STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: YOLONDA D. BRAHAM A/K/A YOLONDA D. WHITE, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 of the Labor Law dated May 8, 2013, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 13-064 RESOLUTION OF DECISION

APPEARANCES

Law Office of Delmas A. Costin, Jr. (Delmas A. Costin, Jr. of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Yolonda D. Braham, Chitrawattie Chan for petitioner.

Antonio Rodriguez, Ana Vazquez, Awilda Burgos, Georgianna White, Labor Standards Investigators Gerard Capdevielle and Carla Valencia for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on May 23, 2013, and seeks review of an order issued by the Commissioner of Labor (Commissioner, DOL or respondent) on May 8, 2013 against petitioner Yolonda D. Braham a/k/a Yolonda D. White (Braham or petitioner).[1] The Commissioner filed his answer on June 26, 2013.

[1] In addition to Braham, the order was also issued against Frederick D. Abston and East Bronx N.A.A.C.P. Day Care Center, Inc. (T/A East Bronx Day Care). Neither one petitioned the Board for review. The order lists the spelling of Braham's first name as "Yolanda." However, the petition clarified that the actual spelling is "Yolonda."

Upon notice to the parties, hearings were held in New York, New York on October 2 and October 16, 2014 before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. 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 order to comply with Article 6 (supplemental wage order) under review directs compliance with Article 6 of the Labor Law and payment to the Commissioner for unpaid vacation due and owing to Leonard Baptiste, Awilda Burgos, Antonio A. Rodriguez, Carol R. Sample, Ana Vazquez, and Georgianna White (claimants) in the amount of $26,320.88 for the time period from July 1, 2007 to June 20, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $20,722.57, and assesses a civil penalty in the amount of $26,320.88, for a total amount due of $73,364.33.

SUMMARY OF EVIDENCE

It is undisputed that The East Bronx N.A.A.C.P. Day Care Center, Inc. (East Bronx) was a not-for-profit corporation that operated two day care centers, one at its Colgate Avenue headquarters (Colgate) and the other on McGraw Avenue (McGraw) and employed 40 or more employees. Much of East Bronx's funding came from the New York City Administration for Children's Services (ACS). Colgate contained seven classrooms, and McGraw had four classrooms. The special education program, the Administration for Children's Services program, and universal pre-kindergarten were housed at Colgate. McGraw housed the extended daycare facility. Of the six claimants, only Burgos worked at Colgate; the others worked at McGraw.

Petitioner's Evidence

Testimony of Petitioner Yolonda Braham

Petitioner Yolonda Braham worked for East Bronx from 1996 to June 2008, initially as a teacher, then assistant education director and, beginning in 2004, as educational director. Braham was originally hired and supervised by executive director Valerie Daly, who left East Bronx in 2002. As executive director, Daly "oversaw the entire organization," including interviewing applicants for both educational and non-educational positions. If there was an interview, at some point later, Daly would call the person back in, and if the position was "for something in the classroom," Daly would observe the job applicant in the classroom, and make a final decision of whether or not the person was hired, and then a letter was generated to the applicant including the salary. Daly had a staff coordinator who also participated in the interviews. Braham also saw Daly fire people, after first conducting disciplinary conferences with them. Daly approved or disapproved vacation requests. Employee pay rates, if not determined by a union contract, were set by Daly and the board. Daly was never replaced as executive director, a decision Braham believes was made by the board.

In 2004 when Braham was appointed to her position as educational director, her duties were "to make sure that all educational aspects" of East Bronx programs met contractual and legal requirements. East Bronx had three contracts, one with ACS, one with the New York City Board of Education, and a special education contract with the NYS special education department. Braham had no involvement in obtaining these contracts.

Braham did not authorize overtime, could not sign paychecks and did not give raises; "[t]hat was the board of directors' decision." Braham had no role in setting pay rates or in handling payroll. When supplies were needed, Braham forwarded a request to the fiscal department, which would "tell me whether or not things could be purchased." Braham "might have attended one" board meeting, had no input into the East Bronx budget, and made recommendations to the board that were not always followed. For educational jobs, Braham, in consultation with the education coordinator, "interviewed and recommended to the board whether or not to hire a person," generally communicating with the board through Abston. The board made the ultimate decision. Braham also communicated with Abston about possible terminations; she believes he "consulted with the board and he would tell us what the decision was and then there would be a written memo to the person." Braham approved vacation schedules for educational staff at Colgate and sometimes also at McGraw, although requests at McGraw generally went to the site director there. The approval of vacation scheduling went to the fiscal department, which kept track of employee attendance.

East Bronx had a controller who headed the fiscal department, over which Braham had no authority. Braham does not know how East Bronx's financial problems began, but at some point in 2007, she became aware that East Bronx had financial difficulties. At the direction of the board, Braham or the controller, Marcy Alfred, wrote to staff stating that payroll would be late. Braham had no role either in creating or in fixing these problems, which were the board's responsibility.

Braham had no contact with the board after April 2008, even though she repeatedly tried to call them: "[m]ostly" Abston, and also Burgess. On May 8, 2008, Abston, as Chairman of the Board, sent a letter directed "To All Staff Members of East Bronx NAACP" stating "that the child services contract will terminate effective July 31, 2008."

The petitioner introduced in evidence a May 14, 2008 letter from ACS to Abston, Burgess and another member of the East Bronx board stating that "ACS is terminating the Contract effective July 31, 2008 . . . . On Tuesday, April 29, 2008, we met with Mr. Abston and expressed our intent to close out the Contract." The letter also states that ACS met with Braham and Chan "to explain certain close out protocols."

> "East Bronx's Child and Adult Care Food Program [CACFP] has been cited for serious deficiencies relating to fiscal mismanagement as well as an inability to administer CACFP . . . . [T]he State may terminate CACFP funding and should such funding cease East Bronx will not have the ability to provide food, beverages, and snacks to the children in its care. Accordingly, ACS has no choice but to move quickly to transfer the children in East Bronx's care to a new provider.
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> "ACS plans to transfer all child care services being provided by East Bronx by Friday June 6, 2008. The remaining period between the intended service termination date of June 6th and the Contract termination date of July 31st shall be used for further close out."

Unable to reach the board, Braham and Chan took direction from ACS, which "directed us how to basically how to close out the program . . . . ACS talked to the staff and we followed up with just communicating to staff that our program was being transferred to Tremont Crotona." Since Tremont Crotona was not taking over the McGraw day care center, Braham, after speaking with Peterson, the acting site director, went there to give staff Abston's March 8, 2008 letter. Braham testified that employees at McGraw asked what would happen to them, but she "was just there to let them know what was happening at East Bronx. I did not have the authority to tell them what would happen with them. I only went because I knew that [the] board was not communicating with anyone." Braham did not recall any questions at the meeting about vacation entitlement.

Braham ceased to be an East Bronx employee and became a Tremont Crotona employee on June 6, 2008. Tremont Crotona kept most, though not all, the Colgate staff. Braham did not decide which employees were retained. Besides the Colgate day care contract which ACS terminated effective June 6, 2008, a New York State Education Department contract for preschool education programs was terminated effective June 30, 2008, and other state and city contracts may have been canceled as well.

At the request of claimant Awilda Burgos, who "asked for a letter saying that she was no longer employed . . . [f]or her housing as well as to collect the unemployment," Braham wrote a June 20, 2008 letter on East Bronx letterhead, addressed "To Whom It May Concern" and signed "Yolonda Braham, Director," stating that Burgos "will no longer be employed at the East Bronx NAACP Day Care Center effective today . . . . The East Bronx NAACP Day Care Center will no longer operate the Special Education Program in which, Ms. Burgos was employed."

Braham, like the claimants, was entitled to vacation pay but never received payment. When DOL investigator Carlos Suarez met with Braham, she referred him to the East Bronx board of directors and specifically to Abston. Contrary to what is stated in a "Narrative Report" from Suarez included in the DOL's investigatory file, Braham did not produce East Bronx records, and did not state that "she still could make recommendations to its board to pay the vacations." Braham testified she "had no contact with the board of director[s] since April 2008. I had no way to talk to them to make any recommendations. I did not say that to anyone." Braham never spoke to DOL investigator Carla Valencia.

Testimony of Chitrawattie Chan

Chitrawattie Chan worked for East Bronx as a bookkeeper in the fiscal department from February 2006 to June 2008. East Bronx's fiscal department, located at Colgate, was headed by a controller and included Chan, another bookkeeper and an accountant. East Bronx was run by a board of directors chaired by Frederick Abston, who was responsible for hiring, disciplining, and firing staff. When Chan was hired, Abston conducted the final interview and made the decision to hire her. According to Chan, Abston "had the ultimate power to employ and fire. No one else could have made that decision." Chan saw Abston fire people, but does not recall their names.

The Board of Directors created East Bronx's "Personnel Practices and Procedures" manual which was given to each new employee when they were hired. This manual contained the day care center's policies and procedures, including provisions pertaining to vacation pay. Employment and personnel records, including disciplinary records, were kept in a locked closet

in the fiscal department; Braham did not have access to personnel records, and if necessary, she had to request specific records from the controller. The assistant bookkeeper maintained employee time cards. The fiscal department staff calculated employees' work hours, and the controller sent the information to a payroll service. The payroll service delivered the paychecks to the controller, who reviewed them for accuracy, and then distributed them to employees.

Braham's only involvement in payroll was to verify, if asked, that a teacher had worked more hours than originally scheduled. Braham did not set pay rates; the controller recommended employee wages, showed it to Braham, and Braham would take the recommendation to East Bronx's Board of Directors. It was the Board's decision to reject or approve employee pay rates. Chan testified that Braham "supervises the teachers, the classrooms, the programs," but "doesn't have the authority to make the decisions on her own."

The controller determined the East Bronx budget in conjunction with the Board of Directors. The authorized signatories for East Bronx's four bank accounts were Abston and another member of the board, its secretary Theresa Burgess. Valerie Daly, listed as "executive director," had also been an authorized signatory for East Bronx bank accounts, but she was no longer employed at East Bronx during Chan's employment. Braham was not an authorized signatory on East Bronx's bank accounts. Chan identified a June 3, 2004 letter in Braham's personnel file from Abston, as Chairman of the Board of Directors, notifying Braham of the Board's resolution to appoint her as Educational Director. Throughout Chan's employment, "we never had an executive director."

Abston, as chair of the board of directors, signed the East Bronx contract with ACS for the period July 1, 2006 through June 30, 2009. This contract also listed Abston as East Bronx's Chief Executive Officer. In May 2008, the Internal Revenue Service levied on East Bronx's bank accounts after financial problems left East Bronx unable to pay payroll taxes. ACS canceled its contract with East Bronx and retained another day care to run the Colgate site.

On May 8, 2008, Abston, as board chairperson, sent a letter addressed "To All Staff Members and East Bronx NAACP" stating: (1) that ACS "has notified the Board . . . that the child care services contract will terminate . . . and [t]he last date of service under our contract will be June 6, 2008"; (2) that in order to ensure the continuation of service, ACS selected Tremont Crotona Day Care Center (Tremont Crotona) to assume sponsorship of the program effective June 9, 2008; and (3) "On behalf of the Board I wish to extend a thank you for all your hard work and dedication to East Bronx NAACP in providing much needed services to the community."

The universal pre-kindergarten program at McGraw closed in May and the extended day care program at McGraw closed in June. Tremont Crotona hired Chan and continues to employ her as bookkeeper.

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Respondent's Evidence

Testimony of Antonio Rodriguez

Claimant Antonio Rodriguez was a lead teacher at the McGraw pre-kindergarten from December 2000 to June 2008. Rodriguez was hired by Dr. Valerie Daly, not by Braham, as is stated on his claim. When Rodriguez wanted days off, he asked the McGraw site supervisor; he believes she took the request to Braham who in turn took it to the fiscal department. Braham "probably" was involved in scheduling for Rodriguez, because "most of the things, like schedules and trips, I believe, were consulted with the director." A September 26, 2006 memo in Rodriguez's personnel file indicates that the McGraw educational coordinator, Shirley Jackson, granted Rodriguez's vacation request, and states, "Please note I have exhausted the many possibilities in resolving your conflicting time schedule between your home and job dilemma. I do hope these resolutions have been helpful."

Rodriguez discussed lesson plans with his on-site supervisor, Braham and "other supervisors . . . like five of them approximately." Rodriguez saw Braham about once a month. Rodriguez believed her title was executive director and Lynn Peterson, site supervisor at McGraw, was educational director. Rodriguez believed that Braham was responsible for making the decision to close McGraw because "she was the director at that time. I believe she had the power to do that."

Testimony of Ana Vazquez

Claimant Anna Vazquez was an assistant cook at McGraw from 1999 to July 2008. Valerie Daly hired Vazquez. At the time of the McGraw's closing, Lynn Peterson was Vazquez's immediate supervisor at the McGraw facility, and Braham was the "one in charge." If Vazquez needed kitchen supplies she "[s]ometimes" spoke to Braham, but went to kitchen supervisor Mary Dubarry "most of the time." When Vazquez wanted time off, she asked Peterson and Dubarry; Vazquez believes such requests also had to be approved by Braham because "[s]he was the director."

Testimony of Awilda Burgos

Claimant Awilda Burgos worked at Colgate from 2000 until June 20, 2008. Originally hired by Daly as an assistant bookkeeper/receptionist, Burgos was promoted in 2006 to special education intake coordinator, when the previous intake coordinator left. Burgos testified that she did not "recall whether it was I that told [Braham] . . . that I was interested," that Burgos was not interviewed in connection with the promotion, the position was vacant for a few months before Burgos was promoted, and that Braham informed her of the promotion and a slight pay increase. Burgos does not know if Braham consulted with the Board of Directors regarding the promotion. There was no one there to train Burgos in the new position because the clinical coordinator, who was Burgos' supervisor, was terminated a month later. Burgos considered Braham her supervisor because Braham was there if Burgos encountered problems at work. For a time an educational coordinator, Nayana Bhattacharjee, also played this role, but after she left "[t]here was only one supervisor, Ms. Braham." When Burgos wanted time off, she requested it from Braham.

Braham told Burgos her employment at East Bronx was ending and signed "my letter of termination," that is, the June 20, 2008 "To Whom It May Concern" letter which Burgos testified she requested "for unemployment purposes and stuff like that. I needed to prove that I no longer worked there." Burgos did not take vacation when she could have "because there was nobody there to do the work" and Braham "told me not to take vacation." In September or October 2008, Braham interviewed Burgos for a vacant position at Tremont-Crotona but Burgos was not hired.

Testimony of Georgianna White

Claimant Georgianna White testified she worked for East Bronx from 2002 until July 3, 2008, first as an assistant teacher, later as a group teacher and then again as an assistant teacher. Although White listed Braham on her claim form as the person who hired her, White admitted that she made a mistake and Braham did not actually hire her. A woman named Ms. Ross interviewed White, hired her as an assistant teacher, and told White her hours, all in the same day. Initially hired to work at Colgate as an assistant teacher, White was promoted to the position as a group teacher at McGraw. An October 27, 2006 memo from "Yolonda Braham, Director" to White states: "The agency is pleased to promote you to the position of Group Teacher." No one interviewed White before she was promoted; Braham "just spoke to me and said I have a class vacancy and we are going to put you there and she told me I am a good worker or whatever." White testified that she did not know who was involved in the decision to promote her.

Even though employees at McGraw "didn't see Ms. Braham that often," White considered Braham her supervisor. When McGraw employees put in for vacation, Peterson, the McGraw site supervisor told them that she would have to call Braham and let her know, and if Braham approved the vacation, Peterson would "sign off on it." When employees called in sick, they spoke to Peterson, who told them, "okay, I will let Ms. Braham know." If a parent showed up late or additional coverage was needed for a classroom in order to keep children safe, Peterson would assign overtime and say "I will let Ms. Braham know tomorrow." White did not actually hear Peterson discuss such decisions with Braham, but believed based on such comments that they required Braham's approval. White submitted lesson plans for approval to Nayana Bhattacharjee, the educational coordinator.

Before graduation, White encountered Braham on the street and asked Braham about the status of McGraw. Braham told her that McGraw would have to close because of lack of funding, and Peterson would give her more details. White responded, "Oh, my gosh, if I had known that I would have taken all my days that's pending." During this conversation, White requested a letter she could show prospective employers. Peterson subsequently provided White a June 20, 2008 letter signed by Braham as Director, stating that White "is an employee of East Bronx Day Care Center. However, the school will be closing on July 3, 2008 and therefore [that] will be her last day of employment."

White seldom spoke to Braham about work, "because if there was anything that was happening at the center that needed her opinion or approval of, like I said, we would go to Lynn Peterson." When White did speak to Braham, Braham "always spoke about Mr. Abston, Frederick Abston," as her go-to person. "Whatever we are talking about, Ms. White, let me check it out with Mr. Abston first and then I will get back to you and she will."

Testimony of Labor Standards Investigator Gerard Capdeville

Labor Standards Investigator Gerard Capdevielle introduced in evidence the DOL investigative file, including sworn claims filed with respondent in June 2008 by custodian Leonard J. Baptiste, Rodriguez, Vazquez, teacher assistant Carol R. Sample, and teacher Georgianna White, and August 20, 2008 by Burgos. A "Narrative Report" by Investigator Carlos Suarez, included in the investigative file, states that Braham told Suarez on June 30, 2008 that though she was no longer with East Bronx, "she still could made recommendations to its board to pay the vacations to the clmts; however, she acknowledged that now East Bronx Day Care may not have the money."

The "Narrative Report" also records that on July 1, 2008, Peterson told Suarez that McGraw was expected to reopen with a new board of directors. "The changes were brought about by the City of New York (ACS and HRA), because the Board of director[s], chaired by Frederick Abston was not acting to resolve financial problems . . . . She said she has no contact with Frederick Abston." A July 1, 2008 fax from Peterson states that "I Lynn Peterson will ask the new board of directors . . . to roll over and/or negotiate the employees vacation time for the next school year."

Capdevielle testified that Braham was named as an employer in the supplemental wage order because "[s]ome of the claimants named her as a responsible party on the claim forms."

Testimony of Labor Standards Investigator Carla Valencia

Labor Standards Investigator Carla Valencia testified that she took over the investigation in May 2010 after Suarez retired. She testified Braham was deemed an employer because "Everyone named her as the director, the go-to person, based on the claim forms." In addition, Braham "let the employees know that as of a certain date they no longer were going to be part of the day care because it was closing," and employees "would go to her for vacation . . . . Therefore, we assumed that the director is the employer." The DOL never wrote to Braham during the investigation; LSI Valencia does not know why. LSI Valencia did try telephoning Braham at Tremont Crotona twice but no one answered, and LSI Valencia did not try again. She did not try to reach Peterson because "[s]he was never named as the director," and LSI Valencia did not look into whether McGraw indeed reopened under a new board as Peterson had indicated. LSI Valencia testified she made no recommendation about whether Braham was an employer, and "Based on everything that I looked at on the case, the only two people that were the employers . . . were Frederick Abston and Theresa Burgess." LSI Valencia's superiors, not she, decided that Braham was an employer.

SCOPE OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same (*Id.* § 101 [3]).

Pursuant to Board Rules of Procedure and Practice 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 by a preponderance of the evidence that the orders are not valid or reasonable. (*See also* State Administrative Procedures Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

The petition in the present case did not dispute that the claimants were owed vacation pay or the amounts stated in the supplemental wage order, but stated that Braham "was never the employer of the individuals named." Thus, the only issue is whether Braham is personally liable as an employer for the failure to pay earned and promised vacation pay found in the supplemental wage order. To the extent that there might be other objections to the order's findings, such objections were waived by the failure to raise them in the petition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

"Employer" is defined by Labor Law Article 6 as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" includes permitted or suffered to work (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203 [g]), and the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test for analyzing employer status under FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR-10-182 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 2015 NY App Div LEXIS 2219 [1st Dept Mar. 19, 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*). Under the broad New York and FLSA definitions, more than one entity can be found to be a worker's employer.

Applying this test to the record in the present case, we find that it was not reasonable and valid to deem Braham a statutory employer who in economic reality was responsible for the failure by East Bronx to pay earned vacations. With respect to the first of the four factors listed in *Herman*, Braham credibly testified that she had no power to hire and fire employees but at best, could transmit recommendations concerning educational employees to the Board of Directors, particularly Abston, the chairman of the board and East Bronx's CEO. Abston, as Chairman of the Board of Directors notified employees on May 8, 2008 that the center was closing and thanked employees for their hard work. We credit Chan's testimony that during her 2006-2008 tenure, Abston had the ultimate power to hire, fire and discipline employees. Chan also testified that she saw Abston fire employees. Braham attended only one meeting of the Board of Directors while she was educational director from 2004 to 2008, and testified that recommendations she made to the Board were not always followed.

Contrary evidence relied on by the DOL was purely conclusory, essentially consisting of claimants' belief that Braham had hiring authority. Although Burgos, Rodriguez, Sample, Baptiste, and White listed Braham as the "person hiring you" on their claim forms, all five were actually hired long before she became educational director and it is clear she did not hire them. White, in response the question, "Why did you name Yolonda Braham as the person who hired you?" testified, "To be honest, I made a mistake." When asked whether Braham hired him, Rodriguez, who listed Braham as having hired her in 2000 testified, "No, Ms. Braham was not there at that time." While Burgos listed Braham as the person who hired her on her claim form, she testified that it was actually Daly, not Braham, who hired her. Likewise, Sample who was hired in 1999 and Baptiste, hired in 2000, named Braham on their claim forms as the person who hired them, at a time when Braham was not educational director. Vazquez also testified that Valerie Daly, not Braham, hired her.

Although Braham notified Burgos and White of later promotions, there was no evidence that she, as distinct from the board, made even those decisions. Burgos could not recall the circumstances of the promotion except that she was not interviewed, the position was vacant for a few months, and she did not know if Braham consulted with the Board of Directors before she received the promotion. White, likewise, testified that she did not know who was involved in the decision to promote her.

With respect to the second *Herman* factor, whether Braham "supervised and controlled employee work schedules or conditions of employment," Braham was certainly a supervisor of East Bronx's educational employees including intake coordinator Burgos, teacher Rodriguez, teacher assistant Sample and teacher White. However, and even assuming Braham was also a supervisor of custodian Baptiste and assistant cook Vazquez, credible evidence indicates that Braham did not have authority to act on her own. Claimant White testified that whenever she requested Braham's approval, "Braham always spoke about Mr. Abston, Frederick Abston, as her go-to person" and Braham would "have to check it out with Mr. Abston first." Chan testified that Braham "doesn't have the authority to make decisions on her own" and Braham testified that her recommendations were not always followed. Chan testified that Braham's only involvement in payroll was to verify, if asked, that a teacher had worked more hours than originally scheduled. The *Herman* test does not mean that every supervisor is automatically a statutory employer and personally liable for legal violations to which the supervisor had little actual connection (*Donovan v Agnew*, 712 F2d 1509, 1513 [1st Cir 1983]).

Here, little evidence connected Braham to any aspect of vacations. Rodriguez testified he asked Peterson about vacations, and believed she transmitted requests to Braham who in turn transmitted them to the fiscal department. Vazquez testified she asked Peterson and senior cook Dubarry about vacations, and believed Braham approved requests since she was the director. White testified Peterson approved vacation requests subject to Braham's okay, but did not know if Peterson ever actually sought approval, and as discussed above, White testified that Braham would first have to clear any request with Abston. Even Burgos, who testified she did not take vacations when she could have "because there was nobody there to do the work" and Braham "told me not to," did not make clear whether Braham ever actually denied, or had the authority to deny, a request. Even beyond vacations, with respect to "schedules or conditions of employment" in general, the claimants' testimony that Braham exercised control was vague and conclusory, typified by Rodriguez' testimony that she "probably" was involved in scheduling.

More fundamentally, there was no evidence at all that Braham had anything to do with East Bronx's illegal failure to pay earned vacations, or the financial problems that caused that failure. Braham credibly testified, and no one disputed, that she had nothing to do with the East Bronx budget, nor was she authorized to sign checks on any of the four East Bronx checking accounts. The May 14, 2008 ACS letter to Abston, Burgess and the East Bronx board indicates that Abston knew a closing was imminent from at least April 29, 2008, well before Braham, and that the rapid closing resulted in part from "serious deficiencies in fiscal mismanagement" and inability to administer a Child and Adult Care Food Program which, so far as the record shows, was completely outside Braham's purview as educational director.

With respect to the third *Herman* factor, there is no evidence that Braham set or was involved in setting wage rates, methods of payment, vacation policy or other parameters for employment. Braham and Chan credibly testified, and no one disputed, that Braham had nothing to do with such matters, which were set by the board or through collective bargaining. In addition, the ACS contract which was introduced in evidence also includes some provisions concerning employee compensation, requiring East Bronx to comply with the New York City Living Wage Law (N.Y.C. Administrative Code § 6-109) and specifying hours and salaries for teachers and other staff. But that contract was negotiated and signed by Abston as chair of the board, not Braham as educational director. We credit Chan's testimony that Braham's only involvement in payroll was to verify, if asked, that a teacher had worked more hours than originally scheduled. We also credit Braham's testimony that when she was promoted to her position as Educational Director, the Board of Directors did not give her the same authority as Valerie Daly, East Bronx's former Executive Director. While Daly had the power to hire and fire (and hired all but one of the claimants), set pay rates, and sign checks, Braham had no such authority.

With respect to the last *Herman* factor, maintaining employment records, it is undisputed that employment and personnel records and employee time cards were maintained for East Bronx by the fiscal department in a locked closet to which Braham had no access. If necessary, Braham had to request specific records from the controller. While LSI Suarez's "Narrative Report" states that Braham produced East Bronx records at a June 30, 2008 meeting (at a time when she was employed by Tremont Crotona, not East Bronx), Braham credibly denied that, and Suarez did not testify or explain his report's statement. Whether or not Braham, after she failed to reach Abston or other board members, was strictly authorized to give Burgos and White letters at their request stating their last dates of employment, we do not believe that her doing so meant

she was maintaining employment records or became a statutory employer within the meaning of *Herman.*

We find that Braham met her burden to show that holding her personally liable was unreasonable or invalid. Accordingly, the orders are revoked with respect to Braham.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The supplemental wage order dated May 8, 2013 is revoked with respect to Yolonda D. Braham a/k/a Yolonda D. White;

2. The petition of Yolonda D. Braham a/k/a Yolonda D. White be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Absent
Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 10, 2015.

she was maintaining employment records or became a statutory employer within the meaning of *Herman.*

We find that Braham met her burden to show that holding her personally liable was unreasonable or invalid. Accordingly, the orders are revoked with respect to Braham.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The supplemental wage order dated May 8, 2013 is revoked with respect to Yolonda D. Braham a/k/a Yolonda D. White;

2. The petition of Yolonda D. Braham a/k/a Yolonda D. White be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 10, 2015.