

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Olive, Viola and Will, Inc.
d/b/a Dragon Pizza and
Delicious and Company, and Charles Redd,

Petitioners,

Docket Nos.: LB-22-0551-0553

v.

Office of the Attorney General,
Fair Labor Division,

Respondent.

Appearance for Petitioners:

Charles Redd, *pro se*
Somerville, MA 02143

Appearance for Respondent:

Alexander Sugerman-Brozan, Esq.
Assistant Attorney General
Office of the Attorney General
Fair Labor Division
1 Ashburton Place, 18th Floor
Boston, MA 02108

Administrative Magistrate:

John G. Wheatley

SUMMARY OF DECISION

The citations issued to the petitioners by the Office of the Attorney General, Fair Labor Division, are affirmed. The petitioners did not sustain their burden of proving by a preponderance of the evidence, under G. L. c. 149, § 27C(b)(4), that the citations were erroneously issued.

DECISION

The petitioners appealed three citations issued by the Fair Labor Division of the Office of the Attorney General (“OAG”). The citations allege that the petitioners: (1) failed to furnish true and accurate payroll records to the OAG on August 31, 2022; (2) failed to post and/or distribute a required earned sick time workplace notice; and (3) failed to accurately track employees’ accrual and use of earned sick time. Each citation called for a \$500.00 civil penalty, totaling \$1,500.00.

I held an evidentiary hearing on March 29, 2023, at the Division of Administrative Law Appeals (“DALA”), 14 Summer Street, Malden, Massachusetts. I admitted six documents into evidence during the hearing (Exhibits 1-3 and 4A-4C). The Fair Labor Division called its investigator Tom Lam to testify at the hearing, and Mr. Redd testified on behalf of himself and the other petitioners. The parties elected not to file post-hearing memoranda, but each party made a closing statement orally at the end of the hearing.

FINDINGS OF FACT

The facts in this matter are not in significant dispute. Based on the testimony at the hearing and the documents admitted into evidence, I make the following findings of fact:

1. Mr. Redd is the principal of Olive, Viola and Will, Inc., which operates a restaurant named Dragon Pizza in Somerville, Massachusetts. (Redd Test.)
2. On November 12, 2021, OAG Supervising Investigator Tom Lam issued a “payroll demand” to Dragon Pizza, via email, requesting true and accurate copies of the following documents relating to work performed by all employees from July 1 to November 12, 2021:
 - “1. Payroll ledgers or journals, pay stub records, and time-keeping records which reflect the individual’s identity, address, occupation, and rate of pay;
 2. Number of hours worked each day and each week, including daily clock in & out times;

3. Wages paid, and deductions taken each pay period;
4. Any policies regarding tips, tip pooling, and/or tip distribution and allocation;
5. Any accounting of tips and/or documents used to tally, calculate, report, and/or distribute tips, whether on a daily, weekly, or other basis;
6. Any and all personnel policies and/or manuals;
7. A list containing the names of all workers, including job titles, hire/termination dates, phone numbers and email addresses, if available;
8. A list of all corporate entities operated by the principal(s) in Massachusetts; and
9. A list of all Massachusetts business locations.”

(Ex. 1; see Lam Test.)

3. The payroll demand letter further requested the following documents regarding earned sick leave policies for Dragon Pizza:

“1. . . . (a) the contents of the policies; (b) any changes to the policies during [July 1, 2021 to November 12, 2021]; (c) documents that reflect the method and timing that such policies (and any changes) were communicated to your Massachusetts employees; and (d) the start and end date of the company’s benefit year;

2. Documents that reflect the accrued hours of earned sick time for every employee; [and]

3. Documents that reflect each employee’s use of the accrued sick time and Documents that reflect any requests to use accrued sick time that was denied (not granted). If an employee has not yet requested to use the employer’s earned sick time policy, please provide a signed, dated statement affirming that not one of your employees has requested to use earned sick time under G.L. c. 149, § 148C[.]”

(Ex. 1.)

4. The letter set a deadline of November 29, 2021, for the company to deliver the requested documents to the OAG by mail and by email to Investigator Lam. (Ex. 1.)
5. The petitioners were further directed to affirm, on an attached declaration form, that they are providing “all true and accurate records requested” by the OAG. (Ex. 1.)

6. Also attached to the payroll demand letter was a blank “establishment information” form that instructed the petitioners to complete the form and submit it together with the other records requested by the OAG. (Ex. 1; Lam Test.)
7. The OAG did not receive a timely response to Mr. Lam’s payroll demand. (Lam Test.)
8. On January 14, 2022, Mr. Lam sent a substantially identical payroll demand letter to Dragon Pizza by U.S. mail, which again included the establishment information and declaration forms for the company to complete and submit with the records requested. This letter set a deadline of January 28, 2022, for delivery of the requested documents to the OAG. (Ex. 2; Lam Test.)
9. On January 25, 2022, Mr. Redd contacted Mr. Lam by telephone to seek clarification regarding the documents requested. Mr. Lam reviewed the payroll demand letter with Mr. Redd to identify the documents that he needed to provide. (Lam Test.; Redd Test.)
10. During the telephone call, Mr. Redd expressed his willingness to cooperate with the OAG to provide the documents and information that it sought.¹ (Redd Test.)
11. Mr. Redd did not request an extension of time to provide the requested records to the OAG. (Lam Test.)
12. On February 2, 2022, Mr. Lam sent an email to Mr. Redd providing the option to upload the requested documents via “OneDrive.” (Ex. 3.)
13. On the same day, Mr. Redd emailed Mr. Lam payroll reports provided by the restaurant’s payroll company. (Ex. 3.)

¹ I found Mr. Redd’s expressed desire to cooperate with the OAG to be sincere, and that he genuinely intended to comply with the OAG’s demand for records.

14. On February 8, 2022, Mr. Lam followed up with Mr. Redd via email with a list of the outstanding documents that the OAG required from the business. These included a completed establishment information form, a signed declaration form, any employee handbook provided to employees, and all relevant documents related to earned sick leave for Dragon Pizza employees. (Ex. 3.)
15. Mr. Redd responded on February 16, 2022, indicating that the business had no documentation related to sick leave for employees or an employee handbook. Mr. Redd asked Mr. Lam to again provide the establishment information and declaration forms that the OAG required him to complete. (Ex. 3.)
16. The petitioners did not have an earned sick time policy, did not track its employees' accrual or use of earned sick time during the relevant period, and did not have any record or documentation providing notice to employees of earned sick leave policies. (Redd Test.; Exs. 2, 3.)
17. On August 31, 2022, Mr. Lam sent an email to Mr. Redd again requesting him to complete the establishment information and declaration forms. Mr. Lam attached the second payroll demand letter (dated January 14, 2022) to this email, which included the blank forms for him to complete. (Ex. 3.)
18. Mr. Redd received Mr. Lam's August 31 email, but he neglected to open it prior to receiving the three citations from the OAG. (Redd Test.)
19. Mr. Lam did not receive a response to his August 31 email. (Lam Test.)
20. On November 9, 2022, the OAG issued three citations to the petitioners alleging the following violations: (1) failure to furnish true and accurate payroll records to the OAG on August 31, 2022, in violation of G. L. c. 151, §§ 15 & 19(3) (citation #21-09-26759-001); (2)

failure to post and/or distribute a required earned sick time workplace notice from July 1, 2021, to February 4, 2022, in violation of G. L. c. 149, § 148C(o) (citation #21-09-26759-002); and (3) failure to accurately track accrual and/or use of earned sick time from July 1, 2021, to February 4, 2022, in violation of G. L. c. 149, § 148C(m) (citation #21-09-26759-003). The OAG indicated that the asserted violations were done “without specific intent” by the petitioners. The OAG ordered the petitioners to rectify the alleged infractions immediately and assessed a civil penalty of \$500.00 per citation. (Exs. 4A, 4B, 4C.)

21. In determining the amount of these penalties, Mr. Lam considered the maximum penalty allowable (\$7,500.00 per violation), the number of employees employed by the restaurant (seventeen), the absence of any prior cited violations issued to the petitioners, the fact that no employees were affected monetarily by the violations, and the absence of any evidence of an intent to violate Massachusetts labor laws. (Lam Test.; see Exs. 4A, 4B, 4C.)
22. On November 15, 2022, Mr. Redd timely appealed all three citations to DALA.

DISCUSSION

An employer challenging a citation or order of the OAG has the burden of proving “by a preponderance of the evidence that the citation or order was erroneously issued.” G. L. c. 149, § 27C(b)(4). The petitioners did not satisfy their burden of proving that any of the citations were erroneously issued or any error in the civil penalties assessed. The citations are therefore affirmed, as required by G. L. c. 149, § 27C(b)(4).

I. Failure to Furnish Payroll Records

Under Massachusetts wage and hour laws, employers are required to maintain accurate payroll records for each of their employees. General Laws c. 151, § 15, provides in pertinent part that “[e]very employer shall keep a true and accurate record of the name, address and

occupation of each employee, of the amount paid each pay period to each employee, [and] of the hours worked each day and each week by each employee.” An employer must “furnish immediately” to the OAG copies of any such records requested and must also provide, on demand, “a sworn statement of such record . . . upon forms prescribed or approved by” the attorney general. *Id.* An employer that fails to furnish such records to the OAG “shall be subject to a civil citation or order as provided in [G. L. c. 149, § 27C.]” G. L. c. 151, § 19(3). Accordingly, “any failure on the part of an employer to respond to a Fair Labor Division payroll demand letter can be treated as a violation, *whether or not the employer specifically intended to withhold documents.*” *Watsop v. Office of Attorney General*, LB-20-0462-0463, at 15 (DALA Oct. 21, 2021) (emphasis added). See *Rhone v. Office of Attorney General*, LB-18-0290, at 4 (DALA Dec. 17, 2018) (“The law does not envision that OAG ask employers for documents multiple times, and check employers for compliance, only to find that an employer has eventually, months after the deadline, complied for the most part.”).

The cited violation based on failure to furnish requested records is well supported by the evidence. The petitioners did not comply with the deadline for submitting records under either the OAG’s initial demand for records dated November 12, 2021, or its subsequent demand for records dated January 14, 2022. Although the petitioners ultimately provided the majority of the documents requested, the tardy submission of those records constituted a violation of G. L. c. 151, §§ 15 and 19(3). And even if the petitioners’ submission had complied with the OAG’s stated deadline(s), the petitioners failed to provide a sworn statement attesting to the completeness and accuracy of those records as required by G. L. c. 151, § 15, that is, by completing, executing, and submitting the declaration form that the OAG provided to the petitioners and requested on several occasions. The failure to provide the requested declaration

to the OAG was also a violation of §§ 15 and 19(3). Although Mr. Redd was cooperative, and his business undoubtedly faced unprecedented challenges as a restaurant that stayed open during the Covid pandemic, the OAG did not err in issuing this citation.²

II. Earned Sick Time Violations

Under G. L. c. 149, § 148C(d), Massachusetts employers are required to “provide a minimum of one hour of earned sick time for every thirty hours worked by an employee,” which may be paid or unpaid depending, generally, on the number of employees employed by such employer. Employers are obligated to “make, keep, and preserve records” pertaining to their employees’ accrual and use of earned sick leave, consistent with the recordkeeping requirements of G. L. c. 151, § 15, and must provide copies of such records on demand to the OAG. G. L. c. 149, § 148C(m); 940 Code Mass. Regs. § 33.09(1), (2). In addition, employers must post a notice of the earned sick time law “in a conspicuous location” in the workplace and provide a copy of the notice to their employees. G. L. c. 149, § 148C(o).

Mr. Redd conceded at the hearing that the restaurant did not have an earned sick time policy and it did not track its employees’ accrual or use of earned sick time during the period in question. He did not claim or produce any evidence indicating that the restaurant posted the required workplace notice of the earned sick time law or that it provided copies of such notice to its employees. Mr. Redd noted that he has since rectified the earned sick leave infractions, which is commendable, but DALA does not have authority to alter or dismiss a citation based on the petitioners’ subsequent compliance with the earned sick time laws. See G. L. c. 149, § 27C(b)(4).

² I note that the OAG cited the petitioners for only a single violation of §§ 15 and 19(3), possibly in recognition of his cooperation and the challenging times.

III. Civil Penalties

The OAG is authorized to assess civil penalties for violation of Massachusetts labor laws. G. L. c. 149, § 27C. Mr. Lam took into consideration the statutory factors in his evaluation, in accordance with G. L. c. 149, § 27C(b)(2), including the absence of any prior violations of Massachusetts labor laws by the petitioners, the number of employees involved, the fact that no employees were affected monetarily, the maximum penalty allowable by statute, and the absence of any intent to violate the law. The petitioners did not establish any error in issuing these penalties. Cf. *Roufail v. Office of Attorney General*, LB-21-0406-0409 (DALA June 6, 2023); *Garcia v. Office of Attorney General*, LB-21-0034-0036 (DALA Dec. 16, 2021).

CONCLUSION AND ORDER

For the foregoing reasons, the citations issued by the Office of the Attorney General, Fair Labor Division—numbered 21-09-26759-001, 21-09-26759-002, and 21-09-26759-003—are affirmed. The petitioners are hereby ordered to pay the civil penalties assessed in those citations, in the total amount of \$1,500.00.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ John G. Wheatley

John G. Wheatley
Administrative Magistrate

AUG 21 2023