STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NANCY SOLOMON AND JOHN EILERTSEN AND DOROTHY JACOBS AND LONG ISLAND TRADITIONS, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order under Article 19 of the New York State Labor Law, both dated July 6, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-197 RESOLUTION OF DECISION

APPEARANCES

Robinson & Associates, P.C., (Kenneth L. Robinson of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Nancy Solomon, for Petitioners.

Labor Standards Investigator Armando Gonzalez, for Respondent.

WHEREAS:

On July 20, 2009, a Petition for Review was filed 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 to Comply that the Commissioner of Labor (Commissioner, DOL, or Respondent) issued against Nancy Solomon, John Eilertsen, Dorothy Jacobs and Long Island Traditions (Petitioners) on July 6, 2009. The first Order to Comply with Article 6 (Wage Supplements Order) finds that the Petitioners failed to pay vacation pay to Robin S. Grosswirth (Claimant) for the period December 10, 2007 to December 21, 2007 in the amount of

$880.00; interest at the rate of 16%, calculated through the date of the Order in the amount of $211.78; and a civil penalty assessed at $660.00, for a total amount due as of the date of the Order of $1,751.78. The second Order under Article 19 (Penalty Order) finds that the Petitioners failed to keep and/or furnish true and accurate payroll records for the period June 21, 2007 through December 4, 2007, and demands payment of $750.00 as a penalty.

The Petition alleged that the Claimant was not owed vacation pay because under Petitioners' written vacation leave policy, part-time employees were not entitled to vacation until they completed six months of employment, which Claimant did not. The Petition also challenged the penalties and interest imposed by the Commissioner. Respondent filed an answer on October 26, 2009.

Upon notice to the parties, a hearing was held on May 4, 2011 in Old Westbury, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments.

I. SUMMARY OF EVIDENCE

Testimony of Nancy Solomon

Long Island Traditions is a non-profit corporation which presents cultural programs, gives historic site surveys and provides grants to artists. Solomon is the executive director. Claimant was hired as a part-time education director on June 21, 2007, earning $22.00 per hour. The job posting for Claimant's position lists health benefits, paid vacation and sick leave as employee benefits.

Claimant was paid $880.00 every two weeks, which corresponded to $22.00 per hour for forty hours. The Petitioners did not record daily or weekly hours; Solomon testified: "We work on an honor system. It's just two of us." Claimant's job was deemed "a salaried position. Even though we pay a fixed amount per hour, we consider it a salaried position." Pay stubs did not state a pay rate or hours worked, nor list any days off work. Solomon testified, however, that Claimant verbally requested four days off during her employment and was given these days "as vacation days, even though she was not entitled to them," based on earning one day per month worked. Three of the four days (September 12 through 14) were Jewish holidays[1] and the fourth, November 23, was the day after Thanksgiving; all were "days when neither one of us – we weren't working."

Claimant's employment ended on December 4, 2007 when she refused an assignment saying it was not in her job description, left the office and failed to return Solomon's calls. The termination letter sent by Solomon stated that "there is no unused sick leave, personal or vacation time due. We ask that you sign this letter to acknowledge this."

[1] A 2007 calendar shows that Rosh Hashanah that year began at sundown, Wednesday, September 12 and ended at sundown on Friday, September 14.

Claimant did not respond. The Petitioners mailed her a final wage check which included pay for December 5th, even though Claimant did not work that day.

In early January 2008, the Petitioners received a letter from the DOL stating that Claimant claimed to be owed $880.00 in vacation pay for the period December 10, 2007 through December 21, 2007, and requesting that if the Petitioners disagreed, they provide a full statement of reasons including "any payroll record, benefit policy, contract, commission agreement, etc. to substantiate your position."[2] On January 7, 2008 Solomon sent the Department a letter stating that Claimant "earned 1 day per month for vacation, beginning on July 1 and ending December 5, 2007, a total of 5 days," and took five days off (September 12-14, November 23 and December 5) "as part of her vacation pay." Solomon's letter did not refer to a written vacation policy to substantiate the Petitioners' position, as requested in the DOL's letter.

Solomon testified that the Petitioners did not receive, but she eventually obtained through a Freedom of Information Law request, a July 31, 2008 letter from the Department's Senior Labor Standards Investigator Annemarie Culberson, which the Department misaddressed (to 82 rather than 382 Main Street in Port Washington).[3] Culberson's letter states that Claimant claimed that two weeks' vacation pay was due her and "indicated that you and she had verbally agreed to her taking her vacation in December 2007." In this letter, Culberson also stated that in "our phone conversation of yesterday" Solomon agreed "that there is nothing written concerning how a vacation is earned or given, when it is due, or how much is due. You also mentioned that [Claimant] took holidays off. Holidays are normally paid days off from work...." Culberson requested documentation that Claimant took days off "as vacation days rather than sick days or other paid days off," and noted that a fringe benefit policy

> "must be written.... [,] should be as detailed as possible and although it is not required, you should have the employee sign an acknowledgment sheet saying he has seen it, read it and received a copy of it. You should also keep a careful record of what days have been taken as vacation, what days taken as sick time, and what days taken as holidays. (Ms. Grosswirth indicated that she never saw a written policy.) ....
>
> "Absent documentary evidence to the contrary, we are upholding Ms. Grosswirth's claim."

Solomon testified that she recalled no discussion with Claimant about taking time off around Christmas time. Petitioners entered into evidence a "Holiday Pay and Vacation Leave Policy" which was "adopted by Petitioners' Board of Directors on April 25, 2007."

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[2] The letter stated that Claimant also claimed to be owed $880.00 in unpaid wages for the period November 22, 2007 through December 4, 2007. It is undisputed that the final wage check which the Employer mailed to Claimant in December satisfied that claim.

[3] According to the DOL's records, this letter was not returned as undelivered.

According to the policy, part time employees are not entitled to vacation pay until they have worked for a period of 6 months. Solomon testified that under Petitioners' vacation policy, had Claimant worked a full six months (which she did not), and had she not already been given vacation days (which Solomon testified she had), she would have been entitled to five days' vacation, with a dollar value of $440.00. The Holiday Pay and Vacation leave Policy was not discussed at Claimant's hiring interview, but she was presented with it and asked to sign a copy on her first day of work. Claimant refused to sign, stating that her attorney had advised her not to sign any agreements, but to the best of Solomon's knowledge, she understood the policy.

In 2011, Claimant telephoned Solomon and stated that she had moved on with her life and was not pursuing her claim.

Testimony of Labor Standards Investigator Armando Gonzalez

Gonzalez testified that Department records reflect that on December 11, 2007 Claimant filed a Claim for Unpaid Wage Supplements stating that she was owed $880.00, "bi-weekly gross," as vacation pay for the period 12/10-12/21. According to the claim form, the only written agreement covering this benefit was the Petitioners' job posting from April 2007 stating that the position would provide "paid vacation and sick leave;" as to the "terms of agreement (eligibility requirements) for this benefit," the claim form states that "I let her know orally and she agreed." Department records also include an e-mail dated September 2, 2007 from Claimant to Solomon stating:

> "Upon my hiring, you told me specifically that I was getting off on **all school holidays – that we follow the school schedule.** That was a selling point to me because I still have a son at home....
>
> Every day things evolve and take a different shape and it isn't appropriate to operate a business that way, Nancy. It was never mentioned that I had to work weekends. It should have been verbalized to me..."

The administrative file also contained a January 2008 letter from Claimant to the Department stating that when she received her final wage check, "no vacation wages were included. I was due to take a vacation one week before Christmas and one week after Christmas."

II. STANDARD OF REVIEW AND BURDEN OF PROOF

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).). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or

modify the same" (Labor Law § 101[3]). Pursuant to Rule 65.30 of the Board Rules, 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 Petitioners to prove that the Orders under review were invalid or unreasonable.

III. 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). For the following reasons, we affirm the Wage Supplements Order and find that it was not invalid or unreasonable for the Commissioner to determine that the Employer failed to pay Claimant earned vacation pay in accordance with its policy. However, we modify the Order to award Claimant pay for five rather than ten days of vacation under the policy enunciated in the Petitioners January 7, 2008 letter to the DOL. We affirm the Penalty Order and find that the Petitioners did not maintain required records.

a. The Petitioner Failed to Maintain Required Payroll Records.

Labor Law § 195[4] states that every employer must "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee." Title 12 of the New York Code of Rules and Regulations, 12 NYCRR § 142-2.6 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: ...
> (3) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (6) the amount of gross wages;
> (7) deductions from gross wages;...
> (9) net wages paid ...
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

It is undisputed that Long Island Traditions did not establish, maintain and preserve daily and weekly payroll records as required by Labor Law § 195[4] and 12 NYCRR § 142-2.6. Solomon testified that the Employer did not record Claimant's daily or weekly hours. Neither Claimant's pay stubs nor the "Employee QuickReport" which Petitioners submitted to the Commissioner includes this required information. Accordingly, it was not unreasonable or invalid for the Commissioner to issue the Penalty Order finding that the Employer failed to keep and/or furnish payroll records. Labor Law § 218[1] directs the Commissioner to impose civil penalties for violations other than failure to pay wages, benefits or wage supplements

> in an amount not to exceed one thousand dollars for a first violation.... 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, [and] the history of previous violations.

Given that § 218[1] expressly authorizes a larger, $1,000 penalty for a first violation, we find that the considerations and computations that the Commissioner was required to make in connection with the imposition of the $750.00 penalty is reasonable in all respects.

b. The Order Finding the Petitioners Owe Claimant Vacation Pay is affirmed, as modified.

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 that the employer provide this benefit in accordance with the terms of the established leave policy. *(Gennes* v *Yellow Book of New York, Inc.,*23 AD3d 520, 521 [2nd Dept 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 Joel D. Fairbank and 2nd Nature, LLC,* PR 09-052 (April 27, 2011); *In the Matter of the Petition of Nathan Godfrey [TIA A.S.U.],* PR 09-024 [January 27, 2010]; *In the Matter of the Petition of Center for Fin. Planning, Inc.,* PR 06-059 [January 28, 2008]).

Labor Law § 195 (5) requires an employer to "notify his employees in writing or by publicly posting the employer's policy on ...vacation," and Labor Law § 198-c requires "any employer who is party to an agreement to pay or provide benefits . . . within thirty days after such payments are required to be made." Forfeiture of vacation pay upon termination must be specified in the employer's vacation policy or in an agreement with the employee *(In the Matter of the Petition of Marc E. Hochlerin and Ace Audio Video, Inc. [T/A Ace Audio Visual Co., and Ace Communication]* PR 08-055 [March 25, 2009]), and forfeiture provisions must be explicit (*In the Matter of the Petition of Center for Fin. Planning, Inc., supra*). *See also*, *Yellow Book*, 23 AD3d at 522 (employees were not entitled to vacation pay upon termination under a policy that expressly stated "[n]o vacation time is accrued or payable if the [employee] is not employed as of July 1 following the calculation period") and *Paroli v Dutchess County*, 292 AD2d 513 (2nd Dept 2002), (an employee was entitled to vacation pay upon termination as the employer's benefit plan contained no qualifying language entitling employees to the benefit only if they were in "good standing").

Petitioners argued that Claimant was not entitled to vacation pay because its written Holiday Pay and Vacation Leave Policy states that part-time employees "are not entitled to vacation pay until they have worked for a period of 6 months" and thereafter, part-time employees are entitled to five days of vacation per calendar year. This written policy contradicts the policy enunciated in Petitioners' January 7, 2008 letter to the DOL which states that the Claimant was deemed to earn one vacation day per each month worked. We find that the Petitioners' vacation policy was as stated in the January 7, 2008 letter and not in the policy claimed to be adopted by Petitioners' Board of Directors in April 2007.

That Claimant's employment ended before she "cashed in" accrued days would not result in forfeiture; as the Board ruled in *Matter of Marc E. Hochlerin*, PR 08-055 [Mar. 25, 2009], "An employee must be paid for accrued vacation upon termination unless the employer has, through a written policy or agreement, specified that employees forfeit accrued vacation pay upon termination."

Petitioners also argued that Claimant actually took five paid vacation days before her termination and therefore, was owed no further vacation pay. As discussed above, the absence of adequate records made it impossible to verify that Claimant was absent from employment on the days in question. Still less did Petitioners succeed in demonstrating that assuming Claimant was indeed absent, as Solomon testified she was, the days in question were vacation days rather than other alternatives, which in fact appear more probable. It was therefore not invalid or unreasonable for the Commissioner to find that Claimant continued to be owed vacation days when terminated.

The days during Claimant's employment which Solomon testified Claimant was given "as vacation days, even though she was not entitled to them" were for Rosh Hashanah and the day after Thanksgiving. On all four of the days, according to Solomon's testimony, neither Claimant nor Solomon herself (the Employer's only two employees) were working, that is, Long Island Traditions was closed. In addition, most of these days are days when many schools close, and the Employer had agreed at Claimant's hiring interview that she could take off when her son had holidays from school. Solomon testified that Claimant's job was "a salaried position" with actual pay not varying depending on exact hours worked; evidence suggests that on occasion, Claimant worked and was expected to work extra hours beyond those normally scheduled. Under these circumstances, it was not invalid or unreasonable to find that the Employer did not demonstrate that these days were vacation days which used up Claimant's accrued vacation. As for the last day Petitioners claimed to have paid Claimant as a vacation day, December 5th, there is no evidence that payment for that day, which was included in Claimant's last wage check, was meant as payment for accrued vacation. Solomon testified, rather, that "because it was the end of a pay period, we included December 5th in that pay period even though she had already left the position."

We therefore find that it was not invalid or unreasonable for the Commissioner to determine that the Employer failed to pay Claimant earned vacation pay in accordance with its policy, but we find no adequate basis for ordering payment of two weeks' vacation pay, as opposed to the five days in the January 7, 2008 letter. Accordingly, we modify the Wage Supplement Order by reducing the vacation pay found due from $880.00 to $440.00, corresponding to five rather than ten days' pay.

IMPOSITION OF CIVIL PENALTIES

The Wage Order additionally assessed a civil penalty in the amount of 75% of the wages due. We find that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount are 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." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of payment."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order under Article 6 of the Labor Law is affirmed, as modified; and

2. The Order under Article 19 of the Labor Law is affirmed; and

3. The Petition is otherwise denied.

Anne P. Stevason, Chairperson

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
March 29, 2012.