PATRICIA A. HOMMEL COCCHIA
(T/A PATRICIA A. COCCHIA, ESQ.)

Docket No. PR 09-056

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PATRICIA A. HOMMEL COCCHIA (T/A PATRICIA A. COCCHIA, ESQ.), Petitioner, To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 6 of the Labor Law, both dated January 20, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-056 RESOLUTION OF DECISION

APPEARANCES

Anthony Proscia, Esq., Traub, Lieberman, Straus and Shrewsberry, for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl, of counsel, for Respondent, Commissioner of Labor.

WITNESSES

Patricia Cocchia; Christina Dunlap; Labor Standards Investigator Enrique Anico-Taveras.

WHEREAS:

On March 20, 2009, Petitioner Patricia A. Hommel Cocchia (T/A Patricia A. Cocchia, Esq.) (Petitioner or Cocchia) filed 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), seeking review of two Orders that the Commissioner of Labor (Commissioner or Respondent) issued against her on January 20, 2009.

The Order to Comply with Labor Law Article 6 (Wage Order) finds that Cocchia violated an agreement to pay wage supplements to Christina M. Dunlap (Claimant or Dunlap) and demands payment of $2,110.80 in wage supplements (vacation pay) due and owing, interest at the rate of 16% calculated to the date of the Wage Order in the amount of $323.85 and a civil penalty in the amount of $1,055.00, for a total amount due of $3,489.65.

The Order Under Article 6 (Penalty Order) finds that the Cocchia failed to notify employees in writing or post notice of her fringe benefits policy for the period from January 1, 2008 through February 5, 2008, in violation of Labor Law 195.5 and assesses a civil penalty of $250.00.

The Petition alleges that the Claimant was an at-will, part time employee who was never promised vacation pay. It also challenges the reasonableness of the amount of the wage supplement in the Wage Order on the ground that it assumes that Claimant worked a forty-hour week when she worked for Petitioner only twenty hours a week. Respondent's Answer alleges that the Wage Order is based on the claim filed with the Department of Labor (DOL) by the Claimant and that DOL demanded and/or requested a copy of Petitioner's fringe benefits policy, evidence that the Claimant received a copy of such policy, and payroll records proving either that the time had not accrued or that the accrued time had been used, or that the accrued and unused time had been paid, but Petitioner failed to supply such records.

SUMMARY OF THE EVIDENCE

Cocchia testified that she operates a law office as a solo practitioner practicing real estate law and that Dunlap worked for Bedrock Title, a title insurance company owned by Cocchia's husband, for "probably two months, I'm pretty sure it was less than a year" before beginning to work in her law office as a part-time paralegal sometime in 2006. Dunlap replaced a full-time paralegal, and according to Cocchia, worked twenty hours a week as a paralegal for Cocchia and twenty hours a week as a title clerk for Cocchia's husband's company, whose office is adjacent to Petitioner's law office.

Cocchia testified that she had no formal policy regarding vacation or personal days, and that she did not dock Claimant when she took sick days or bereavement time. Cocchia stated that Claimant took a four- or five-day paid vacation during her employment with Petitioner, and until Dunlap's grandmother's death, Dunlap was "a very responsible, reliable, loyal employee. Most days she was there before I was. She would always stay if I needed her to do something. She never asked for additional compensation . . . she was always willing to help."

According to Cocchia, during the time that Dunlap worked for her, Dunlap was Cocchia's only paralegal. Petitioner stated that Dunlap did not have a set schedule, although she later stated that Dunlap worked for her primarily in the morning and for Cocchia's husband in the afternoon, and that each of the Cocchias paid Dunlap for twenty hours of work each week regardless of for whom she worked. According to Cocchia, Dunlap had a

desk in each of the Cocchias' offices, but Dunlap used the desk in the law office most of the time because the computer contained more programs. Cocchia stated that Dunlap would go back and forth between offices.

Cocchia testified that after Dunlap's grandmother passed away before Christmas 2007, Dunlap took off from work for an extended bereavement period amounting to three or four days. Cocchia testified that initially she did not keep track of the days that Claimant took off, but began noting on her calendar the days that Dunlap took off from work or came in late. Cocchia testified that she would pay Dunlap even when she was absent or late.

Cocchia testified that Claimant was an "at will" employee who did not have an employment contract, and "[m]y position wasn't based upon a payroll record stating whether or not she was entitled to something. My position is that she was not entitled to anything, she was not a full time employee" and "even if she was entitled to vacation pay . . . she was absent from work, at that time I estimated over forty hours in the last four weeks that she worked for me." Dunlap's last day of employment was February 5, 2008.

Dunlap testified that in October 2006, Petitioner and her husband interviewed and hired Dunlap for a position as a title clerk with Bedrock Title. Dunlap believes Patricia Cocchia may be a partner in Bedrock Title. Both Cocchias told her that her benefits included two weeks paid vacation and five paid sick days per year. Her starting pay was $16.59 an hour. In January 2007, Petitioner's full-time paralegal announced that she was moving, and the Cocchias asked Dunlap to work for Petitioner as a paralegal. When Dunlap began working for Petitioner in January 2007, Cocchia told Dunlap that she would continue to receive two weeks paid vacation and five paid sick days per year. Dunlap testified that she took one week of paid vacation in April 2007, while working for Petitioner. In November 2007, Dunlap received a raise to $17.59 per hour after passing her notary examination. Petitioner paid Claimant to take the notary exam so that Dunlap could notarize bank documents at real estate closings when Cocchia was not present.

Dunlap testified that after January 2007, she worked forty hours per week for Petitioner and rarely worked for Petitioner's husband although she continued to be paid separately for twenty hours by each of the Cocchias. Dunlap testified that she had the keys to Petitioner's office, but did not have the keys to the office of Petitioner's husband; that any work she did for Petitioner's husband was performed at Dunlap's desk in Petitioner's law firm; and that Petitioner's husband downloaded his software programs onto Dunlap's computer in Petitioner's office. Dunlap testified that on the occasions when she worked for Petitioner's husband, she first had to finish the work she was doing for Petitioner.

Dunlap testified that she was not excessively absent during her employment with Petitioner. She stated that her grandmother died on Friday, December 21, 2007; that the law office was closed on the following Monday and Tuesday for Christmas Eve and Christmas, and that the only day she took off for her grandmother's death was Wednesday, December 26, when her grandmother was buried. Dunlap testified that she was never provided with a written vacation policy and was never informed that she would forfeit vacation pay if she did not use it.

Labor Standards Investigator Enrique Anico-Taveras testified that the Claimant filed a claim with DOL on February 15, 2008. Labor Standards Supervisor Phil Pisani sent Petitioner a notice of Claimant's claim for vacation pay and in return received a letter from Petitioner stating that Dunlap was an "at will" employee, that there was no employment contract, and that Dunlap was not entitled to vacation pay. A second letter was received from Petitioner thereafter stating that Dunlap was absent from work for over forty hours during her last four weeks of employment "so even *if* she was entitled to 'vacation' pay, it would have more than utilized by the time Ms. Dunlap did not report to work, or came in, or left early" (sic). In response to this letter, Senior Labor Standards Investigator Lori Roberts wrote to Petitioner notifying her that "Article 6 Section 195.5 of the New York State Labor Law requires employees to be notified in writing of the specifics of the employer's policies on fringe benefits." In this letter, Roberts asked Petitioner to submit documentary evidence to show that the claim is invalid. Petitioner responded by letter stating, "I do not have a copy of 'fringe benefits' since I have never had any contractual employees, only 'at will' employees, such as Ms. Dunlap."

STANDARD OF REVIEW AND BURDEN OF PROOF WHERE EMPLOYER FAILS TO KEEP REQUIRED RECORDS

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 the claims that she asserts to show that the Orders are not valid or reasonable.

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

New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy for its employees, Labor Law § 198-c requires the 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 Nathan Godfrey (T/A A.S.U.),* PR 09-024 [decided January 27, 2010]; *In the Matter of the Petition of Center for Financ. Planning, Inc.,* PR 06-059 [decided January 28, 2008]).

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."

The issue in this case is whether there was an agreement between Claimant and Petitioner that Claimant would receive two weeks of paid vacation per year. The Petitioner testified that she had no agreement with Claimant to provide a paid vacation, and the Claimant testified that Petitioner told Claimant that she would receive a two-week paid vacation. We resolve the conflicting testimony by crediting the Claimant and thereby we necessarily find that Petitioner did not meet her burden of proving that there was no agreement to provide two weeks of vacation pay per year to Claimant (*see Matter of the Petition of Nathan Godfrey (T/A A.S.U.),* PR 09-024 [decided January 27, 2010]).

Dunlap's testimony was more specific and detailed than Petitioner's. Dunlap remembered that Petitioner promised the vacation benefits upon hiring her and then again when the nature of her job changed months later. Also, what Petitioner testified to as an extended bereavement leave – three or four days – Dunlap explained as days the office was closed for the Christmas holiday season, and Petitioner did not rebut this testimony. That Dunlap was given a week's paid vacation in April 2007 tends to support the finding that Petitioner promised a paid vacation more than it supports Petitioner's assertion that she had no vacation policy at all.

Cocchia's statement that "I felt she was entitled to nothing. I didn't have to go through and show every single day that she came in late, and left early, and was out" reflects a fundamental misunderstanding of the law that governs here; it fails to take into account that the Petitioner had the burden to prove all of the claims raised in the Petition, including the claim that she asserts that she "didn't have to" prove. Cocchia stated that she kept notes on her calendar that would show the days that Dunlap was absent. However, she failed to produce the calendar either during DOL's investigation or at the hearing. It is reasonable to infer from Cocchia's failure to produce the calendar that either it does not exist or does not say what she claims that it does. In any event, we find that Cocchia failed to meet her burden to prove her alternative claim that even if she had an agreement to give Dunlap a two-week paid vacation, Dunlap received equivalent paid time off before she left Cocchia's employment.

Finally, Petitioner's claim that Dunlap was "not entitled to anything" because "she was not a full time employee" or was an "at will" employee is unavailing because an employee's status as part-time or at-will is irrelevant to an employer's obligation to comply with Section 198-c. Moreover, we again credit Dunlap's testimony over that of Petitioner's and find that the Claimant was a full-time employee of the Petitioner who worked forty hours per week. It is undisputed that Dunlap replaced a full-time paralegal, spent her work time in Petitioner's firm, and was required to give Petitioner's work priority. Therefore, we find it reasonable to base the amount of the vacation pay due to Dunlap on a forty-hour work week.

As we have found that Cocchia and Dunlap agreed that Dunlap would have two weeks paid vacation a year and because Dunlap took one week of paid vacation in April 2007, she is entitled to one additional week of vacation pay for the year that she worked for Petitioner from January 2007 to February 2008. Accordingly, we reduce the Wage Order from three weeks to one week of vacation pay owed.

CIVIL PENALTIES

The Wage Order assessed a 50% civil penalty and the Penalty Order assessed a $250.00 civil penalty for failing to notify employees in writing or to post a notice of the Petitioner's fringe benefits policy. During the hearing, the Commissioner moved pursuant to Labor Law § 101 to preclude evidence on the issue of civil penalties contending that the civil penalties were not raised as an issue in the Amended Petition.

Labor Law § 101 states:

> "The petition shall be filed with the board in accordance with such rules as the board shall prescribe, and shall state the rule, regulation or order proposed to be reviewed and in what respect it is claimed to be invalid or unreasonable. Any objection to the rule, regulation or order not raised in such appeal shall be deemed waived.

The Petitioner asserted that the civil penalties were raised in Paragraphs 2 and 3 of the Amended Petition. These paragraphs contain no mention of civil penalties. We therefore find that the issue of civil penalties was waived pursuant to Labor Law § 101.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Labor Law Article 6, dated January 20, 2009, is modified by reducing the amount of supplemental wages due and owing to $703.60 and by reducing the Interest and Civil Penalty assessed accordingly; and

2. The Order Under Labor Law Article 6, dated January 20, 2009 is affirmed; and

3. The Petition is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 23, 2010

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2. The Order Under Labor Law Article 6, dated January 20, 2009 is affirmed; and

3. The Petition is denied.

Anne P. Stevason, Chairman

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