COMMONWEALTH OF MASSACHUSETTS

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

Trevor Rhone and SCS Building Maintenance, Inc.,
Petitioners

v. Docket Nos. LB-19-0406 and LB-19-0407

Office of the Attorney General,
Fair Labor Division
Respondent

Appearance for Petitioners:

Trevor Rhone, *pro se*
Framingham, MA 01702

Appearance for Respondent:

Alex Sugerman-Brozan, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

Petitioners, a commercial cleaning company and its president, violated G.L. c. 149, § 148 by failing to pay out accrued vacation time to seven employees upon termination. The Fair Labor Division of the Office of the Attorney General ("FLD") appropriately assessed $7,728.00 in restitution. The $4,000 civil penalty assessed by the FLD was within its discretion; it was well below the statutory maximum for an offense committed without specific intent and was proportionate to the number of employees affected and the restitution owed.

The Petitioners also violated G.L. c. 151, § 15 by failing to furnish required records upon request by the FLD. The civil penalty of $5,000 assessed by the FLD was reasonable. Because this was the second such violation by the Petitioners, the maximum penalty was $25,000. The Petitioners did not furnish documents by the deadline set by the FLD, and when they did produce documents, their production was incomplete.

DECISION

On July 31, 2019, the Respondent, the Office of the Attorney General, Fair Labor Division ("FLD"), issued two civil citations to the Petitioners, SCS Building Maintenance, Inc. ("SCS") and its president, Trevor Rhone, pursuant to G.L. c. 149, § 27C. Citation 001[1] was issued for failure to make timely payment of wages due and owing from June 25, 2018 through July 8, 2018, in violation of G.L. c. 149, § 148, *without* specific intent, and assessed restitution of $7,728.00 and a civil penalty of $4,000.00. Citation 002[2] was issued for failure to furnish payroll records to the Attorney General's Office, in violation of G.L. c. 151, §§ 15, 19(3), *without* specific intent, and assessed a civil penalty of $5,000.00. The Petitioners filed timely appeals of the two citations pursuant to G.L. c. 149, § 27C(b)(4).

Chief Administrative Magistrate Edward McGrath held a hearing on October 24, 2022 at the Division of Administrative Law Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148. The hearing was recorded digitally. Chief Magistrate McGrath admitted into evidence Petitioners' Exhibits 1-2 and Respondent's Exhibits 1-18.[3] Investigator Tom Lam, former SCS employee Fernando Fonseca, and former SCS employee Edigleyton Arruda testified on behalf of the FLD. Mr. Rhone testified on behalf of the Petitioners. The Petitioners submitted a written closing argument on November 7, 2022, at which point the record was closed.

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1 Citation No. 18-07-50984-001/Docket No. LB-19-0406.

2 Citation No. 18-07-50984-002/Docket No. LB-19-0407.

3 Five documents were marked for identification as follows: Petitioner's Pre-Hearing Memorandum ("A"); Respondent's Pre-Hearing Memorandum ("B"); Amended Status Report ("C"); Complaint Regarding Fines, FLD LB-19-0406 and 0407 ("D"); and Respondent's Proposed Exhibit 20, a copy of M.G.L. c. 151, § 19 ("E").

Before Chief Magistrate McGrath was able to render a decision in this matter, he left DALA for another position. The parties agreed to have this matter decided by the undersigned administrative magistrate on the present record pursuant to 801 CMR 1.01(11)(e). I note that I was present for the October 24, 2021 hearing.

FINDINGS OF FACT

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

1. SCS is a privately held domestic corporation that incorporated in Massachusetts in 2010. (Stipulation, ¶ 1).[4]
2. SCS's current principal office location is 4 Mount Royal Ave, Suite 370 in Marlboro, Massachusetts. (Stipulation, ¶ 2).
3. SCS is engaged in commercial cleaning. (Stipulation, ¶ 3).
4. Mr. Rhone is the owner/operator of SCS, serving as its lone corporate officer in the roles of President and Treasurer. (Stipulation, ¶ 4).
5. Mr. Rhone has complete direction and control of SCS's operations and employees. (Stipulation, ¶ 5).
6. SCS had a contract to clean schools for the Dennis-Yarmouth School District. (Fonseca Test.).
7. Mr. Fonseca was hired by SCS in July 2015. He was first hired as a custodian, but was made a supervisor about six weeks later. (Fonseca Test.).
8. Mr. Arruda testified that he was also hired by SCS in July 2015. He worked as a custodian at the Station Elementary School in South Yarmouth,

[4] The parties' factual stipulations are set forth in their pre-hearing memoranda.

Massachusetts. (Arruda Test.).

9. When Mr. Fonseca was first hired by SCS, a group of employees were brought together in a hotel in Yarmouth and verbally apprised of the vacation policy by a manager. Mr. Fonseca was told that non-supervisor employees would receive a week vacation after one year of employment. Supervisors would receive two weeks of vacation in their second year and would start receiving three weeks in their third year. (Fonseca Test.).
10. SCS paid its employees a $1.00 per hour "health and welfare benefit" in addition to their hourly salary. (Fonseca Test.; Respondents' Exhibits 18 and 19).
11. Mr. Rhone testified that employees for the Dennis-Yarmouth School District contract received offer letters that set forth their rates of pay, but that did not say anything about vacation time. (Rhone Test.). Mr. Fonseca and Mr. Arruda did not recall having received any such offer letter. (Fonseca Test.; Arruda Test.). No such letters were produced to the FLD or furnished in connection with this matter. (Rhone Test.). Given the time that has passed, SCS's seemingly lackluster record-keeping practices, and the fact that no offer letters were produced, I am not able to find that the employees received the offer letters described by Mr. Rhone.[5]
12. Other than Mr. Fonseca, the SCS employees for the Dennis-Yarmouth School District cleaning contract would punch timecards at the various sites to which

[5] Even if I found that the offer letters described by the Petitioners had been provided to the employees, it would not be material to the analysis that follows. The absence of any discussion of vacation policy would not be inconsistent with my finding that SCS had verbally communicated the vacation policy described by Mr. Fonseca.

they were assigned. (Fonseca Test.). Mr. Fonseca was told by SCS that he was not required to punch a timecard. (Fonseca Test.).

13. Every Monday morning, Mr. Fonseca would collect timecards from SCS employees assigned the various worksites. At first, he conveyed the information contained in the timecards to the home office over the telephone. This information included vacation, holiday, and sick time taken by employees. At some point, he stopped calling in with this information and instead entered it into a spreadsheet that he would e-mail to the home office every Monday. Mr. Fonseca would communicate his own time on Mondays as well. (Fonseca Test.).
14. Mr. Fonseca kept track of sick, holiday, and vacation time as part of his record-keeping. (Fonseca Test.; Respondents' Exhibits 18 and 19).
15. Mr. Fonseca put the timecards into a box. When SCS lost the cleaning contract, an SCS manager collected SCS equipment and records (including the timecards) from the worksites and put them into a truck. (Fonseca Test.).
16. SCS's contract with the Dennis-Yarmouth School District ended on July 1, 2018. SCS did not win the bid to renew the contract. (Respondent's Exhibit 1; Fonseca Test.).
17. Although Mr. Arruda received one week of vacation per year, he had not taken vacation time in 2017. Accordingly, he had accrued 80 hours of vacation time in 2018. (Arruda Test.).
18. Mr. Fonseca had accrued 160 hours of unused vacation time by the end of the contract. (Fonseca Test.).

19. Mr. Fonseca submitted hours for the two weeks preceding the final pay date of the contract, July 13, 2018. (Fonseca Test.; Respondent's Exhibits 8-9). The hours included accrued and unused vacation hours. (Fonseca Test.). Although Mr. Fonseca did not testify to this directly, I infer that he included these vacation hours because he knew the contract was ending. Mr. Fonseca also included 8 hours of holiday pay for Ronaldo Paiva. These hours were entered by the SCS home office on July 12, 2018 into a document titled "DYRSD Bi Weekly Payroll Time Sheet" and bearing a stamp indicating that it was entered on July 12, 2018. (Respondent's Exhibit 9, pp. 2-4). Below the entry stamp are initials that I infer are for Jessica Torres, who worked in the SCS home office. This document was later produced by SCS to FLD in response to a demand for records. (Lam Test.).
20. I find that Mr. Fonseca testified truthfully about the hours reported and that he had the knowledge and familiarity necessary to correctly document his fellow employees' accrued and unused vacation time. After all, Mr. Fonseca collected timecards and communicated to the home office his fellow employees' hours every week.
21. The seven SCS employees who were owed the vacation and holiday time set forth in Respondent's Exhibit 9 were not paid for this time. (Fonseca Test.; Arruda Test.; Respondent's Exhibits 8, 18, and 19).
22. On or about July 24, 2018, Mr. Fonseca filed a complaint against SCS, claiming, among other things, that when SCS paid him his final paycheck after the conclusion of the Dennis-Yarmouth School District contract, it did

not include a payout for vacation time he had been owed. (Respondent's Exhibit 2; Fonseca Test.).

23. By that time, the FLD had issued Citation No. 17-11-47805-001 (unrelated to this matter), alleging a violation of G.L. c. 151, § 15 for failing to furnish records to FLD *with* specific intent. SCS v. Office of the Attorney General, Fair Labor Division, LB-18-0290 (DALA December 17, 2018). The Petitioners appealed to DALA, and the matter proceeded to a hearing on August 21, 2018. DALA later affirmed the citation and the $10,000 civil fine, concluding that the Petitioners "did not provide documents by the deadline, did not take timely steps necessary to comply with the payroll demand, and ultimately did not provide all demanded documents, even late." Id. at 6.
24. At the August 21, 2018 hearing, FLD investigator Tom Lam hand-delivered a payroll demand ("the Demand") to Mr. Rhone. The Demand sought, for the period between January 1, 2018 and August 18, 2018, payroll ledgers, pay stub records, and time-keeping records that reflect each individual's (1) identity; (2) address; (3) occupation; (4) rate of pay; (5) number of hours of work performed each day and each week; (6) wages paid; and (7) deductions from each pay period. The payroll demand letter also requested SCS's vacation time/pay and sick time policies, as well as records concerning employees' accrual and use of earned sick time. (Respondent's Exhibit 4).
25. The production deadline was on/by September 4, 2018. (Respondent's Exhibit 4).
26. Mr. Rhone did not make any phone calls, send any e-mails, or otherwise

communicate with Mr. Lam between August 21, 2018 and September 4, 2018. (Lam Test.; Respondent's Exhibit 6).

27. On September 10, 2018, Mr. Rhone left a voicemail for Mr. Lam stating, among other things, that the September 4, 2018 deadline for responding to the Demand would be "impossible." He also stated "I thought I was already dealing with an investigation so now I guess you are asking me for more stuff." (Respondent's Exhibit 3).

28. Mr. Lam responded to the voicemail that day and stated that he had previously advised Mr. Rhone that the Demand was for a time period different than that which was at issue with respect to Citation No. 17-11-47805-001. Mr. Lam further stated that between August 21, 2018 and September 4, 2018, Mr. Lam had not received any phone calls, e-mails, or other correspondence from Mr. Rhone. Mr. Lam further reminded Mr. Rhone of the following language set forth in the citation: "Each day of not responding to this request will be deemed a separate offense and result in a separation [sic] citation." (Respondent's Exhibits 3, 6).

29. Later that day, Mr. Rhone e-mailed FLD an Excel spreadsheet titled "Mass Payroll Report." (Respondent's Exhibit 7). Respondent's Exhibit 8 is the FLD's working copy of the Mass Payroll Report spreadsheet. I take this to be a document reflecting data extracted from the spreadsheet. Respondent's Exhibit 8 recites the gross pay, total hours, regular hours, overtime hours, holiday hours, paid time off hours, sick paid time off hours, vacation paid time off hours, and "vacation payout hours" for seven SCS employees for pay dates

between January 12, 2018 and July 13, 2018.

30. That day, Mr. Rhone and Jessica Torres (from the SCS home office) also e-mailed the FLD bi-weekly payroll time sheets for the Dennis-Yarmouth School District project. These included bi-weekly records for the following pay dates: April 6, 2018, April 20, 2018, May 4, 2018, May 18, 2018, June 15, 2018, and July 13, 2018. They also included a payroll time sheet record entered on July 10, 2018 that bore the notation "Termination List for ADP." (Respondent's Exhibits 9 and 10).

31. Also on September 10, Mr. Rhone forwarded a list reflecting the name, address, and rates of pay for SCS employees, (Respondent's Exhibit 13), as well as payroll registers prepared by ADP. (Respondent's Exhibits 17, 18, and 19).

32. The Petitioners did not produce daily time keeping records or pay stub records. (Lam Test.).

33. On May 21, 2019, Mr. Rhone informed the FLD:

> My files from Dennis-Yarmouth contract may be in a storage unit with our equipment as a result of contract ending and my employees evacuating our on-site office. I am behind on payments to the storage facility so I do not have current access to the unit to confirm. I'm hoping some receivables come in the next week or so to get caught up and check the storage unit. (Respondent's Exhibit 11).

34. Mr. Lam, relying upon the hours reflected in Respondent's Exhibit 9 (which was in turn based on the hours reported by Mr. Fonseca), concluded that SCS employees were owed restitution as follows:

Name	Rate of Pay	Vacation Hours	Holiday Hours	Total Owed
Ana Laviolette	$14.00	40	0	$560.00
Andreia	$14.00	40	0	$560.00

Salgues Carvalho				
Edigleyton Arruda	$14.00	80	0	$1,120.00
Fernando Fonseca	$22.50	160	0	$3,600.00
Jacqueline Fonseca	$14.00	40	0	$560.00
Mauro Quevedo Hernandez	$14.00	40	0	$560.00
Ronaldo Paiva	$16.00	40	8	$768.00

TOTAL: **440** **8** **$7,728.00**

(Lam Test.; Respondent's Exhibit 14).

35. On July 31, 2019, about ten months after the document production deadline of September 4, 2018, FLD issued Citation No. 001 and Citation No. 002. (Respondent's Exhibits 15 and16).

36. On August 12, 2019, the Petitioners timely appealed these citations to DALA.

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 001

The FLD issued Citation 001 for failure to make timely payment of wages due and owing from June 25, 2018 through July 8, 2018, in violation of G.L. c. 149, § 148, *without* specific intent. Specifically, FLD contends that the Petitioners failed to pay out accrued vacation time for seven employees (and holiday pay for one employee) when they were discharged upon the termination of the Dennis-Yarmouth School District contract.

General Laws c. 149, § 148, provides, in relevant part:

> [A]ny employee discharged from ... employment shall be *paid in full on the day of his discharge.... The word "wages" shall include* any holiday or *vacation payments* due an employee under an oral or written agreement.... No person shall by a special contract with an employee or by any other means exempt himself from this section."

(Emphases added.)

Employers are not required to offer employees vacation time -- but if they do, they "must pay unused, earned vacation time to employees who have been involuntarily discharged." Dixon v. City of Malden, 464 Mass. 446, 450 (2013) (citing Elec. Data Sys. Corp. v. Att'y Gen., 454 Mass. 63, 71 (2009)).

I have found that, by the time the SCS employees were terminated, they had accrued the vacation hours (and holiday hours) itemized by the FLD and that the FLD correctly determined their respective rates of pay.

The Petitioners have not met their burden of proving that the citation was issued in error. The Petitioners state that there is nothing in writing memorializing an agreement that SCS employees would accrue vacation time. This is irrelevant. Employees may accrue vacation time under an oral agreement. G.L. c. 149, § 148. An oral agreement is what Mr. Fonseca described.

The Petitioners also take issue with the accrued vacation hours provided by Mr. Fonseca and memorialized in Exhibit 9:

> Fonseca and Arruda submitted a request for vacation payment at contract termination that was not applicable and denied by the home office … this document was NOT approved by the home office and the request was denied. The request was fraudulent, suspicious, and without authority. (Post-Hearing Brief, at 3, ¶ 6).

These conclusory remarks spur more questions than they answer. Why were the vacation requests "inapplicable" and "denied by the home office?" Is the Petitioners' position that SCS did not offer vacation time to its employees? Or do they acknowledge that SCS offered vacation time, and instead assert that Mr. Fonseca misunderstood or misstated the accrual process? Do the Petitioners contend instead that he inaccurately logged the vacation hours already taken by his fellow employees? Or that he made a mistake in his calculations?

The passage quoted above from the Petitioners' post-hearing brief encapsulates an overarching problem with the Petitioners' arguments in this appeal: they cast general aspersions on the claims for vacation pay, but they never proffer evidence regarding what they allege SCS's vacation policies actually were.

To be clear, the Petitioners' burden is to prove that the citation was issued in error, not to advance an alternative account of its vacation policies and the vacation time accrued (if any). If the Petitioners could show that the FLD's assessment is untenable without substantiating an alternative understanding, perhaps that could suffice to meet their burden. Nevertheless, in this case, SCS as the employer should be in a position to clearly and affirmatively describe its vacation accrual policies and itemize with precision the unused vacation hours its employees may have accrued. The Petitioners' conclusory challenges to Mr. Fonseca's tally of the vacation hours owed to SCS employees ring hollow.[6]

The Petitioners' efforts to challenge the $4,000 civil penalty assessed by the FLD do not fare any better. The FLD states that because the Petitioners acted without specific

[6] The Petitioners do not appear to lodge any challenge to the calculation of holiday pay owed to Ronaldo Paiva.

intent, the maximum penalty under G.L. c. 149, § 27C(b)(2) is $7,500. It appears that, for this citation, the FLD is not including the Petitioners' prior citation, Citation No. 17-11-47805-001, as a prior offense for purposes of calculating the maximum penalty. If the prior citation were included, the maximum penalty would be $25,000. G.L. c. 149, § 27C(b)(1). I will assume, for purposes of the following discussion, that the maximum penalty for Citation 001 is $7,500.

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. FLD, 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. FLD, LB-09-1022/09-1074, at 21 (DALA February 26, 2013).

The FLD's explanation for how it assessed the civil penalties for the two citations was threadbare. FLD (a) summarily noted that it considered the statutory factors; (b) observed that the penalties were below the statutory maximums; and (c) remarked that each day the Petitioners failed to maintain or furnish records and each employee not paid wages owed could constitute separate offenses (and thus incur separate penalties). (Opening Statement; Lam Test.). The FLD's observation that the penalties could have been much greater is not an explanation of how the FLD arrived at *these* particular penalties.

In some cases, an explanation may be required. As Acting Chief Administrative Magistrate Rooney has observed, the FLD's basis for assessing a particular penalty is "information that it alone possesses." Addario v. FLD, LB-20-0169, at 8 (DALA January 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. Majowicz v. FLD, LB-11-163, at 9-10 n.2 (DALA September 11, 2012).

Sometimes, of course, the existence of the violation, but not the amount of the penalty, is contested. In such instances, a penalty with scant justification might very well pass muster if it falls below the applicable statutory maximum. Briggs v. FLD, LB-09-1022/LB-09-1074, at 24-25 (DALA February 26, 2018) (citations omitted). But here, the Petitioners *do* challenge the penalty amount. They argue that the FLD did not appreciate SCS's small size when it calculated the penalties. (Post-Hearing Brief, at 1-2). Nevertheless, given this fairly discrete challenge to the penalties, they can be evaluated without a meaningful explanation from the FLD as to how they were assessed.

Turning to the civil penalty for Citation 001 (the penalty for Citation 002 will be discussed later, in the next section), I cannot say that the $4,000 civil penalty assessed here was erroneously issued. It is well below the statutory maximum and is not disproportionate when viewed in the context of the number of employees affected (seven) or the restitution owed ($7,728.00). As for the Petitioner's argument that the penalty is too large for a business of its small size, I conclude that the more salient considerations are the number of employees affected and the monetary amount of the violation. SCS may be a small business (a relative term, but serviceable for present purposes), but the

civil penalty is proportional to its violation. I see no basis for concluding that a small business can "punch above its weight" in terms of the violation (assuming, without accepting, that this is what occurred), but is also somehow excused from a penalty proportional to that violation.

Citation 002

The FLD issued Citation 002 for failure to furnish records for inspection 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:

> 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.

"The [FLD] has the authority to demand access to any documents that bear on a question of wages." Wiedmann v. Bradford Grp., Inc., 444 Mass. 698, 704 (2005) (citing G.L. c. 151, § 3). Naturally, this includes the type of records specified in G.L. c. 151, § 15. Metro Equip. Corp. v. Commonwealth, 74 Mass. App. Ct. 63, 65 n.3 (2009). The employer has no right to refuse a demand for these records from the FLD, and the FLD "is not burdened by the statute to reveal the nature of [the] investigation when making a records request." Metro Equip., 74 Mass. App. Ct. at 67 (citing G.L. c. 151, § 15). Failure to furnish records to the FLD upon request is a violation of the statute that may result in civil or criminal penalties. G.L. c. 151, § 19(3) (citing G.L. c. 149, § 27C). Compulsory production of required records and strict liability for noncompliance are vital regulatory tools designed to achieve the Wage and Hour Law's goal of preventing oppressive, unfair compensation practices. Metro Equip., 74 Mass. App. Ct. at 69; G.L. c. 151, §§ 1-2.

Employers are required to maintain true and accurate payroll records and make them available to the Attorney General "at any reasonable time." G.L. c. 151, § 15. As Administrative Magistrate Kenneth Bressler stated in the prior DALA case involving SCS, "[a]mong the purposes of G.L. c. 151, § 15 is to make it easier for [the FLD] to ensure that employers are complying with the law and that employees receive their due under the law. The law does not envision that [the FLD] 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." SCS v. Office of the Attorney General, Fair Labor Division, LB-18-0290, at 4 (DALA December 17, 2018).

Here, the Petitioners failed to produce records by the deadline of September 4, 2018 and when they did produce records, their production was incomplete. There is no dispute that the Petitioners did not produce daily time-keeping records or paystub records, even after the passage of the ten months between the original demand deadline and the date the FLD issued Citation 002.

The Petitioners have indicated that daily time-keeping records, the timecards, were unavailable either because they were not "returned" to SCS from the work sites or because they were located in a storage unit that they could not access because they lacked the funds to pay the storage bill. Either way, this is not a defense. First, as G.L. c. 149, § 27C makes plain, a violation of the requirement to maintain and furnish wage and hour records may occur even in the absence of an intent to violate the statute. Cf. Lighthouse Masonry, Inc. v. Div. of Admin. L. Appeals, 466 Mass. 692, 698–99 (2013) (citing § 27C in the context of a prevailing wage violation). Second, SCS has a legal obligation to maintain proper wage and hour records and to maintain them so they may be inspected "at any reasonable time." SCS displayed scant care in maintaining the timecards: collecting them in "a box" off-site and then transporting them (along with equipment and other miscellany) to a storage unit that cannot be accessed, even after the passage of many months, because of a cash shortfall. The Petitioners' asserted inability to access the timecards would not serve as a defense under these circumstances, even if the statute did not impose strict liability upon employers to maintain and allow ready access to wage and payroll documentation.[7]

[7] In their Post-Hearing Brief, the Petitioners make a handful of other assertions regarding their response to the Demand. (See Post-Hearing Brief, at 2, ¶¶ 3-4). The significance of

Turning to the civil penalty assessed, because the Petitioners had previously been issued a citation under G.L. c. 151, § 15, the maximum civil penalty is $25,000. G.L. c. 149, § 27C. The Petitioners have failed to meet their burden of proving that the civil penalty of $5,000, which is well below the statutory maximum, is excessive or otherwise unwarranted. Although the Petitioners' production of documents was only a few days late, their production remained incomplete, even after the passage of ten months. And although the Petitioners may not have acted with specific intent, this does not appear to be an instance where an employer, although acting with due care, finds itself ensnared in a strict liability offense. Instead, as noted above, the Petitioners seem to have taken a somewhat casual approach to their record maintenance and accessibility obligations. I cannot say that, in the circumstances of this case, the civil penalty of $5,000 for this second violation of § 15 was erroneously issued.

Nor have the Petitioners shown that this penalty was excessive in light of SCS's size. The Petitioners state that "SCS['s] current Full-time equivalent (FTE) is less than 15. SCS provides nighttime cleaning services requiring mostly part-time employees." (Post-Hearing Brief, at 1, ¶ 1). This assertion was not explained or developed at the hearing, but I will assume, without deciding, that the documentary evidence would substantiate this statement. That said, based on the records before me, SCS had seven worksites for the Dennis-Yarmouth School District cleaning contract, with anywhere between three and seven SCS employees a piece. Whether or not some (or many) of these employees were part-time, the fact remains that the Petitioners have failed to

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these assertions is not entirely clear and, in any event, they are unsupported by the evidence in the record.

provide daily timekeeping records for over thirty employees. The Petitioners' assertion that a civil penalty of $5,000 is somehow too large for a business its size is not convincing.

For the reasons stated above, Citation 001 and Citation 002 are both affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: