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INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
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In the Matter of the Petition of: APPLE SPORTS WEAR, INC., Petitioner, To review under Section 101 of the New York State Labor Law: Two Orders to Comply with Article 19 of the Labor Law, both dated April 6, 2007, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-07-022 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on May 14, 2007. An amended petition was filed June 15, 2007. Upon notice to the parties a hearing was held on November 19, 2007 in the Board's New York City office before Board Member Susan Sullivan-Bisceglia.

Petitioner Apple Sports Wear, Inc. was represented by John Lau, Certified Public Accountant and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Benjamin T. Garry of counsel. 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.

On April 6, 2007 the Commissioner issued the two Orders to Comply under review in this proceeding. The first Order directs compliance with Article 19 of the Labor Law, demands

payment to the Commissioner for wages due and owing to a named employee (Complainant) in the amount of $12,049.00 for unpaid wages from September 2003 to September 2005, with interest continuing thereon at the rate of 16% calculated to the date of the Order in the amount of $2,915.52 and assesses a civil penalty in the amount of $12,049.00, for a total amount due of $27,013.52[1]. The second Order directs compliance with Article 19 of the Labor Law and demands payment to the Commissioner of $2,000 in civil penalties. Count I is a penalty for failure to establish, maintain and preserve payroll records showing hours worked, gross wages, deductions and net wages for each employee in the amount of $1000.00. Count II is a penalty for failure to give each employee a complete wage statement in the amount of $1000.00.

I. SUMMARY OF EVIDENCE

DOL initiated an investigation of the Petitioner after conducting an apparel registration minimum wage sweep on September 30, 2005. Petitioner Apple Sports Wear, Inc., sells T-shirts to screen printers. Following its investigation, DOL determined that Apple Sports Wear failed to pay full wages to two employees for the period between September 2003 and September 2005, failed to keep adequate and complete time and payroll records and failed to issue wage statements to employees. However, during the course of the investigation, one employee failed to reply to any attempts by DOL to clarify information that he earlier provided to DOL. Thus DOL dropped the wage claim for that employee.

Asim Rashid, the son of Apple Sports Wear's owner testified on behalf of the petitioner that Apple Sports Wear is open Monday – Sunday, that he started working there in 2005, is a salesman and works Friday and Saturday 7:30 AM – 5:30 PM and Sunday 7:30 AM to 12:00 PM. Employees are marked as present to begin work at 7:30 AM and end work at 5:30 PM, Monday through Saturday, and Sunday from 7:30 AM to 12:00 PM as indicated on a sign-out sheet and that all records are given to Petitioner's accountant. On Sundays Complainant comes to work only when called by Petitioner and only in May, June and July. He also explained that employees are given a one hour lunch break and are paid weekly. The payroll is handled by Mr. John Lau.

Labor Standards Investigators Edwin Bautista and Cloty Ortiz testified on behalf of the Respondent. Mr. Bautista and Ms. Ortiz testified that on September 30, 2005 they accompanied Senior Investigator Maritza L'Ambois on a targeted sweep of screen printing shops located at 1165 Broadway, New York, Apple Sports Wear's location.

During this investigation sweep, Mr. Bautista spoke with Mr. Asim Rashid, who identified himself as the President of Apple Sports Wear, and also interviewed the Complainant, an employee of Apple Sports Wear. Mr. Bautista testified that the Complainant stated that he

[1] On the day of the hearing the DOL stated that it had reduced the amount due to the Complainant and the amount reflected on the order to comply by reducing Complainant's hours worked by one half day on Sundays and a three month period during which it was established that the Complainant was out of the country and thus not working.

was working seven days a week from 7:30 AM to 6:00 PM from November 1999 to September 30, 2005, the day of the sweep, that he received a half-hour lunch break, that he was paid $425.00 per week in cash and check and that he received a pay stub or wage statement. There was additional evidence from the initial investigation that another employee did not receive a wage statement.

Ms. Ortiz testified that during that sweep she interviewed another employee who stated that he was employed there for over 12 years. He was a packer, delivery person and floor worker. He worked Monday to Friday from 8:00 AM to 6:00 PM and Saturdays from 7:00 AM to 5:00 PM with a half hour lunch. He did not have a time record, there was no record of his daily hours and he earned $400.00 weekly in cash and received no wage statement.

Ms. Ortiz testified that during the DOL sweep on September 30, 2005, Apple Sports Wear made it clear that no records were going to be provided to DOL as requested. Thus, Ms. Ortiz proceeded to compute the overtime underpayment based on the information the Complainant provided to her and Mr. Bautista. She further testified that on October 14, 2005, DOL issued a Notice of Labor Law Violation to Apple Sports Wear for failure to pay overtime, keep payroll records and issue complete wage statements with wage payment. The Notice of Labor Law Violation also included a recapitulation sheet setting out the wages owed, the period covered and gave the employer 20 days to request a conference.

Ms. Ortiz testified that she was present at a subsequent compliance conference held with Apple Sports Wear by Joyce Chan, her supervisor. Mr. Lau was present on behalf of Apple Sports Wear and provided some documentation regarding wages paid to Complainant, and copies of a passport showing that the Complainant was in Pakistan during part of the time included in the order, specifically, between December 14, 2003 and March 27, 2004. Ms. Ortiz also testified that she revised her recapitalization sheet after speaking with the Complainant on the morning of the hearing to reflect that he worked six and a half days, Monday to Saturday from 7:30 AM to 6:00 PM and Sunday from 7:00 AM to 12:00 PM.

Senior Labor Investigator, Joyce Chan, also testified on behalf of the Respondent. Ms. Chan testified that on March 14, 2006, a Notice of Conference was sent to Apple Sports Wear to appear in the DOL office on April 5, 2006, and that on April 5, 2006, Mr. Lau appeared on behalf of Apple Sports Wear and provided a weekly time sheet showing the Complainant signs in at 8:30 AM and leaves at 5:30 PM from Monday to Saturday. Ms. Chan testified that such weekly time sheet does not comply with New York State law and that there were no time cards or records with a signature of the Complainant indicating that the he worked specified hours.

After the conference on April 5, 2006, Ms. Chan received a letter from Mr. Lau, dated May 22, 2006 stating that overtime is not required and that the Complainant did not mention that wages were not paid. Subsequently, on August 18, 2006 Ms. Chan sent a revised recapitulation sheet to Apple Sports Wear reducing the amount due by the three months that the Complainant was out of the country. In response, she received another phone call from Mr. Lau again stating that the employee did not work the hours stated.

Ms. Chan testified that the Order which imposed 100% penalty was imposed because Petitioner failed to provide time records or make payments and numerous meetings and phone calls with Mr. Lau served only to delay the process and that an Order to Comply, dated April 6, 2007, was sent to Apple Sports Wear.

DOL issued the first Order under review based on the hours and wage rates declared by the Complainant, the investigation conducted and because the petitioner failed to produce adequate records and that the ones produced were not.

The Complainant testified on behalf of the Respondent. He testified that he has worked for Apple Sports Wear for eight years and that he spoke to Mr. Bautista the day of the hearing stating that he did not work a full day on Sundays, he worked 7:30 AM to 12:30 PM. Other days he worked 7:30 AM to 5:30 PM. During the hearing the Complainant testified that he works from 7:30 or 8:00 AM to 5:30 PM Monday to Friday and that he sometimes worked on Sunday from 7:00 or 8:00 AM to 12:00 PM. and that he received a one hour lunch break each day.

II. GOVERNING LAW

A) 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 shall presume that an order of the Commissioner is valid (*see* Labor Law § 103 [1]).

Pursuant to the Board's 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 that the Orders under review are not valid or reasonable.

B) The Commissioner's authority to issue Orders to Comply and to assess civil penalties

When the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

> "If the commissioner determines that an employer has violated a provision of . . . article nineteen (minimum wage act) . . . of this chapter, or a rule or regulation promulgated there under, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

The Commissioner is also authorized to assess a civil penalty and interest based on the

amount owing. The civil penalty is in addition to, or concurrent with, any other remedies or penalties provided under the Labor Law (Labor Law § 218[4]). Labor Law § 218(1) further provides that:

> "[i]n no case shall the order direct payment of an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty . . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . the failure to comply with recordkeeping or other non-wage requirements."

C) Record keeping requirements

Labor Law § 661 states in relevant part that:

> "[e]very employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary . . . . Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time."

Regulations at 12 NYCRR 142-2.6(a) further provide that:

> "(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) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (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) money paid in cash; and
> (10) student classification."

In addition, every employer "shall furnish to each employee a statement with every payment of wages listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages" (12 NYCRR 142-2.7).

An employer who fails to keep adequate records, "shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements" (Labor Law § 196-a).

D) Premium pay for overtime

Under the minimum wage order, "[a]n employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate" for hours worked in excess of 40 hours in one week (12 NYCRR 142-2.2.3). A salaried employee's regular rate of pay is calculated by dividing the weekly salary by the number of hours worked. The overtime wages due are then determined by multiplying the number of overtime hours by 50% of the regular rate to determine the premium due (12 NYCRR 142-2.16). *See also, In the Matter of Cayuga Lumber, Inc.*, PR 05-009 (October 24, 2007).

III. FINDINGS

Having given due consideration to the pleadings, hearing testimony and documentary evidence, the Board makes the following findings of fact and law pursuant to the provision of the Board Rule 65.39 (12 NYCRR 65.39).

A) Recordkeeping violations and burden of proof

Labor Law § 196-a provides in relevant part that ". . . the employer in violation of [Labor Law articles 6, 19 or 19-a] shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." Having failed to maintain accurate time and payroll records as required by 12 NYCRR 142-2.6, DOL's calculation of the overtime wages due based on the Complainant's statement must be credited unless Petitioner meets its burden of proving that the Complainant was paid the disputed wages (*see e.g. Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 [3d Dep't 1989] ["When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer"]). The Petitioner has failed to meet this burden.

B) Overtime liability

We find that Apple Sports Wear violated article 19 of the Labor Law by failing to pay overtime to the Complainant. However, it has successfully demonstrated that Complainant was not entitled to wages during the period from December 14, 2003 to March 27, 2004, that work ended at 5:30 PM Mondays through Saturday and that work ended at 12:00 PM on Sundays. Therefore the Order must be modified.

Outside of the above mentioned adjustments, which require that the first Order be modified, the Petitioner has simply not produced any reliable evidence to contradict DOL's determination of the overtime wages owed to the Complainant.

In light of the Complainant's initial interview with the investigators and Petitioner's failure introduce any record in contradiction, DOL reasonably calculated Complainant's hours beginning at 7:30 AM seven days a week. Complainant's testimony states an ending time of 5:30 PM Monday through Saturday and 12:00 PM on Sundays. Complainant also testifies to a one hour lunch break Monday through Saturday. Complainant thus worked a 58.5 hour week at a rate of $425.00 per week. As such, his rate of pay was $7.26 for the first 40 hours per week and $10.90 for the 18.5 overtime hours. His weekly payment therefore should have been $492.05, resulting in a $67.05 weekly underpayment for each of 91 weeks, totaling $6101.55 that is due the Complainant.

IV. CIVIL PENALTIES

The first Order to Comply assessed a 100% civil penalty in the amount $12,049.00 and the second Order to Comply assessed civil penalties totaling $2,000.00.

The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalties in this matter were proper and reasonable in all respects.

V. INTEREST

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, 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 § 14-a sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The first Order to Comply with Article 19 of the Labor Law, dated April 6, 2007, is modified to direct payment to Complainant in the sum of $6101.55 in unpaid wages together with a 100% penalty and interest at 16% calculated to the date of the Order; and

2. The Order is remanded to the Commissioner to issue an amended Order consistent with the Board's Resolution; and

3. The second Order is affirmed in all respects.

4. The Petition for Review is denied in all other respects.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 30, 2008.