

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
FOUR J's SPORTSWEAR INC.,	:	
	:	
Petitioner,	:	
	:	DOCKET NO. PR 08-093
To Review Under Section 101 of the Labor Law:	:	
An Order Under Article 19 of the Labor Law dated :	:	<u>RESOLUTION OF DECISION</u>
April 18, 2008,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	

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APPEARANCES

Jimmy Caceres, *pro se* Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Jimmy Caceres, for Petitioner; Edgar Feng, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 17, 2008. Upon notice to the parties a hearing was held April 24, 2008 before Board Chairperson Anne P. Stevason in New York City. 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 that is under review in this proceeding on April 18, 2008. The Order assesses a civil penalty of \$2,000 against Petitioner Four J's Sportswear Inc. (Petitioner) on two counts: Count I assesses a fine of \$1,000 based on Petitioner's failure to keep and/or furnish true and accurate payroll records for each employee in violation of Section 661 of Article 19 of the New York State Labor Law

(Labor Law) and Section 2.6 of Part 142 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York (12 NYCRR 142-2.6); Count II assesses a penalty of \$1,000 based on Petitioner's failure to give each employee a complete wage statement with every payment of wages in violation of Labor Law § 661 and 12 NYCRR 142-2.7.

Petitioner alleges that although it did not have records upon the Department of Labor's (DOL) first inspection, when the inspector returned in June 2007, records were produced.

The Commissioner moved to dismiss the petition as untimely and containing only conclusory allegations. Relying on the Board's Rules of Practice and Procedure (Rules) 66.5(d) (12 NYCRR 65.5 (d)) Board staff denied the motion, finding that the petition was post-marked and therefore filed, within the 60 day limitations period that Labor Law § 101 (1) prescribes for commencing a Board review proceeding. Board staff also found that an amended petition filed on August 18, 2008 stated a sufficient ground for appeal. Board staff directed the Commissioner to file an answer which she subsequently did. We find that the motion to dismiss was correctly decided.

I. SUMMARY OF EVIDENCE

The facts of this case are not in dispute. Petitioner is a sewing contractor engaged in the apparel business. On May 16, 2007, DOL conducted an inspection at Petitioner's place of business. DOL Investigator Feng testified, and Jimy Caceres (Caceres), Petitioner's president, admitted, that there were at least six individuals working at the time. Feng stated that while he observed six people sewing, there were times cards for only two people.

On May 23, 2007, DOL returned to inspect Petitioner's payroll records for the period of October 2006 to May 2007. Petitioner provided records for only three employees for the week of May 14, 2007 through May 19, 2007. Feng again observed four to six people working. Petitioner admitted that there were other people working but stated that they had just started.

At hearing, Petitioner produced wage statements for three employees which stated that they were for the period of "June 30, 2007 to June 30, 2007" and its quarterly Federal Tax Return for October, November and December of 2006. Caceres testified that he had made arrangements with DOL to pay \$250 in resolution of the penalty at issue here. However, he sent the payment in later than agreed and DOL returned the payment to Petitioner.

II. 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 is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board 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 Petitioners to prove that the Order is not valid or reasonable.

Record Keeping Requirements

Every employer is required to keep time and payroll records for each of its employees and to make those records available for inspection by the Commissioner. The records must be kept for six years. Labor Law § 661 states in relevant part:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time”

The Minimum Wage Order for Miscellaneous Industries specifies the information required to be maintained. 12 NYCRR 142-2.6 provides in relevant 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) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - (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.”

Requirement to Furnish a Wage Statement

The Minimum Wage Order for Miscellaneous Industries, 12 NYCRR 142-2.7 provides that every employer “shall furnish to each employee a statement with every payment of wages.” The statement must contain a listing of “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 each of its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

The Commissioner’s authority to issue Orders to Comply and to assess civil penalties

When 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) provides, in pertinent part:

“If the commissioner determines that an employer has violated a provision of . . . article nineteen (minimum wage act) . . . of this chapter, or a rule or regulation promulgated there under, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation.”

The Commissioner is also authorized to assess a civil penalty. Labor Law § 218 (1) further provides that:

“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 for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. 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.”

III. FINDINGS

The basis for Petitioner’s challenge to the Order is that payroll records were provided to DOL. While payroll records were provided, they did not meet the requirements of New York Labor Law. Time and payroll records are required to be kept for each employee, and each employee must receive a wage statement every time he is paid. When DOL initially visited Petitioner’s place of business no time records existed for four employees. When DOL made its revisit, payroll records were not produced for all of the employees and even the records available were for only a one week period. Even if the other workers present at that time had just begun employment, Petitioner should have had payroll records for all of the employees that had been observed working two weeks before and did not.

For all of the above reasons, we find that the Order demanding payment of a civil penalty of \$2,000 was not unreasonable or invalid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. Respondent’s motion to dismiss be, and hereby is, denied; and
2. The Order to Comply with Article 19 of the Labor Law, dated April 18, 2008 under review herein, is affirmed; and
3. The Petition for Review be, and the same hereby is, dismissed.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

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