

of Docket No. PR 06-038 on November 3, 2006. Upon notice to the parties, a hearing was held in Buffalo on March 1, 2007 before Mark S. Perla, Member of the Board and designated Hearing Officer in this case.

Petitioner, Bruce Ribble (D/B/A Perfecto Cleaners), appeared without legal counsel and presented no witnesses. The Commissioner was represented by Maria L. Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro, of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The first Order to Comply under review, Docket Number PR 06-038, dated April 7, 2006, was issued by Respondent to Petitioner and contains the following four counts:

Count I alleges a violation of Labor Law, article 19, § 661 as supplemented by the Minimum wage Order for the Miscellaneous Industries and Occupations, Section 2.6 of Part 142 of Title 12 of the New York Official Compilation of Codes, Rules and Regulations (12 NYCRR 142-2.6), for failing to keep and/or furnish true and accurate payroll records for each employee for the period on or about November 2, 2003 through November 12, 2005, and assesses a civil penalty in the amount of \$1,000.00.

Count II alleges a violation of Labor Law article 19, § 191(1)(a) for failing to pay employees in a timely manner, for the period on or about November 2, 2003 through November 12, 2005, and assesses a civil penalty in the amount of \$1,000.00.

Count III alleges a violation of Labor Law article 19, § 195(5) for failing to post notice of the Petitioner's hours and/or fringe benefits policy, for the period on or about November 2, 2003 through November 12, 2005, and assesses a civil penalty in the amount of \$1,000.00.

Count IV alleges a violation of Labor Law article 19, § 195(6) for failing to notify an employee in writing, within five working days of her termination date, of the date that her employment was terminated and the date that her benefits were cancelled and would end. Count IV assesses a civil penalty in the amount of \$1,000.00.

The second Order to Comply dated April 7, 2006, Docket Number PR 06-039 was issued pursuant to the provisions Labor Law article 6, § 191(1) (failure to pay wages earned) and directs payment to the Commissioner of wages found due to claimant, for the period August 16, 2005 through August 21, 2005, in the amount of \$156.00, with continuing interest thereon at the rate of 16% calculated to the date of the Order in the amount of \$15.65, and assessing a civil penalty in the amount of \$312.00 for a total of \$483.65

SUMMARY OF EVIDENCE

The Petitioner is a private employer doing business in the State of New York, as defined by Article 1 of the Labor Law, and is subject to the jurisdiction of the Commissioner. It is also an employer as defined in Labor Law § 651.6.

The Respondent's sole witness was Terrence Dusseault, the New York State Labor Standards Investigator who investigated the claim. He identified various documents and exhibits from the DOL file, which were subsequently admitted into evidence. Included among the documents was a Claim for Unpaid Wages of Stacy Winter. Ms. Winter claimed that she had been an employee of the Petitioner for one week, starting on August 15, 2005. She wrote, in an accompanying letter, also received in evidence, that she informed the Petitioner on August 21, 2005 that she would not be returning, and asked for her pay. She said he never paid her and that she was owed \$156.00

Investigator Dusseault testified that he conducted a site inspection of the Petitioner's place of business. On November 9, 2005, while at the Petitioner's business he questioned one employee, Lisa LaPlant, and asked her about the Petitioner's record keeping and payroll procedures. She was unable to produce any records. Dusseault stated that he scheduled a second site visit and prior to it, notified the Petitioner as to what records needed to be produced.

Dusseault returned to the premises on November 17, 2005 and again only spoke with Lisa LaPlant. He said she handed him some documents but they were not all the documents that he had requested. No time records or time cards were provided, nor were complete payroll records. He testified that the employer failed to record total hours worked and the rate of pay on a weekly basis for each employee.

Investigator Dusseault also testified about the civil penalty calculations. Importantly, he said there had been fourteen (14) previous claims against the Petitioner. In evidence is a DOL inter-office memo which confirms that the New York State Attorney General was asked to initiate a criminal prosecution against Mr. Ribble, the Petitioner, for a violation of Labor Law § 191(1)(a). Documentation was also offered and admitted into evidence to show that the Attorney General ultimately withdrew the charge after Mr. Ribble paid \$150.00.

The Respondent called no other witnesses. Despite being given an opportunity to present evidence or make a statement on his own behalf, Mr. Ribble presented no proof. He stated that his attorney had failed to appear on his behalf because the attorney supposedly was required to be in Federal Bankruptcy Court. In view of that information, the Hearing Officer told the parties that the Petitioner would have thirty (30) days after the receipt of the hearing transcript to submit any evidence he may have to support the Petition.

On August 6, 2007 a letter from the Petitioner's attorney, Charles C. Welch, Esq., was sent by facsimile to the Board. Attached to the letter was an undated document purporting to be from Lisa LaPlant, the Petitioner's former employee who had been interviewed by Investigator Dusseault when he visited to the Petitioner's place of business.

Mr. Welch requested that the Board accept the document into evidence. In response, the Commissioner's attorney submitted a letter to the Board on August 16, 2007 objecting to the document being accepted into evidence. Alternatively, he argued that even if accepted into evidence, the document has no probative value, being undated and, even if read, and accepted as true, has no apparent relationship to any issue or facts before the Board.

The Board notes that the Counsel for Respondent moved, in his opening statement, to drop the unpaid wage portion of the second Order to Comply in the amount of \$156.00 because the Petitioner had made restitution for the unpaid wages as part of the criminal proceeding handled by the Attorney General. He asserted that the civil penalty and interest portion of the Order should be affirmed.

GOVERNING LAW

Standard for Review

In general, upon a filing of a petition for review, 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 shall presume that an order of the Commissioner is valid. Labor Law § 103(1) provides, in relevant part:

"Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to 12 New York Code of Rules and Regulations 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 Order under review is not valid or reasonable.

The Employer's Burden of Proof Where It Has Failed To Keep Adequate Records

An employer's obligation to keep adequate employment records is found in the Labor Law, at § 195, as well as at 12 NYCRR, § 142-2.6 which provides, in pertinent 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) the wage rate;
 - (4) the number of hours worked daily and weekly, . . .;
 - (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.

“ . . .

“(d) Employers...shall make such records...available upon request of the commissioner at the place of employment.”

Failure of an employer to keep these records subjects the employer to a civil penalty. In addition, where an employee has filed a complaint with DOL, if the employer has failed to keep adequate records, the employer bears the burden of proving “that the complaining employee was paid wages, benefits and wage supplements.” (Labor Law § 196-a; *see also Angello v. National Finance Corp.*, 1 AD3d 850, 854 [3rd Dept 2003] where the court found that where the employer failed to keep required records, “the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees.”)

The Board, having given due consideration to the pleadings, the testimony, documentary evidence and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of Rule 65.39 (12 NYCRR 65.39):

FINDINGS

The Board has considered the undated letter, purporting to be from Lisa LaPlant, which was submitted by Petitioner’s attorney on August 6, 2007, after hearing. In view of Ms. LaPlant’s earlier conflicting statements and based upon the obscure references in the letter itself, we find it to have no probative value on any of the issues or facts before this Board.

The Petition calls into question the validity and reasonableness of the civil penalties imposed in the two (2) Orders to comply. The Petitioner was given an opportunity to testify at the hearing. He chose not to avail himself of that opportunity. Instead he relies principally on the August 6, 2007 letter of his attorney, and the document purporting to be from Lisa LaPlant attached thereto.

The Respondent showed, through the testimony of Investigator Dusseault and the exhibits offered into evidence, that a thorough investigation was conducted. Two site visits were made and the Petitioner was given ample opportunity to show his compliance with the various record keeping requirements of the Labor Law. While the Board would like to have heard from the claimant, Stacey Winters, her failure to appear will not affect the Board’s analysis of the within Orders, in view of the complete lack of evidence in support of the Petitioner and Petitioner’s burden of proof.

With respect to Counts I, II and III of the first Order, the Petitioner has not sustained his burden to show that he kept or furnished accurate payroll records for each employee, including daily and weekly hours, or that he paid all his manual workers within 7 days after the end of the week when wages were earned, or that he notified his employees in writing or posted notice of hours and/or fringe benefits policy at his place of business. According, Counts I, II and III are upheld as valid and, considering the Petitioner’s past violations, the fines in the amount of \$1000 each are reasonable .

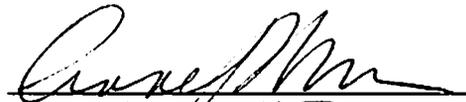
Count IV of the first Order also imposes the maximum \$1,000 fine for “failing to notify a terminated employee of such termination...within 5 days of such termination”. This violation involved the period in or around August 21, 2005 and concerns the claimant. In considering the validity of this Count the Board notes that there is no evidence in the record that the Claimant was receiving any benefits. Based upon the facts of this case we find that Count IV is not valid and reasonable.

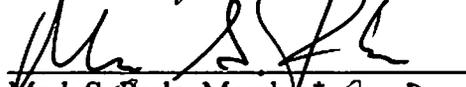
Therefore, we uphold Counts I, II and III of the first Order, and overturn Count IV.

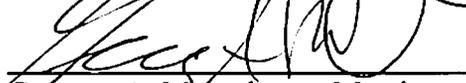
The second Order to Comply is modified by subtracting the \$156.00 of “wages due and owing” pursuant to the request of Respondent’s counsel. We affirm the civil penalty and interest, which we find to be valid and reasonable under the circumstances at hand. Stacy Winters filed a complaint. Petitioner failed to keep records or provide any probative evidence that Ms. Winters was paid properly. Therefore, pursuant to Labor Law § 196-a, Petitioner has failed to meet its burden of proof. Respondent has admitted that the wages have been paid through the Attorney General’s office, therefore, the Order is affirmed with regard to the civil penalty and interest only.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

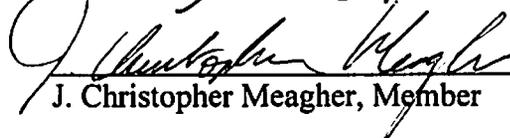
1. The Orders to Comply under review, as modified herein, be, and the same hereby are, affirmed; and
2. The Petition for Review filed herein be, and the same hereby is, denied.


Anne P. Stevason, Chairman


Mark S. Perla, Member*


Gregory A. Monteleone, Member


Susan Sullivan-Bisceglia, Member


J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on December 19, 2007.