COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Murali Ghanta and Horizon International Trd., Inc.,
Petitioners

v. Docket Nos. LB-22-0554 – 0558

Office of the Attorney General,
Fair Labor Division
Respondent

Appearance for Petitioners:

Sean Cronin, Esq.
Cronin Law, PC
108 Waldemar Ave
East Boston, MA 02128

Appearance for Respondent:

Alex Sugerman-Brozan, Esq.
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Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Petitioners appeal five civil citations issued by the Fair Labor Division of the Massachusetts Attorney General's Office.

The first two citations, based, respectively, on a failure to pay employees on a bi-weekly or semi-monthly basis and on the failure to furnish a suitable pay slip, both in violation of G.L. c. 149, § 148, are affirmed. There is no serious dispute that Petitioners failed to comply with the requirements of the statute. Nor have the Petitioners met their burden of proving that the penalties for these citations were incorrectly assessed.

The third citation is for failure, with specific intent, to furnish payroll records in violation of G.L. c. 151, §§ 15, 19(3). This citation is reversed. The specific intent finding is vacated because, although the production deadline was communicated to the

Petitioners' counsel, he did not convey this deadline to the Petitioners. Notwithstanding the general ascription of an agent's knowledge to a principal, such ascription does not apply where the principal's *actual* knowledge or intent is at issue. Although the record does not support a finding of specific intent, it does support a violation without specific intent. The penalty for the third citation is remanded to the Fair Labor Division for recalculation in light of the reversal of its specific intent determination.

The fourth citation, based on a failure to track the accrual and usage of earned sick time, in violation of G.L. c. 149, § 148C(m), is affirmed. Although the Petitioners claim they had an "unlimited" sick time policy, which might in theory excuse them from the statute's tracking requirements, what they actually had was an informal practice of accommodating sick time requests. This is not the same as having a "policy," let alone an unlimited sick time policy. Nor have the Petitioners met their burden of proving that the penalty for this citation was incorrectly assessed.

The fifth citation, based on an asserted failure to post and/or distribute the earned sick time notice required by G.L. c. 149, § 148C, is reversed. The Petitioners did post the required sick time notice. The Petitioners did not furnish evidence of this to the Fair Labor Division prior to the issuance of the citation, but that failure did not preclude them from doing so at the hearing.

DECISION

The Petitioners, Horizon International Trading, Inc. ("Horizon") and Murali Ghanta, appeal five civil citations issued by the Respondent, the Office of the Attorney General, Fair Labor Division ("the FLD").[1]

I held a hearing on August 29, 2023, at the Division of Administrative Law Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148. The hearing was recorded digitally. I admitted into evidence Petitioners' Exhibits 1-12 and Respondent's Exhibits 1-18. Investigator Tom Lam testified on behalf of the FLD. Mr. Ghanta testified on

[1] The FLD had issued a prior citation, dated May 11, 2022, for failure to produce records. On June 22, 2023, I granted the FLD's motion to dismiss as untimely the Petitioners' appeal of that citation. (*Horizon Int'l Trading, Inc., et. al. v. Office of the Attorney General – Fair Labor Division*, Docket No. LB-22-0626). That citation, and the circumstances leading to its issuance, are discussed in this decision for context.

behalf of the Petitioners. The parties submitted post-hearing briefs, at which point the record was closed.

FINDINGS OF FACT

Based on the evidence presented by the parties, the parties' stipulations, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. Horizon is a privately held software development company incorporated in Louisiana and located in Belmont, Massachusetts. (Stipulation No. 1).
2. Mr. Ghanta is the company's director. (Stipulation No. 2).
3. On October 18, 2021, the FLD sent Mr. Ghanta a demand for Horizon documents encompassing the period of January 1, 2021 through October 18, 2021. (Respondent's Exhibit 1).
4. On November 2, 2021, the Petitioners produced monthly pay stubs from January 1, 2021 through September 30, 2021 and a one-page memo concerning holidays and vacation time. The Petitioners did not provide: daily time keeping records, earned sick time policies, earned sick time accruals, personnel policies, or information concerning employee job titles and classifications, all of which the FLD had demanded. (Lam Test.; Respondent's Exhibit 1).
5. At some point, FLD investigator Tom Lam spoke with Mr. Ghanta over the telephone about the missing documents. (Lam Test.).
6. On May 11, 2022, the FLD issued Citation No. 21-08-25924-001 to the Petitioners for failure to produce records, with specific intent, in violation of G.L. c. 151, §§ 15, 19(3). The FLD assessed a civil penalty of $5,000. (Lam

Test.). As explained in footnote 1, this citation is not at issue in this appeal.

7. On June 29, 2022, the FLD issued a second demand for production, requesting (1) payroll, timekeeping, sick leave, and other documents for January 1, 2021 through June 29, 2022; and (2) pay stubs for October 1, 2021 through June 29, 2022. The FLD set a deadline of July 14, 2022. (Stipulation No. 3; Respondent's Exhibit 1).
8. Mr. Ghanta left a voicemail requesting an extension. The deadline was extended to July 29, 2022. (Lam Test.).
9. At some point in July 2022, the FLD had a conversation with Mr. Ghanta. (Respondent's Exhibit 2).
10. On July 20, 2022, the FLD e-mailed Mr. Ghanta confirming its understanding that Horizon did not have: (1) any documents that show the number of hours worked by employees each day and each week; (2) a written earned sick time policy; or (3) a record of earned sick time accruals and usage for all employees. (Respondent's Exhibit 2).
11. In the July 20, 2023 e-mail, the FLD also set a deadline of July 29, 2022 for production of documents it believed Horizon did possess, including: (1) the names of all workers employed by Horizon from January 1, 2021 through the present, along with their job titles, rates of pay, hire/termination dates, phone numbers, and e-mail addresses; (2) payroll ledgers or journals for January 1, 2021 through the present; (3) pay stubs for October 1, 2021 through the present; and (4) any and all personnel policies and/or manuals, other than the single page document already provided. (Respondent's Exhibit 2).

12. On July 28, 2022, the FLD, in response to a voicemail left by Mr. Ghanta, granted a two-week extension for producing the documents, setting a new deadline of August 10, 2022. (Respondent's Exhibit 3).

13. In a letter dated July 29, 2022, Mr. Ghanta advised the FLD as follows:

> Our company does not have any specific sick-pay policy or other related records apart from the state mandated provisions. [...] As suggested in your email, we instituted a process to track hours for some of the employees. Also started maintaining the sick time records as instructed. We will start taking pay frequency election forms from new employees.

Attached to this letter was (1) an employee list with job titles, classification, dates of hire and termination, salaries, and addresses; (2) a holiday pay policy; and (3) pay stubs for January 2021 to June 2021. (Lam Test.; Respondent's Exhibit 10).

14. On August 10, 2022, the Petitioners retained Attorney Corey Williams of Williams Law Firm. (Stipulation No. 5).

15. On August 25, 2022, the FLD held a telephonic meeting with Attorney Williams and Mr. Ghanta to discuss the Petitioners' failure to comply with wage and hour laws and to identify the steps required for the Petitioners to get into compliance. (Lam Test.; Ghanta Test.).

16. The FLD followed up with an e-mail to Attorney Williams on August 25, 2022, confirming the Petitioners' next steps, namely:

    - Establishing a daily time-keeping record for the company's employees and producing those records to the FLD;
    - Establishing an earned sick leave policy;
    - Providing notice of the earned sick leave policy to the company's employees;
    - Tracking and having a record of earned sick leave accrual and usage;
    - Election forms for all salaried employees who have agreed to be

paid on a monthly basis; and

- For employees who have elected not to be paid on a monthly basis, payroll documents for those employees to show they are being paid either weekly or bi-weekly.

The e-mail also set a production deadline of September 30, 2022. Mr. Ghanta, who was by this time represented by Attorney Williams, was not copied on this e-mail to his counsel. (Stipulation No. 6; Lam Test.; Respondent's Exhibit 4).[2]

17. Attorney Williams did not apprise Mr. Ghanta of the September 30, 2022 deadline until after the deadline had passed. (Ghanta Test.).[3]

18. Investigator Lam sent an e-mail on August 26, 2022, asking the Petitioners to also calculate the earned sick time leave accruals dating back to January 1, 2022. (Respondent's Exhibit 5).

19. The Petitioners did not provide the requested documents to the FLD by September 30, 2022. (Stipulation No. 7).

20. In an e-mail to Attorney Williams on October 5, 2022, the FLD inquired as to the status of the outstanding documentation. (Stipulation No. 8).

21. On October 12, 2022, Attorney Williams e-mailed Mr. Ghanta the list of items required to bring the Petitioners into compliance, adding: "Let me know

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[2] Mr. Lam initially testified that this e-mail memorialized a September 30, 2022 deadline established during the telephone call (in which Mr. Ghanta had participated), but later acknowledged that this e-mail could have been the first time the deadline had been set. (Lam Test.).

[3] I make this finding based on the record before me. Attorney Williams is not a party or a witness in this matter and thus lacked an opportunity in this forum to respond to the assertion that he failed to apprise the Petitioners of the September 30, 2022 deadline.

where we stand. I will reach out to the AG's office and let them know we are almost complete to buy us some more time." (Petitioners' Exhibit 12).

22. On October 14, 2022, the FLD sent another e-mail to Attorney Williams, asking for the status of the outstanding documents. (Respondent's Exhibit 6).

23. On October 14, 2022, Attorney Williams replied, apologized for the delay, and assured the FLD that the documentation would be provided "ASAP." (Stipulation No. 9; Respondent's Exhibit 6).

24. On October 20, 2022, Attorney Williams e-mailed Mr. Ghanta five documents for his review, titled, respectively, "Payroll Frequency Election Form," "Work Attendance Policy," "Critical Document Acknowledgment," "Discrimination and Harassment Policy," and "Horizon International Client Agreement." (Petitioners' Exhibit 12).

25. On October 26, 2022, the FLD e-mailed Attorney Williams once again, requesting an update on when the requested information would be provided. (Stipulation No. 10; Respondent's Exhibit 7).

26. On November 1, 2022, Attorney Williams responded to the FLD's October 26 e-mail stating, among other things: "I just met with my client and I will submit a package tomorrow at the latest." (Stipulation No. 11; Respondent's Exhibit 8).

27. No documents were received on November 2, 2022. (Stipulation No. 12).

28. On November 7, 2022, the FLD issued five citations against the Petitioners:

    - Citation No. 21-08-25924-002 for "failure to make timely payment of wages due and owing from January 1, 2021 to September 30, 2021," in violation of G.L. c. 149, § 148, without specific intent; a civil penalty of

$10,000 was assessed;

- Citation No. 21-08-25924-003 for "failure to furnish a suitable pay slip, check stub, or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amount of deductions or increases made for the pay period from January 1, 2021 to September 30, 2021," in violation of G.L. c. 149, § 148, without specific intent; a civil penalty of $5,000 was assessed;

- Citation No. 21-08-25924-004 for "[f]ailure to furnish true and accurate payroll records to the AGO on September 30, 2022," in violation of G.L. c. 151, §§ 15, 19(3), with specific intent; a civil penalty of $10,000 was assessed;

- Citation No. 21-08-25924-005 for "[f]ailure to accurately track accrual and/or use of earned sick time from January 1, 2021 to September 30, 2021," in violation of G.L. c. 149, § 148C(m), without specific intent; a civil penalty of $5,000 was assessed; and

- Citation No. 21-08-25924-006 for "[f]ailure to post and/or distribute required earned sick time workplace notice, from January 1, 2021 to September 30, 2021," in violation of G.L. c. 149, § 148C(o), without specific intent; a civil penalty of $5,000 was assessed.

(Stipulation No. 13; Respondent's Exhibit 9).

29. Horizon's annual payroll was in excess of $2.8 MM. (Lam Test.).

30. Horizon employed approximately twenty employees. (Lam Test.).

31. In determining the penalty amounts, the FLD considered the statutory factors set forth in G.L. c. 149, § 27C(b)(2): (1) any previous violations of G.L. c. 149 or G.L. c. 151; (2) whether the violation was intentional; (3) the number of employees affected; (4) the monetary extent of the violation; and (5) the total amount of the payroll involved. (Lam Test.).

32. Specifically, in its penalty determinations, the FLD considered the fact that there was a prior violation, the number of employees (twenty), the fact that there was no direct monetary loss to employees, and the total amount of

payroll involved (over $2.8 MM). The FLD concluded that the violations underlying Citations 002, 003, 005, and 006 were unintentional and took that into account. The FLD concluded that the violation underlying Citation 004 was the result of specific intent, basing this conclusion on the course of communications with Attorney Williams. (Lam Test.).

33. On November 15, 2022, Attorney Williams e-mailed the FLD, attaching Horizon's "Work Attendance Policy," "Discrimination and Harassment Policy," "Critical Document Acknowledgement Form" (including a section that gives employees payroll frequency options), and "Annual Summary Sheet" (which would be used to track daily timekeeping for employees and sick time usage and accrual). Attorney Williams' e-mail also attached two e-mails, dated April 4, 2014 and April 28, 2015, respectively, tendering offers of employment at Horizon. The attached e-mails contain a paragraph advising the offeree that salary would be paid on a monthly basis. (Petitioners' Exhibits 1-7).
34. On February 24, 2023, Attorney Williams withdrew his representation. (Stipulation No. 14).
35. During the time period of January 1, 2021 through September 30, 2021, Horizon paid its employees on a monthly basis. (Stipulation No. 15).
36. During the time period of January 1, 2021 through September 30, 2021, Horizon employees conveyed their sick time requests via e-mail to company management. (Ghanta Test.).
37. From January 1, 2021 through September 30, 2021, Horizon displayed the

earned sick leave advisory poster prepared by the Attorney General's Office in a common area of its office. (Ghanta Test.; Petitioners' Exhibit 11).[4]

CONCLUSION AND ORDER

An employer who appeals a citation issued by the FLD bears the burden of proving by a preponderance of the evidence that the citation was erroneously issued. G.L. c. 149, § 27C(b)(4).

Citation 002[5]

The FLD issued Citation 002 for failure to pay employees on a bi-weekly or semi-monthly basis from January 1, 2021 to September 30, 2021, in violation of G.L. c. 149, § 148.

General Laws c. 149, § 148, provides, in relevant part, that employers must pay employees:

> "engaged in a bona fide executive, administrative or professional capacity…and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week…bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly…"

There is no dispute that Horizon paid its employees on a monthly basis from January 1, 2021 to September 30, 2021. (Stipulation No. 15). The Petitioners appear to argue that Horizon's employees *did* elect to be paid on a monthly basis because they

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[4] Exhibit 11 consists of two photographs, one depicting the then-current version of the earned sick time advisory poster prepared by the Attorney General's Office and the other depicting the previous version. The FLD argues that "nothing about the exhibit shows that the posters were in fact posted in the workplace nor when they were in fact posted." (FLD Post-Hearing Brief, at 13). I credit Mr. Ghanta's testimony about when and where they were posted.

[5] For ease of reference, the citations will generally be identified by their three trailing digits.

"were notified before they even began working at Horizon that payment would be monthly" and that each employee "received an offer letter that included that the salary was paid monthly, and no employee has ever requested to be paid sooner, either before or after being employed at Horizon." (Petitioner Post-Hearing Brief, at 4 (citing Petitioners' Exhibits 3-4); Ghanta Test.). The argument is unavailing. The term "elects," coupled with the phrase "at his own option," makes plain that the employee must choose to be paid monthly as a matter of his or her own personal preference, without pressure or influence from the employer. Neither prospective employees' knowledge that Horizon decided it would pay them on a monthly basis, nor the employees' acquiescence in this arrangement, is an "election" at the employee's "own option" to be paid that way.

Citation 003

The FLD issued Citation 003 for failure to furnish a suitable pay slip in violation of G.L. c. 149, § 148, which requires that "[a]n employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period." There is no dispute that the pay stubs the Petitioners provided to the FLD failed to include all of the information required by the statute. Specifically, they did not list the number of hours worked by the employees. Accordingly, the Petitioners did not meet their burden of proving that this citation was issued in error.

Citation 004

The FLD issued Citation 004 for failure to furnish true and accurate payroll records on September 30, 2022, in violation of G.L. c. 151, § 15. The Massachusetts

Wage and Hour Law requires all employers who employ persons in the Commonwealth to keep true and accurate records of the following information:

> the name, address and occupation of each employee, of the amount paid each pay period to each employee, of the hours worked each day and each week by each employee, and such other information as the [Director of the Department of Labor Standards] or the attorney general in their discretion shall deem material and necessary.

G.L. c. 151, § 15. Regulations promulgated by the Department of Labor Standards also require employers to keep true and accurate records of employee social security numbers, vacation pay, deductions made from wages, and fees or amounts charged to the employee by the employer. 454 CMR 27.07(2). Employers must keep all such wage and hour records for at least three years. *Id.*

The Wage and Hour Law also requires all employers to permit inspection of their records by authorized individuals and to provide copies of those records upon demand "at any reasonable time":

> Such records shall be maintained at the place of employment, at an office of the employer, or with a bank, accountant or other central location and shall be open to the inspection of the commissioner or the attorney general, or their authorized representatives at any reasonable time, and the employer shall furnish immediately to the attorney general, commissioner or representative, upon request, a copy of any of these records . . . An employer shall allow an employee at reasonable times and places to inspect the records kept under this section and pertaining to that employee.

G.L. c. 151, § 15.

Citation 004 charges that the Petitioners violated G.L. c. 151, § 15, with specific intent. "'Specific intent' refers to purposeful violations, meaning that the employer consciously committed an act or omission with the goal of causing a particular result." *Gilbert, et. al. v. Office of the Attorney General – Fair Labor Division*, Case Nos. LB-19-0211 and 0212, at *11 (DALA Feb. 13, 2020).

The Petitioners contend that they lacked the specific intent to violate the statute because Attorney Williams did not advise them of the September 30, 2022 deadline imposed by the FLD. The FLD demurs, writing that "[i]t is one of the most well-established principles of law that notice upon a party's attorney constitutes notice upon the party itself." (FLD Post-Hearing Brief, at 10).

The FLD's position is understandable, but it overshoots the mark. Even well-established legal principles admit of exceptions and caveats, notwithstanding their seeming familiarity. So too, here. Although information provided to an attorney is generally imputed to the client for the "purpose of determining the client's rights and liabilities" in a matter, the imputation is not made if "those rights or liabilities require proof of the client's personal knowledge or intentions." Restatement of the Law Governing Lawyers, § 28(1) (2000). This rule is consonant with the imputation standards for agency-principal relationships generally. *See* Restatement (Second) of Agency, § 268, comment d (1958) (providing that if an agent fails to transmit information to a principal "the principal is not responsible in an action in which a consciousness of the fact not revealed is a necessary element").[6]

Here, because specific intent turns on the Petitioners' actual intention *vis-à-vis* the production, it would not be legally sound to impute Attorney Williams' knowledge to Horizon. *Contrast Metro Equip. Corp. v. Commonwealth*, 74 Mass. App. Ct. 63, 73 & n.10 (2009) (noting that petitioner could not escape specific intent finding where it did

[6] FLD makes no argument that specific intent could be imputed to the Petitioners under a theory of vicarious or *respondeat superior* liability. Accordingly, I will not address whether such a theory would be applicable to the conduct of outside counsel, such as Attorney Williams.

not argue it was unaware of FLD demand for payroll records sent to its counsel and did not seek to disavow or disassociate itself from counsel's actions).

Attorney Williams' apparent lack of communication may preclude a finding of specific intent, but I see no basis for concluding that it precludes a general violation (that is, a violation without specific intent). *Compare Scyoclirka v. Office of the Attorney General – Fair Labor Division*, LB-10-218 & others, at *20 (DALA Sept. 27, 2011) (affirming general violation of citation for failure to produce records, even though employer was unaware of an e-mail to counsel seeking missing documents, and observing that placing the responsibility of providing a response to FLD in the hands of counsel was a decision attributable to the employer). Liability under G.L. c. 151, § 15 is strict. *King v. National Refrigeration, Inc.*, LB-12-367 and LB-12-407, at *10 (DALA Jan. 29, 2014) (observing that failure to keep or furnish records is a strict liability offence).

Accordingly, insofar as Citation No. 004 asserts a violation of G.L. c. 151, § 15, it is affirmed. The specific intent finding is vacated. The penalty is remanded to the FLD for recalculation.

<u>Citation 005</u>

Citation 005 was issued for failure to track the accrual and/or use of earned sick time, in violation of G.L. c. 149, § 148C(m), from January 1, 2021 to September 30, 2021. Section 148C(m) does not recite any specific requirements on the part of employers. Instead, it provides that the Attorney General "shall prescribe by regulation the employer's obligation to make, keep, and preserve records pertaining to this section consistent with the requirements of section 15 of chapter 151."

The citation itself does not identify which regulation the Petitioners violated. In its post-hearing brief, the FLD cites 940 CMR 33.09, which states: “Employers shall keep true and accurate records of the accrual and use of earned sick time, consistent with the recordkeeping requirements of M.G.L. c. 151, § 15” and “Employers shall maintain such records for a period of three years and must provide copies upon demand by the Attorney General or a designee from the Attorney General's Office.”

The Petitioners assert in their post-hearing brief that Horizon had an “unlimited” sick leave policy. (Petitioner Post-Hearing Brief, at10). This is of potential significance because 940 CMR 33.07(6) provides that employers “that have an unlimited sick leave policy shall not be required to track accrual of sick leave or allow any rollover, provided that such leave is otherwise consistent with M.G.L. c. 149, § 148C.” Accordingly, if Horizon had an “unlimited” sick leave policy from January 1, 2021 to September 30, 2021 and such policy was otherwise consistent with § 148C, it would not have been obliged to track the accrual of sick time.

The record does not quite bear out the existence of an unlimited sick leave policy. Nor is there evidence that any such policy had been communicated to employees. Mr. Ghanta asserted in his July 29, 2022 letter that Horizon did not have “any specific sick-pay policy.” (Respondent’s Exhibit 10). At the hearing, Mr. Ghanta testified that the Petitioners had never denied a sick time request and had never disciplined anyone for taking sick time. (Ghanta Test.). I credit Mr. Ghanta as a generally conscientious employer who personally endeavors to be understanding and accommodating, but this

practice, while positive, is not a "policy." Horizon was not excused from tracking the accrual and usage of earned sick leave.

Also unavailing is any suggestion that Horizon "tracked" sick time usage via its e-mail system because sick leave requests were made via e-mail. The ability to reconstruct employees' sick time use by pulling e-mails from Horizon's e-mail system falls short of "tracking" sick time usage.

Citation 005 was properly issued.

Citation 006

Citation 006 was issued for failure to post and/or distribute the earned sick time notice required by G.L. c. 149, § 148C. As I have credited Mr. Ghanta's testimony that Horizon did, in fact, post the earned sick time poster, I conclude that this citation was issued in error.

The FLD argues that because Petitioner's Exhibit 11 (containing images of the then-current and prior poster located at Horizon's office) "was not provided to FLD at any time prior to the issuance of the citation," it cannot serve as the basis for challenging the issuance of the citation. That might be true if this case was a complaint for judicial review of an agency action pursuant to G.L. c. 30A, § 14. Such proceedings, with certain exceptions and qualifications, are confined to a review of the record that was before the administrative agency. G.L. c. 30A, § 14(5), (6). The FLD provides no argument that proceedings pursuant to G.L. c. 149, § 27C(b)(4) are similarly cabined.[7]

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[7] An employer's failure to furnish corroborating evidence prior to the issuance of a citation and proffering it for the first time at a DALA hearing might bear on the credibility and probative worth accorded such evidence. Depending on the circumstances, a DALA magistrate might conclude, for example, that if the evidence was bona fide, it would have been furnished to the FLD before issuance of the citation, rather

Citation No. 006 is thus reversed.

Penalties

I turn next to the civil penalties assessed by the FLD for Citations 002, 003, and 005. I do not consider the civil penalty assessed for Citation 004, which I remand to FLD for recalculation, or that assessed for Citation 006, which I reverse.

In assessing the amount of a civil penalty, the FLD must consider: (1) any previous violations of G.L. c. 149 or G.L. c. 151; (2) whether the violation was intentional; (3) the number of employees affected; (4) the monetary extent of the violation; and (5) the total amount of the payroll involved. *Id.* The FLD has the discretion to assess a civil penalty based on these statutory factors, so long as the penalty falls below the statutory upper limit. *Bryant v. Office of the Attorney General- Fair Labor Division*, LB-18-0584, 18-0585, at 14 (DALA May 10, 2019). The statute does not state how these factors are to be weighed or that these are the only factors that may be considered. *Briggs v. Office of the Attorney General – Fair Labor Division*, LB-09-1022, 09-1074, at 21 (DALA Feb. 26, 2013).

The FLD's basis for assessing a particular penalty is "information that it alone possesses." *Addario v. Office of the Attorney General – Fair Labor Division*, LB-20-0169, at 8 (DALA Jan. 14, 2021). Accordingly, it may be difficult or even impossible for an employer to realistically meet its burden of proving that a penalty was erroneously issued unless the FLD offers some insight regarding how it arrived at the penalty amount.

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than months or years later in connection with an evidentiary hearing. In this case, however, the failure to produce Exhibit 11 seems to evince nothing other than documentation slipping between the cracks.

Majowicz v. Office of the Attorney General – Fair Labor Division, LB-11-163, at 9-10 n.2 (DALA Sept. 11, 2012).

Here, however, the FLD did offer some insight into how the penalties were assessed. Although Mr. Lam's testimony concerning penalties was not detailed, it was not quite so threadbare as to make it unreasonably difficult for Horizon to challenge them or for this Division to review them.

The Petitioners take issue with Mr. Lam's testimony on this subject because Mr. Lam did not approve and provided no recommendations concerning the penalty amounts. The Assistant Attorney General assigned to the case made recommendations, which were submitted to FLD management for approval. Even though Mr. Lam did not, himself, recommend or approve the penalty amounts, it does not follow that he lacked a basis to testify about the FLD's consideration of the statutory factors. Mr. Lam credibly testified that he was involved in the process, and nothing about that testimony would lead me to conclude that his testimony --- as far as it went --- was anything other than an accurate reflection of the FLD's consideration of the statutory factors.[8]

The $10,000 penalty assessed in Citation 002 for failure to make timely payment of wages is not unreasonable in light of the statutory factors. The $10,000 penalty amount represents only 0.36% of Horizon's annual payroll. Nor can I say that a $10,000 penalty is disproportionate when viewed in light of the twenty or so employees affected. The

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[8] In their post-hearing brief, the Petitioners note that the FLD successfully objected on grounds of privilege to a question about the FLD's internal deliberations. (Petitioner's Post-Hearing Brief, at 5 n. 1). This objection concerned the timing of FLD's decision to issue citations, not its consideration of the statutory factors, as the Petitioners appear to suggest in their brief.

FLD considered the fact that this violation was unintentional and also concluded that "the violations did not cause any direct monetary loss to employees." (FLD Post-Hearing Brief, at 15).[9] I cannot say that this penalty, which was less than half the statutory maximum for a subsequent offense, failed to properly accommodate these factors when viewed against the context of Horizon's total payroll and the number of affected employees.

For similar reasons, I conclude that the Petitioners have not met their burden of proving that the $5,000 penalties assessed for Citations 003 and 005 were erroneous.

Conclusion and Order

For the foregoing reasons, (1) the FLD's issuance of Civil Citation Nos. 21-08-25924-002, 21-08-25924-003, and 21-08-25924-005 is affirmed; (2) the issuance of Civil Citation No. 21-08-25924-004 is affirmed insofar as it finds a violation of G.L. c. 151, §§ 15, 19(3), but the finding of specific intent is reversed and the penalty assessment is remanded to FLD for recalculation; (3) the issuance of 21-08-25924-006 is reversed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole
Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: __________

[9] The FLD was perhaps overly lenient in its application of the "monetary extent of the alleged violations" factor. Although the wages may not have been withheld, their payment was detained.