STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: WILLIAM MARK DICTOR and HANLON AUTO TRANSPORT, INC., Petitioners, To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, both dated November 6, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-003 INTERIM RESOLUTION OF DECISION

APPEARANCES

Frederick J. Berman, Esq., for Petitioners.

Maria L. Colavito, Counsel to the New York State Department of Labor, Jeffrey G. Shapiro, of Counsel, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was received by the Industrial Board of Appeals (Board) on January 6, 2009. The Petition seeks review of two Orders to Comply with Article 6 of the Labor Law (Order) that the Respondent Commissioner of Labor (Commissioner) issued on November 6, 2008, finding the Petitioner in violation of Labor Law §§ 193 and 198-c. The first Order (Deductions Order) directs payment of $65,127.95 in unlawful deductions due and owing together with $28,286.06 in interest at 16% per annum calculated to the date of the order, and a civil penalty in the amount of $32,564.00, for a total amount due of $125,978.01. The second Order (Supplements Order) directs payment of $1,405.32 in supplemental wages due and owing together with $216.16 in interest at 16% per annum calculated to the date of the order, and a civil penalty in the amount of $702.00, for a total amount due of $2,323.48. On February 3, 2009, The Commissioner, by her attorney Maria Colavito, counsel to DOL, Jeffrey G. Shapiro of counsel, filed a Motion to Strike paragraphs 17 through 34, inclusive, and paragraphs 36 and 37 from the Petition pursuant to Board Rule 65.13 (a) (12 NYCRR 65.13 [a]). The Petitioner did not oppose the Motion.

We assume for the purposes of this decision that all facts alleged in the Petition are true. We do not repeat those facts here, but incorporate the Petition into this decision as Appendix “A.” For the reasons set forth below, we grant the Motion in part, and deny it in part.

Board Rule 65.13 (a) provides in relevant part that:

> “If any matter contained in a petition . . . be frivolous . . . the Board . . . on the motion of any party made on ten (10) days’ notice of motion, may order such material stricken. In such case, the pleading will be deemed amended accordingly, or the Board may order that an amended pleading be served, omitting the objectionable material.”

We understand frivolous, for purposes of this Motion, to mean clearly insufficient as a matter of law, and agree with the Commissioner that several of the paragraphs of the Petition set forth allegations that are insufficient to show that the Order is unreasonable or invalid as a matter of law, and therefore must be stricken from the Petition.

Labor Law § 193 states in relevant part that:

> “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.”

Several of the practices engaged in by the Petitioners, as alleged in the Petition, demonstrate violations of Labor Law § 193 as a matter of law.

Paragraphs 17 and 18 of the Petition allege that wages payments were withheld from a named employee because such employee breached her duty of loyalty and fidelity to the Petitioners by securing a job with a competitor company and soliciting existing customers of the Petitioners while still employed by the Petitioners to try to take them with her to her new employer. Withholding wages from an employee as a penalty for violating an alleged duty of loyalty and fidelity violates Labor Law § 193 because such withholding is neither authorized by the provisions of any law, rule or regulation, nor one of the deductions allowed by the statute. Furthermore, 12 NYCRR 142-2.10 (a) (3) explicitly lists “fines or penalties for . . . misconduct or quitting by an employee without notice” as a prohibited deduction. Therefore, paragraphs 17 and 18 should be stricken from the Petition.

Paragraphs 23, 24, 25 and 26 of the Petition describe a practice by which the Petitioners deducted money from a certain class of employees' (car-pullers) wages and deposited the money into an escrow account. If the employee damaged a car, the amount of damages would be deducted from the employee's escrow account. If there was money remaining in the escrow account when the employee left the Petitioners, the employee would receive the balance. Deductions from an employee's wages to pay for damage caused by the employee is unlawful under Labor Law § 193 (*see Matter of La France v Tri-State Leasing Serv., Inc.*, 173 AD2d 989, 991 [3d Dept 1991] [deductions from wages for damage to tractor trailer unlawful]; 12 NYCRR 142-2.10 [a] [1] [deductions for spoilage or breakage prohibited]). Accordingly, paragraphs 23, 24, 25 and 26 must be stricken from the Petition.

Paragraphs 31 and 32 likewise describe a system used by the Petitioners to deduct money from the wages of certain employees (truck drivers) to keep in escrow to pay for damage caused by the employees. For the reasons set forth above, this practice violates Labor Law § 193 and therefore these paragraphs must also be stricken from the Petition.

Paragraph 34 of the Petition alleges that those employees of the Petitioners who elected to have their wages paid by direct deposit had $.50 deducted from each payment of wages. The Petitioners alleged that this was the fee charged to them by their payroll company to provide direct deposit to the Petitioners' employees. It is an unlawful deduction from wages in violation of Labor Law § 193 for an employer to deduct a payroll processing fee from its employees' wages (*Angello v. Labor Ready, Inc.*, 7 NY3d 579 [2006]). Accordingly, paragraph 34 must be stricken from the Petition.

Finally, paragraph 36 must be stricken from the Petition because it challenges, without any legal basis, the Commissioner's inclusion of 16% in the Deductions Order. The Commissioner is mandated by Labor Law § 219 (1) to include in her Order a requirement to pay "interest at the rate of interest 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 states that the "maximum rate of interest provided for in section 5-501 of the general obligation law shall be sixteen percent per annum." We further note that the Commissioner has no discretion to charge a lower rate of interest, as such discretion was taken away from her by the Legislature in 1987 (*see* L. 1987, ch. 417; *see also Matter of Long Island-Airport Limousine Service Corp.*, PR 31-89 [September 24, 1992]).

The Commissioner also seeks to have paragraphs 20, 21, 22, 27, 28, 29, 30 and 37 stricken from the Petition. The Board declines to strike those paragraphs because we do not presently have sufficient information from the pleadings alone to determine as a matter of law that those paragraphs do not state a claim upon which relief can be based. Paragraphs 19 and 33 should be stricken to the extent that they are inconsistent with this Decision.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. Paragraphs 17, 18, 23, 24, 25, 26, 31, 32, 34, and 36 be, and hereby are stricken from the Petition; and

2. Paragraphs 19 and 33 be, and hereby are, stricken from the Petition to the extent that they are inconsistent with this Decision; and

3. The Petition is deemed amended in accordance with this Decision; and

4. The Respondent Commissioner of Labor shall serve and file an Answer to the remaining paragraphs of the Petition on or before July 20, 2009.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jeam 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.