

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
NATHAN GODFREY (T/A A.S.U.),	:
	:
Petitioner,	:
	:
	: DOCKET NO. PR 09-024
To Review Under Section 101 of the Labor Law: An	:
Order to Comply with Article 6 of the Labor Law and	: <u>RESOLUTION OF DECISION</u>
an Order under Article 19 of the Labor Law, dated	:
December 8, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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APPEARANCES

Daniel Godfrey, for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Daniel Godfrey, William Taft, Margaret Ford, Nathaniel Godfrey and Labor Standards Investigator Christine Anderson

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 4, 2009. An Answer was filed on March 18, 2009. Upon notice to the parties, a hearing was held on November 5, 2009 in Binghamton, New York before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer. 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 or Respondent) issued the Orders under review against Petitioner Nathan Godfrey (T/A A.S.U.) (Godfrey or Petitioner) on December 8, 2008. The Order to Comply with Labor Law Article 6 (Wage Order) directs payment to the Commissioner for vacation wages due and owing to a named Claimant in the amount of \$1,040.00, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of \$102.12, and assesses a civil penalty in the amount of \$520.00, for a total of \$1,662.12.

Petitioner admitted at hearing that he did not comply with the recordkeeping requirements and therefore, is not contesting the Order under Article 19 and the assessment of \$250 as a civil penalty.

The Petition alleges that the Claimant was never promised vacation pay, that no one Petitioner employs gets vacation pay and that no Department of Labor (DOL) representative ever came to his place of business to check payroll records or time cards. Respondent's Answer alleges that the Wage Order is based on a claim that was filed and that DOL demanded and/or requested Petitioner's payroll records on a number of occasions.

I. SUMMARY OF THE EVIDENCE

Petitioner owns a small business involved in the service and repair of large appliances. Petitioner's father, Dan Godfrey, who is employed in the business and represented Petitioner at the hearing, hired Claimant on behalf of his son in November 2006 to do the payroll, order parts and perform other clerical duties. Claimant's rate of pay was \$9.00 per hour at the start and was eventually raised to \$13.00 per hour, the rate when her employment was terminated in April 2007. Dan Godfrey testified that he had no discussion with and made no promise to Claimant regarding paid vacation at any time. He testified that although Petitioner would not dock employees for sick days and allowed Claimant a day off a few times, there was no formal vacation policy, and no one in his or Petitioner's employ was ever given vacation. Also, Claimant was paid for a 40 hour week even though she left 2 hours early every Friday.

Petitioner produced monthly calendars from January 2007 to April 2008 which Dan Godfrey testified were created two days before hearing from the Petitioner's payroll and time records. The underlying documents were not produced. The calendars consistently list Claimant's daily time as "8-12" and "1-5," Monday through Friday, with an occasional sick day, day off, or day where Claimant left work at 3.

Claimant testified that when she was hired, she was offered two weeks of paid vacation after one year of employment. Dan Godfrey told her that the business was just starting out so her starting pay rate would be low, but that she would get benefits and her pay would increase. Claimant testified that she overheard Dan Godfrey offer two weeks of vacation benefits to two other employees, who submitted corroborative statements on Claimant's behalf to DOL investigators. Claimant also testified that in March 2008, she publicly mentioned that she was going on a paid vacation in September 2008 and listed her

vacation dates on the company calendar. Petitioner was present when the Claimant spoke of a paid vacation, participated in looking at the Claimant's vacation promotional video and did not in any way deny that Claimant was getting a paid vacation. Petitioner admitted being present and not saying anything, but stated that the reason he did not say anything was because Claimant "was on her way out." When Petitioner and Dan Godfrey came to Claimant's house to fire her, she asked for her vacation pay and was told that she did not earn it. A week later she sent a letter to Petitioner requesting vacation pay.

Petitioner submitted five notarized statements from employees stating that Petitioner never offered them 2 weeks vacation and nor was anyone they knew. William Taft, a current employee, testified for Petitioner, and stated that he never got a vacation and did not know anyone who did but was out of the office 90% of the time on service calls so he would not know about Claimant's employment package or whether she had vacation benefits. Taft also testified that if he worked overtime one week, he would make up for it by working less the next week. He was not paid for overtime.

Labor Standards Investigator (LSI) Christine Anderson testified that Claimant filed a claim with DOL on May 22, 2008. Anderson sent Petitioner a notice of Claimant's claim for vacation pay and in return received a letter from Petitioner (Hearing Exhibit "C") stating:

"In response to the letter received in our office on 06/23/2008. This matter will need a little more time to get all facts together, as we have just relocated to our new building. However, according to a 'quick' overlook of payroll records, there is NO vacation pay due to this claimant. Please allow additional 7 – 10 days to confirm."

A second letter was received from Petitioner thereafter stating that "there was no vacation time offered nor owed to" Claimant. (Hearing Exhibit "E") Claimant then supplied DOL with two statements from former employees that the company had a vacation policy of "Two weeks paid vacation at the end of one year. Date of hire is the anniversary date." Neither employee testified at the hearing.

II. 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 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 are not valid or reasonable.

III. GOVERNING LAW

Payment of Benefits and Wage Supplements

There is no legal requirement in New York for an employer to provide vacation pay to employees. However, once an employer establishes a paid vacation leave policy for its employees, Labor Law § 198-c requires such employer to provide this benefit in accordance with the terms of whatever leave policy it has established (*Gennes v Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2005]; *Matter of Glenville Gage Co., v State Indus. Bd of Appeals*, 52 NY2d 777 [1980], *affg* 70 AD2d 283 [3rd Dept 1979]; *In the Matter of the Petition of Center for Financial Planning, Inc.*, PR 06-059 [January 28, 2008]).

Labor Law § 198-c(1) requires “any employer who is a party to an agreement to pay or provide benefits or wage supplements to employees...to provide such benefits or furnish such wage supplements within thirty days after such payments are required to be made. . . . “Under Labor Law § 198-c(2) benefits or wage supplements include vacation pay.

Labor Law § 195.5 provides:

“Every employer shall notify his employees in writing or by publicly posting the employer’s policy on sick leave, vacation, personal leave, holidays and hours.”

Burden of Proof where Employer fails to keep required records

Labor Law § 196-a provides in relevant part that “. . . [f]ailure of an employer to keep adequate records . . . shall not operate as a bar to filing a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

VACATION PAY

The only dispute in this proceeding is whether there was an agreement between Claimant and Petitioner that she would accrue two weeks paid vacation after completing one year of employment.

Petitioner owns a small business consisting of four employees including Petitioner and his father. It appears that employees were given days off for sickness or personal days on an ad hoc basis. All witnesses stated that they were not docked for sick days. Further,

Petitioner's calendar shows Claimant absent from work on March 24, 2008 because she needed the day off, and yet the payroll record indicates that she was paid for that day. Nonetheless, we credit Claimant's testimony that she was promised two weeks paid vacation when she was hired. She confirmed this arrangement in Petitioner's presence when she publicly stated that she was taking a paid vacation and listed it on the company calendar and yet Petitioner made no comment. In addition, when Petitioner first responded to Claimant's claim for vacation he did not indicate that there was no vacation policy, only that "according to a 'quick' overlook of payroll records, there is NO vacation pay due to this claimant." (Letter of June 23, 2008, Respondent's Exhibit "C"). Since Petitioner's vacation policy is not in writing and not posted as Labor Law § 195.5 requires, and Petitioner has failed to keep the required records, we must credit Claimant's evidence Petitioner's vacation policy per Labor Law § 196-a, i.e. that she was promised two weeks after one year and is due \$1040. The Board gives no weight to the notarized employee statements submitted by Petitioner since the employees were not available for cross-examination at hearing and therefore, the statements are unreliable.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order under review includes a 50% civil penalty against the Petitioners. 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.

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 December 8, 2008 Order to Comply with Article 6 of the Labor Law is affirmed;
and
2. The December 8, 2008 Order under Article 19 of the Labor Law is affirmed; and
3. The Petition is denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Lafumet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 27, 2010.