

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Boston Best Construction, LLC
and Eduardo Muniz,**
Petitioner

v.

Docket No. LB-24-0016

**Office of the Attorney General –
Fair Labor Division,**
Respondent

Appearance for Petitioner:

Scott K. Semple, Esq.
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Appearance for Respondent:

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Fair Labor Division
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Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF DECISION

The Fair Labor Division's citations for Petitioners' violations of G.L. c. 149, §§ 148B, 148C(b), and G.L. c. 151, §§ 15, 19(3) are affirmed. The Petitioners have not proven that any facts underlying the citations were erroneous, and they have presented no additional evidence to support a reduction in the assessed civil penalties.

DECISION

The Office of the Attorney General, Fair Labor Division (FLD) issued four civil

citations against Petitioners, Boston Best Construction LLC and Eduardo Muniz, for failure to pay the proper overtime rate, failure to furnish true and accurate payroll records, misclassification of employees as independent contractors, and failure to permit employees to earn and use sick time. The FLD also assessed civil penalties against the Petitioners. Petitioners appealed the citations under G.L. c. 149, § 27C(b)(4).

The parties agreed to resolve the matter by written submissions. I issued a filing schedule. On May 9, 2024, the FLD filed a motion for summary decision along with an affidavit of FLD Inspector Tom Lam. On June 14, 2024, Petitioners filed their opposition to the motion for summary decision and filed a cross-motion for summary decision with an affidavit of Attorney Semple and two exhibits to the affidavit.

FINDINGS OF FACT

The following facts are not in dispute:

1. Petitioner Boston Best Construction LLC (“Boston Best”) is a corporation organized under the laws of Massachusetts, with its principal office in Wakefield, MA. (Ex. A.)
2. Petitioner Eduardo Muniz is the CEO and Manager of Boston Best. (Ex. A.)
3. Tom Lam is a FLD Investigator. He is responsible for investigating violations of Massachusetts Wage and Hour Laws and certain other wage-related statutes. He was assigned to investigate Petitioners in this case. (Lam Aff. ¶ 1, 2.)
4. By letter dated July 7, 2021, the FLD requested from Petitioners various documents for the time-period January 1, 2020, through July 7, 2021, including payroll records for employees and documents concerning its earned sick time policy. For any

individuals Boston Best alleged were independent contractors or subcontractors, the FLD requested additional documents such as bills, invoices, time sheets, proof of payment, and all tax documents, etc. (Lam Aff. ¶ 3.)

5. On August 30, 2021, after multiple extensions were granted by the FLD, Petitioners responded to the FLD’s request. The documents provided by Petitioners included payroll information for six employees. Boston Best produced 1099s for 9 individuals that it identified as independent contractors, as well as additional documents for individuals identified as subcontractors. (Lam Aff. ¶ 5.)

6. On January 6, 2022, the FLD requested additional documentation in follow-up correspondence with Boston Best. (Lam Aff. ¶ 6.)

7. In response to the FLD’s request for additional documentation, Boston Best produced an “Establishment Information Form” in which it checked a box responding “No” to a section of the form inquiring as to whether it had an earned sick time policy. It also identified six individuals classified as employees during the relevant period. Boston Best still did not provide documentation of its sick leave or other leave policy, despite being on notice that FLD’s investigation would not close until it received proof of compliance with the Earned Sick Time law. (Lam Aff. ¶¶ 7, 8, 9.)

8. On February 17, 2022, Boston Best provided a copy of an earned sick time policy compliant with the Earned Sick Time Law. It also disclosed that several workers that it had previously described as independent contractors were actually employees but that the company was not able to put these employees on the payroll because the workers did not have social security numbers. (Lam Aff. ¶ 10, 11.)

9. On March 30, 2022, Boston Best emailed the FLD, reporting that all workers were currently being paid overtime and that paystubs noting the accrual and use of sick leave were being issued. (Lam Aff. ¶ 12.)

10. Using this information, on August 9, 2023 the records of one worker who was classified as an independent contractor were examined. The examination concluded that the worker had been paid his straight hourly rate of pay for all hours worked and was not paid at the overtime rate for his overtime hours. (Lam Aff. ¶ 13.)

11. Following the results of the initial overtime audit, the FLD completed a full company-wide overtime audit. On November 28, 2023, the results of the audit were provided to Boston Best. According to the audit, \$44,220.42 in overtime wages were due to 15 individuals. (Lam Aff. ¶ 14, 20.)

12. A report was prepared by the FLD and submitted to FLD Chief Lauren Moran regarding Boston Best's violations of the Independent Contractor law, Earned Sick Time law, Record Keeping Law mandating employers furnish records to the Attorney General's Office upon request, and the Overtime law. (Lam Aff. ¶ 21.)

13. In preparation to issue civil citations to Boston Best, the following information was considered by the FLD in assessing penalties:

- Petitioners had no previous violations of the Wage and Hour Law on record;
- Petitioners did not violate the law with specific intent;
- From January 2, 2021 through August 21, 2021, 16 workers were misclassified as independent contractors;

- For the same period, Petitioner failed to pay \$44,220.42 in overtime to 15 of the 16 workers misclassified as independent contractors;
- Not enough records were produced by Boston Best to calculate restitution for employee Kevin Frischembruder;
- For the same period, 4 workers classified as employees did not have access to earned sick time until a new, compliant policy was adopted in February 2022; and
- Boston Best's gross annual payroll was approximately \$702,000.

(Lam Aff. ¶ 21.)

14. Based on these undisputed facts, on December 29, 2023 the FLD issued four citations:

- No. 21-06-24984-001 for failure to pay proper overtime rate, without specific intent, from 1/2/2021 to 8/21/21 in violation of G.L. c. 151, §§ 1A, 1B. The citation ordered restitution of \$44,220.42 and assessed a \$10,000 civil penalty;
- No. 21-06-24984-002 for failure to furnish true and accurate payroll records, without specific intent, on 7/21/2021 in violation of G.L. c. 151, §§ 15, 19(3). The citation assessed a \$500 civil penalty;
- No. 21-06-24984-003 for misclassification of 16 employees as independent contractors, without specific intent, from 1/2/21 through 8/21/21, in violation of G.L. c. 149, § 148B. The citation assessed an \$8,000 civil penalty; and

- No. 21-06-24984-004 for failure to permit 4 employees to earn and use sick time as required, without specific intent, from 1/2/21 through 8/21/21, in violation of G.L. c. 149, § 148C(b). The citation assessed a \$1,500 civil penalty.

In sum, the citations ordered \$44,220.42 in restitution and \$20,000 in civil penalties.

(Lam Aff. ¶ 22.)

15. On January 5, 2024, Petitioners appealed the four citations. (Appeal letter.)

ANALYSIS

I

Both parties have moved DALA for summary decision. In administrative proceedings, summary decision is the functional equivalent of summary judgment in civil proceedings. *Compare* 801 CMR 1.01(7)(h) with Mass. R. Civ. P. 56. *See Caitlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992) (citing Mass. R. Civ. P. 56 for summary decision in administrative case). *See also, e.g., Calnan v. Cambridge Retirement Bd*, CR-08-589 (DALA 2012); *Steriti v. Revere Retirement Bd*, CR-07-683 (DALA 2009). Summary decision is appropriate when there are no genuine issues of material fact and the case may be decided as a matter of law. *Caitlin*, 414 Mass. at 7. *See* 801 CMR 1.01(7)(h); Mass R. Civ. P. 56. A fact is “material” only if it might affect the outcome of the case. *Lockridge v. The Univ. of Maine Sys.*, 597 F. 3d 464, 469 n.3 (1st Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of material fact is “genuine” only if a fact-finder could reasonably resolve the dispute in favor of either party. *Id.* (citing *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004)).

II

The Attorney General may issue civil citations to any employer who violates the Wage and Hour Laws. G.L. c. 149, § 27C(b). In the case of a corporation employer, this liability extends beyond the corporation itself to include “[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation.”

G.L. c. 149, § 148. *See Wiedmann v. Bradford Group, Inc.*, 444 Mass. 698, 710-11 (2005). Mr. Muniz was the CEO and manager of the corporation; therefore, he is personally liable for any violations.

Petitioners challenge the citations’ penalties only.¹ The same standard applies to challenging a penalty as applies to challenging the underlying substance of the citation. G.L. c. 149, § 27C(b)(4). DALA may vacate or modify a citation only “if the aggrieved person demonstrates by a preponderance of evidence that the citation . . . was erroneously issued.” *Id.* Otherwise, DALA must affirm the citation as issued. *Id.* If the citation is not vacated, the Petitioner must comply with DALA’s decision within 30 days. *Id.* § 27C(b)(6).

III

A

Petitioners object to the penalties levied against them by FLD as excessive. Petitioners request to halve the penalties in Citations #21-06-24984-001, #21-06-24984-003, and #21-06-24984-004, and to vacate the entire \$500 penalty in Citation #21-06-24984-002.

¹ The FLD issued four citations to Boston Best for violating various wage and hour laws listed above. Petitioners do not contest the restitution figure. The order for \$44,220.42 in restitution is therefore affirmed.

The authority to issue civil citations and impose penalties is found at G.L. c. 149, § 27C(b)(2). A maximum civil penalty of up to \$7,500 may be assessed for each violation committed by a first-time violator, and, as in Petitioners' case, made without specific intent. *Id.* The failure to pay each person during each pay period covered by the citation constitutes a separate violation. *Id.*; *Rosa and AR Services, Inc. v. FLD*, LB-21-0372 through -0376, at *5-6 (Oct. 27, 2023). The FLD imposed the following penalties: \$10,000 for failure to pay overtime to 15 employees; \$8,000 for misclassifying 16 employees as independent contractors; \$1,500 for failure to permit four employees to earn and use sick time; and \$500 for failure to furnish complete payroll records. Theoretically, the FLD could have issued citations for a total of more than \$3,000,000. The total penalty of \$20,000 across the four citations was therefore well within the FLD's authority (although that does not explain why the FLD chose to issue \$20,000 in penalties).

In determining the amount of a civil penalty to be assessed, the Attorney General must take into consideration at least "previous violations of [chapters 149 or 151] by the employer, the intent by such employer to violate the provisions of [chapters 149 or 151], the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of [any] public contract of payroll involved." G.L. c. 149, § 27C(b)(2).

Appeals of civil penalties are subject to DALA's Standing Order 23-001. DALA has implemented specific procedures that must be followed when an employer's appeal involves a challenge to a citation's penalties. The main provisions of the standing order are applied when DALA finds evidence of a violation, but determines that the FLD did

not establish all the material evidence which the FLD claims it relied upon when assessing the penalty or the employer established different facts material to the penalty assessment.

B

Petitioners seek to vacate the \$500 civil penalty assessed for failure to furnish true and accurate payroll records. Petitioners' objection is based on its assertion that the FLD did not specify in the citation on what facts it relied to issue the citation. The citation must therefore be vacated, according to Petitioners. After giving Petitioners additional time to respond to the FLD's initial demand for payroll records, Petitioners submitted the requested records. Petitioners assert that, at no time during the investigation, did the FLD suggest that the records produced were untrue or inaccurate. In its motion for summary decision, the FLD states that its citation was based on the fact that the payroll records did not include payroll checks for two employees.

It is a due process problem for an agency to impose penalties without identifying the grounds for them. The citation in question indeed did not state the grounds for its issuance other than to cite the statutory language of a failure to furnish true and accurate payroll records. *See* G.L. c. 151, §§ 15, 19(3). Parties should not need to take appeals and propound discovery to find out what they are being accused of. On the other hand, employers cannot be allowed to bury their heads in the sand and then rely on their ignorance to get out of civil penalties.

In this case, Petitioners' brief shows that they did understand the accusation against them, and they explicitly state in their brief that they do not dispute the accusation. Their argument focuses not on substantive fairness but on the formality of

the citation's text. On the level of formalities, the governing statute does not require the citation to say more than it did. The citation for failure to furnish true and accurate payroll records and the \$500 penalty is affirmed.

C

The Petitioners request that the remaining penalties of \$19,500 be reduced by half because the violations were first-time and were not intentional. During the pre-hearing stages of the proceedings, the FLD and Petitioners agreed that no facts were in dispute. The FLD based its penalty calculations on seven pieces of information, including that these were all first-time violations and that they were unintentional violations. Boston Best has not proven that any underlying fact the penalty calculations were based on was not true. Petitioners have likewise not presented any additional facts that the FLD should have taken into consideration in its penalty calculations.

Petitioners point out that I directed the FLD to file its motion for summary decision first so that Petitioners would know which facts the FLD relied on to calculate the penalties. The FLD provided those facts. Rather than disprove any of those facts, Petitioners essentially argue that none of the penalties are valid until the FLD proves that the penalties are not excessive compared to other penalties that it has assessed in other citations. It is theoretically possible that a petitioner could prove that a set of penalties was excessive compared to other cases, but here Petitioners confuse who must prove what. It is the Petitioners who must prove that the citations were issued erroneously based on their theory, not the FLD who must in the first instance establish the citations' legitimacy. *See* G.L. c. 149, § 27C(b)(4).

To sum up, Petitioners have advanced no reason for DALA to cut the penalties by half. The Petitioners have not proven that any element of the citation was erroneous, and they have presented no additional evidence to support a reduction in the assessed civil penalty. Therefore, the \$19,500 in civil penalties must be affirmed.

ORDER

For the foregoing reasons, the Fair Labor Division's motion for summary decision is allowed. Petitioners' cross motion for summary decision is denied. The citations are affirmed in their entirety.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Kenneth J. Forton

Kenneth J. Forton
Administrative Magistrate

DATED: August 2, 2024