rate because he had resigned without notice and because Mercendetti speculated that Complainant took the job only to pay off a debt.

Mercendetti admitted that when he reduced Complainant's pay rate from $11.00 an hour to $7.15 per hour, he did not give Complainant advance notice that this was going to take place. Mercendetti contended that there was insufficient time between Complainant's resignation and payroll preparation to send Complainant a letter. According to Mercendetti, Complainant's notice was receipt of the rate reduced paycheck itself.

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 (Rules) 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 Orders under review are not valid or reasonable.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;

(4) the number of hours worked daily and weekly…;
(5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
(6) the amount of gross wages;
(7) deductions from gross wages;
(8) allowances, if any, claimed as part of the minimum wage;
(9) net wages paid; and
(10) student classification.

" . . .

"(d) Employers…shall make such records…available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

"Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time employees are paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employees have been properly paid.

ARTICLE 6 – PAYMENT OF WAGES

Article 6 of the Labor Law § 191 (1) (d) provides that a worker "shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer."

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 provisions of Rule 65.39 (12 NYCRR 65.39).

Petitioners had the burden of disproving the amounts claimed as wages due to Complainant. Mercendetti admitted that Complainant was owed one week's wages. Furthermore, at the hearing Mercendetti accepted DOL's assessment of the number of hours worked by Complainant (50.25). Mercendetti also admitted that he reduced Complainant's wage rate for the 50.25 hours from $11.00 per hour to $7.15 per hour without giving the Complainant prior notice of the reduction. The central question here is the propriety of the

wage reduction. The Board finds that Petitioners' failure to give advanced notice of the reduction in the wage rate to Complainant deprived the Complainant of the opportunity to choose whether or not he was willing to accept the new terms before actually working the hours. This improper reduction resulted in unpaid wages in the amount of $248.05 with interest at 16% of $91.05. Accordingly, the Board finds that Petitioner violated Labor Law § 191 (d) (1) by failing to pay agreed wages and the Amended Order of the Commissioner dated June 5, 2008 is reasonable and valid. Subsequent to the hearing, DOL sent a letter to the Board indicating that an additional $32.02 had been received from Petitioner, this amount should be credited to Petitioner and the amount of unpaid wages currently due and owing is $216.03.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of $62.00. Labor Law § 218 provides, in relevant part:

> "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 those provisions, rules or regulations, or to an employer whose violation is 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, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . 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, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount in the Order is proper and reasonable in all respects.

PENALTY ORDER UNDER ARTICLE 19 OF THE LABOR LAW

On June 5, 2008 DOL issued an Amended Order to Comply which assessed a penalty of $250.00 for failure to keep and/or furnish required payroll records. At the hearing Petitioner submitted into the record a payroll journal showing that for the period of June 18,

2007 to June 30, 2007 he paid the Complainant $7.15 an hour straight time for 40 hours and, based on that same rate, paid 7 hours at time and one half for a total of $303.08.

Petitioners credibly demonstrated that they had a system for recording and keeping payroll records. While its employees neither sign timesheets nor punch a time clock, Petitioners rely on a reconciliation of the weekly records kept by the crew chief with the records kept by the employees themselves. This data is supplied to the service contracted to prepare Petitioners' payroll. Mercendetti maintained that the Complainant never turned in his hours for the week that he quit so he based Complainant's number of hours worked solely on records of the crew chief. Petitioners calculated that Complainant worked 47 hours. Complainant however submitted to DOL records calculating that he worked 50.25 hours during his final week. Petitioner, at the hearing, stated that he accepts and would not have disputed that calculation had he been aware of it. He maintained that he might owe the complainant the 3.25 hour difference in calculation of the final week and is willing to pay this amount.

Mercendetti testified that he had presented the payroll journal to the DOL, but conceded that since he sent the payroll journal as an attachment to his petition he could be confusing the DOL with the Industrial Board of Appeals.

It is noted that Petitioner asserted in his December 18, 2007 Petition that he did not receive a request to provide payroll records "for the period on or about June 18, 2007 through February 24, 2007" [sic]. He stated further that he would be willing to provide such documents if required.

The Board takes administrative notice that in a letter to the parties, following a prehearing conference with them on June 3, 2008, the Deputy Counsel of the Industrial Board of Appeals noted "inconsistencies between the answer and the orders in issue here as well as confusion as to the dates to which the order under article 19 applies." i.e. the order stated that Petitioner failed to provide payroll records "for the period on or about June 18, 2007 through February 24, 2007" [sic]. The Deputy Counsel acknowledged that the DOL would be taking measures to clear up the confusion regarding requested payroll periods by June 10, 2008. An Amended Order issued on June 5, 2008 indicated that the correct payroll period in question was June 18, 2007 to June 30, 2007.

Respondent DOL presented as witnesses Labor Standards Investigators Joseph Ryan and Anne Marie Culberson. Mr. Ryan, while present at the hearing, had not participated in the investigative process. He testified that his prior involvement with the documents was solely for the purpose of testifying in this proceeding. Since Ryan was not an assigned investigator familiar with the specific documents presented by the DOL, or qualified as Custodian of Records, the Board accords his testimony no weight.

Ms. Culberson, who was the principle DOL investigator in this matter, did not personally appear at the hearing because of budgetary constraints of the DOL. She participated by telephone over the objection of the Petitioner that the witness' identity could not be verified and "she could be anyone." The Board sustains Petitioners' objection due to

the fact that the hearing officer was unable to observe the demeanor of the witness testifying by telephone nor could he observe what documents the witness was referring to. For these reasons, the Board accords no weight to the testimony of Ms. Culberson.

DOL introduced a letter which it maintained proved that it requested payroll records of Petitioner which were not provided. However, a review of the document indicates that DOL was not demanding to be shown payroll records. The intent of the letter was to inform Petitioners of the claim filed and stated: "If, however, you do not agree that these amounts are due and payable to the claimant(s), we would appreciate a full statement from you giving your reasons. You should include a copy of any payroll record. . . ." We find that failure to provide records in support of the defense against a claim is not the basis for a penalty for failure to furnish records in this case.

Accordingly, Petitioners have shown that they maintain payroll records and were never directed to furnish payroll records and therefore, the Order to Comply which assessed a penalty of $250.00 for failure to keep and/or furnish required payroll records is unreasonable and invalid.

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."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Amended Order to Comply with Article 6 is hereby affirmed, as modified herein; and

2. The Amended Order to Comply with Article 19, dated June 5, 2008, is hereby revoked; and

3. The Petition for review is otherwise hereby denied.

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Anne P. Stevason, Chairman

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J. Christopher Meagher, Member

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Mark G. Pearce, Member

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Jean Grumet, Member

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LaMarr J. Jackson, Member

Dated and signed in the Office of the
Industrial Board of Appeals,
at Albany, New York, on
June 18, 2009.