

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

LEONARD CERVONE &
CERVONE LLC
Petitioners

v.

OFFICE OF ATTORNEY GENERAL,
FAIR LABOR DIVISON
Respondent

Docket No. LB-24-0369

Appearances

For Petitioners: Leonard Cervone, *pro se*
For Respondent: Karina Valencia, Esq.

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Fair Labor Division cited the Petitioners for failure to pay timely wages to two employees. The citation is affirmed with respect to the first employee because it was corroborated by competent evidence, including contemporary records and credible testimony. The citation is affirmed, in part, with respect to the second employee because the amount in question was not corroborated by competent evidence. Finally, the penalty is also affirmed.

INTRODUCTION

The Petitioners timely appeal a citation for a violation of the Massachusetts wage and hours law imposed by the Office of the Attorney General, Fair Labor Division (“FLD”). I held a virtual hearing on December 11, 2024. The FLD called two witnesses: investigator Huong Phan and Jan Abril (a former employee of Cervone LLP); Leonard Cervone testified on behalf of the Petitioners. I admitted Exhibits 1-15 into evidence without objection. I also asked the FLD to

respond to an issue I raised at the hearing.¹ The FLD submitted a brief on January 3, 2025, at which point I closed the administrative record.

FINDINGS OF FACT

1. Leonard Cervone owns and operates Cervone LLP. He is a general contractor whose work includes carpentry. (Cervone testimony.)
2. There is no dispute he hired Jan Abril and Edwin Castrillon to perform work for him. Nor is there any dispute he paid them for some of their time. The only dispute is whether he paid them for all the work they performed.

Cervone, LLC recordkeeping system

3. Cervone LLC did not keep accurate timekeeping or payroll records. (Cervone and Abril testimony.)
4. Mr. Cervone asked employees to keep track of the days and time they worked and what they did. He then asked that they send a summary to him in a timely manner. It seems from his testimony what he meant was that employees were to text him this information. (Cervone testimony; Ex. 4.)
5. Cervone LLC has a payroll company through which it paid some employees, but not all. For those not paid through payroll, it paid them in cash. In those cases, the company did not keep records to reflect the hours paid, tax deductions, etc. (Cervone and Abril testimony.)

¹ Specifically, I questioned why the FLD originally issued one penalty amount in a demand letter and a higher penalty amount with the citation. The FLD's submission was very helpful in explaining why the penalty amount should be upheld, as I discuss below.

6. Mr. Cervone agrees that Messrs. Abril and Castrillon worked for him, but he has no specific recollection or documentation of the dates or times either employee worked.

(Cervone testimony.)

7. He blames the two employees because he says he asked them repeatedly for this information and neither one of them complied. (Cervone testimony; Ex. 4.)

Jan Abril

8. Mr. Abril filed a complaint against the Petitioners for failure to pay his wages. He alleged² he was owed \$1,455.00 for work performed between September 6, 2023 and September 13, 2023. (Ex. 3.)

9. After he submitted his complaint, he supplied the FLD with additional documentation to corroborate his allegation. He had numerous text messages spanning that period between him and Mr. Cervone. The messages show he was performing work for Mr. Cervone on the days he said he was working. They include numerous pictures of the job site. They also include clear and specific time records that show the days, hours, and expected payment. (Abril testimony; Ex. 4.)

10. Mr. Abril also testified that he performed this work and was owed this money. (Abril testimony.)

11. Mr. Cervone does not dispute he agreed to pay Mr. Abril \$42 an hour, and Mr. Abril's calculations are based on that rate of pay. (Abril and Cervone testimony; Ex. 4.)

² He made additional allegations of other kinds of violations, some of which were raised at the hearing. This appeal, however, is limited to the citation at issue: failure to make timely payment of wages.

12. Mr. Cervone's only rebuttal to this claim is that he was unhappy with Mr. Abril's work and says Mr. Abril did not work one of the weeks he claims he worked. (Cervone testimony.)

13. However, I find that Mr. Abril in fact worked the hours in his complaint. (Abril testimony.)

Edwin Castrillon

14. Mr. Castrillon also filed a complaint against the Petitioners for failure to pay his wages. He alleged he was owed \$3,054.00 for work performed between October 22, 2023 and November 19, 2023. (Ex. 1.)

15. The complaint was in Spanish. In it, he listed the days and hours he says he worked, including the payments he received and what he claimed was owed. (Ex. 1.)

16. The document was submitted in Spanish and no translation appears in the record. Thus, I cannot tell what he claims he made beyond the days and hours he listed. (Ex. 1.)

17. After he submitted his complaint, he forwarded pictures to the FLD. A few pictures have date stamps from some of the days within his complaint. The remaining do not have any date stamps, and it is not clear when they were taken. Additionally, it is not clear where the pictures were taken or what work, if any, they represent. (Ex. 3.)

18. Mr. Cervone denies that Mr. Castrillon performed as much work as he claims he did. He says he felt bad for Mr. Castrillon because he needed work, but Mr. Cervone did not have much for him to do. Mr. Cervone repeatedly told Mr. Castrillon this. At one point, Mr. Cervone said he would pay Mr. Castrillon to help Mr. Cervone's wife, who was moving, pack up the house. But that was about as much work as he could find for Mr. Castrillon. (Cervone testimony.)

19. Nevertheless, he concedes he owes Mr. Castrillon payment. His best estimate is that he owes Mr. Castrillon about \$1,200.00. (Cervone testimony.)
20. While Mr. Cervone admittedly has memory problems, some of his testimony with respect to Mr. Castrillon is corroborated by other evidence. For example, Mr. Abril's texts with Mr. Cervone demonstrate that Mr. Abril did not want to work with Mr. Castrillon because Mr. Castrillon did not know what he was doing:

Edwin is 85% counterproductive element. Please tell him he's not needed today at the jobsite. If he's there today I leave...He's like a fly in the work environment. Can't swat him, educate him, or control him. TAKES A LOT OF TIME!...I texted you that I did not require an inefficient person today to impede me on performance.

(Ex. 4.)

21. Mr. Abril sent additional texts complaining about Mr. Castrillon showing up late, which Mr. Cervone acknowledged was a problem. (Ex 4.)
22. Mr. Castrillon had limited experience with power tools and could not "operate a drill or sink a screw." (Abril testimony.)
23. In Mr. Castrillon's complaint, he listed hours that did not line up with Mr. Abril's. On the dates that he and Mr. Abril supposedly worked together, he sometimes listed more hours than Mr. Abril, including arriving earlier than he. He also listed working at that same address during the same week as Mr. Abril, but on days Mr. Abril did not work. (Ex 4.)
24. Mr. Castrillon also reported a wide range of hours, such as working from 7:20 a.m. until 10:00 p.m., 2:00 a.m. until 7:00 p.m., or 2:30 a.m. until 5:00 p.m. And because the

complaint is in Spanish, untranslated, it is not clear what he claims he was doing all that time.³ (Ex. 4.)

FLD Investigation and audit

25. The complaint was originally assigned to investigator Margarita Sejas DePaul. (Phan testimony.)
26. While she was still the investigator, she issued a demand letter to the Petitioners seeking restitution in the amount of \$4,683 (\$1,455 (Abril) + \$3,228 (Castrillon). The demand letter also imposed a penalty of \$468. (Ex. 5.)
27. The demand letter makes clear that there is no final determination, and the amount of restitution and penalties could change. Nevertheless, it gave the Petitioners an option to resolve the matter immediately by paying the requested amounts. (Ex. 5.)
28. When Mr. Cervone did not pay the requested amount, the FLD issued a citation, noting it was a second and subsequent violation with specific intent. It sought the same amount in restitution. However, it increased the penalty to \$1,500. (Ex. 8.)
29. At some point after the citation was issued, investigator Phan took over for investigator DePaul. She conducted her own audit and produced spreadsheets estimating the amounts owed. She did not speak to either complainant. Instead, she credited their submissions and used them as the basis for her estimates. (Phan testimony.)⁴

³ It is possible he meant to write “p.m.” instead of “a.m.” That appears to be how investigator Phan interpreted these records. Even so, it further confirms for me that the records alone are unreliable.

⁴ In her estimate, Mr. Abril was owed \$1,602 (instead of the \$1,455 he claimed) and Mr. Castrillon was owed \$7,806 (instead of the \$3,228 he claimed.) Nevertheless, the FLD is seeking only to enforce the lesser amounts it listed in the citation.

30. Mr. Castrillon did not testify. Investigator Phan, who did testify, does not speak Spanish and did not speak with Mr. Castrillon. She used Google to translate and understand what he said in his complaint. However, in her testimony, she did not explain what she believed Mr. Castrillon said in his complaint and there is no other evidence that explains what he wrote. (Phan testimony.)
31. Investigator Phan does not assess penalties and did not know why the penalty in this case increased from the demand letter to the citation. (Phan testimony.)
32. That said, penalties are based on various factors. Some factors implicated here were that the Petitioners had prior citations for similar violations, the Petitioners did not provide any documentation to explain how they paid the employees, the Petitioners did not maintain good or accurate records of the employees' work, and the violation was intentional. (Phan testimony; exs. 12-14.)

DISCUSSION

A person aggrieved by a citation from the Attorney General may appeal it. *See* G.L. c. 149, § 27C(b)(4). If the Petitioner “demonstrates by a preponderance of evidence that the citation . . . was erroneously issued,” DALA may vacate or modify the citation as appropriate. *Ibid.* Otherwise, DALA must affirm the citation. *Ibid.*

As noted, the Petitioners do not dispute they owe the complainants some money; they just dispute how much. As for Mr. Abril, the FLD did not err in seeking the exact amount he claimed he was owed. Although Mr. Cervone denied owing that much because he said Mr. Abril never sent him his time, that is contradicted by Mr. Abril's text messages and testimony. Mr. Abril produced contemporaneous, corroborating documents. He was also a credible witness. He explained how he recorded his hours, he had good recollection, and he did not overstate matters.

Further, whether or not Mr. Cervone was satisfied with Mr. Abril's work does not excuse his failure to pay him for the work performed.

As for Mr. Castrillon, the Petitioners proved that the FLD erred in the amount of restitution sought. The FLD's position is that it issued a citation and, because the Petitioners lack payroll records, they cannot meet their burden of persuasion that the citation was erroneously issued. That overstates things a bit. Just because the Petitioners do not have payroll records to back up their position does not mean they cannot prevail, though it does make this task harder. But an employer may lack payroll documents yet still have properly paid his employee. Rather, the Petitioners could meet their burden by submitting evidence that calls the citation into question.

This is not novel. I can hold an employer's failure to record an employee's hours against him, "but not to the point of automatically crediting [the employee's] testimony." *Dupuis, et al. v. Fair Labor Div.*, LB-08-065, 2009 WL 5966916, *6 (Div. Admin. Law App. Aug. 13, 2009). Sometimes a document, such as a complaint, "is so flawed that it serves to show that the citation was issued erroneously." *Id.* "While an employer may not be allowed to avoid paying wages by failing to maintain records for days on which an employee worked, the failure of an employer to maintain records for days on which the employee concededly worked is not proof by itself that the employee worked additional days." *Id.*, n. 4.

Here, the Petitioners met their burden of proof that the citation was erroneously issued with respect to Mr. Castrillon. Specifically, given Mr. Castrillon's unreliability, and poor carpentry skills—as described by Mr. Abril—I doubt that Mr. Cervone would have hired Mr. Castrillon to work for the number of hours he claims in the complaint. I find it implausible that Mr. Castrillon worked as many hours as he said he did. For example, it is unlikely he worked

from 2:00 a.m. until 7:00 p.m. It is also unlikely he worked earlier and later than Mr. Abril since Mr. Abril was more experienced and supervised Mr. Castrillon's work. Also, unlike with Mr. Abril, Mr. Castrillon did not produce any contemporaneous records to support his claim. Rather, it appears from this record that he wrote down his hours after the fact. Finally, Mr. Castrillon did not testify so I was unable to assess his credibility; he was unavailable to clear up some of the things that confused me, e.g., the possibility that he meant to write "p.m." instead of "a.m." in some places.

That said, Mr. Cervone admitted he owes Mr. Castrillon money and agreed it was at least \$1,200.00. Thus, the restitution amount is not entirely vacated but instead modified to \$1,200.00.

Finally, there was no error in the penalty assessment of \$1,500.00. Although I questioned why the amount changed between the demand letter and the citation, that alone is not enough to vacate the amount. For one, the demand letter indicated it was not a final determination and the amounts could change. Also, the facts in this record support the penalty. The Petitioners did not contest the penalty. They conceded liability, i.e., that they owed both employees money. The penalty was on the lower end of what could have been a justifiable higher penalty amount (up to \$15,000 for a second or subsequent violation). The Petitioners have prior citations for similar violations. The conduct was intentional. The Petitioners did not maintain true or accurate records. And the FLD relied on facts that are not materially different than what I have found.

CONCLUSION

The FLD did not err in issuing a citation for failure to pay their employees. The restitution amount for Mr. Castrillon is modified to \$1,200.00. The citation is otherwise **affirmed**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate