STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
PEGASUS CLEANING CORPORATION and
VIOLET LEWIS,

Petitioners,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

M. PATRICIA SMITH, as Commissioner of Labor, and
NEW YORK STATE DEPARTMENT OF LABOR,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST8986 Index No. 5029-08

Appearances: Zdarsky, Sawicki & Agostinelli, LLP
Attorney For Petitioners
404 Cathedral Place
298 Main Street
Buffalo, NY 14202
(K. Michael Sawicki, Esq., of counsel)

Andrew M. Cuomo
Attorney General
State of New York
Attorney For Respondents
The Capitol
Albany, New York 12224
(Seth Kupferberg, Esq. Acting Bureau Chief,
Labor Bureau, and Meredith McGowan, Esq.,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioners Pegasus Cleaning Corporation and Violet Lewis (hereinafter, collectively, Pegasus or petitioners) commenced this CPLR article 78 proceeding for review of the May 13, 2008 determination by respondent M. Patricia Smith, Commissioner of Labor. That determination adopted the findings of fact and conclusions of law and the recommended determinations and orders contained in the Hearing Officer's "Report & Recommendation" dated February 29, 2008, finding that, inter alia, Pegasus underpaid its workers wage supplements in the amount of $190,178.66 and recommending the assessment of interest and penalties. The respondents M. Patricia Smith, Commissioner of Labor, and the New York State Department of Labor (hereinafter, collectively, DOL) oppose the petition, seeking its dismissal.[1]

In Fall 1997, Pegasus entered into a public works contract with the New York Office of General Services (OGS) to provide janitorial services to DOL's offices. Although the

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[1] The Department of Labor's Notice of Filing (Petition, Exhibit A [dated 5-13-08) provides that, pursuant to Labor Law § 235 (5) a proceeding to review the subject determination should be commenced directly in the Appellate Division of the Supreme Court. The instant proceeding was commenced in Supreme Court and, upon the Court's review of Labor Law § 235 (5), the Court concludes that transfer is not warranted. Nothing in the plain language of that statute provides that a CPLR article 78 review proceeding be commenced directly at the Appellate Division (compare Labor Law § 235 [5] with Labor Law §220 [8]; see also 22 NYCRR 800.4). Moreover, petitioners do not raise a substantial evidence issue to warrant transfer (see CPLR 7804 [g]). Furthermore, DOL neither raised the issue of transfer in either its Objections in Point of Law nor its memorandum of law. For the above stated reasons, the Court will proceed with review of this matter.

contract was set to expire in September 1999, three renewals extended the contract through January 3, 2003. Meanwhile, after receiving a wage complaint, in May 1998, DOL launched an investigation regarding whether Pegasus was paying its building service employees a prevailing wage pursuant to Labor Law article 9 and the parties' contract. DOL requested that Pegasus provide it with certain documentation, including proof of payment of supplemental benefits. In December 1998, DOL released money to Pegasus that it had been withholding under the parties' contract.

The Hearing Officer's report explains:

> On December 10, 1998, [DOL] investigators met with a representative of Pegasus to discuss the investigation. Pegasus' representative testified that following the December 10, 1998 meeting, he had the impression that the prevailing rate issues with [DOL] were resolved. On December 23, 1998, Pegasus complied with an outstanding request for the names, social security numbers and addresses of all of Pegasus' employees. Thereafter, from December 23, 1998 until November 26, 2002, a period of approximately 4 years, [DOL] initiated only one further contact with Pegasus and apparently did little to investigate the matter further. During that time [the Office of General Services] entered into three separate one-year contract extensions with Pegasus (Report & Recommendation [dated 2-29-08], Petition, Exhibit A).

The record shows that, in the above-mentioned four-year period, DOL sent one letter to Pegasus on May 14, 1999, which sought further payroll records.

Thereafter, on April 28, 2004, DOL requested further payroll records, later issuing a subpoena for such records. Pegasus complied with the subpoena except for providing copies of cancelled payroll checks. On February 14, 2006, DOL sent Pegasus a copy of the audit it prepared. DOL concluded that Pegasus had underpaid 188 workers supplement benefits

in the amount of $190,178.66. On March 6, 2006, DOL issued a Notice of Labor Law Inspection Findings to Pegasus. Further, the New York State Comptroller withheld $100,000 on the public works' contract pursuant to DOL withholding notices.

In Spring 2007, an administrative hearing was held regarding the above-discussed investigation and resulting conclusion. The central issue at the hearing and, in this proceeding, is whether Pegasus underpaid workers supplemental benefits pursuant to Labor Law article 9. The Hearing Officer concluded that Pegasus had underpaid such benefits by $190,178.66 less certain wages paid to one specific employee. However, the Hearing Officer determined that Pegasus' violation Article 9 of the Labor Law was neither willful nor did it involve the falsification of payroll records under that article. In part, the Hearing Officer further determined that Pegasus: (1) " is responsible for interest on the total underpayment at the rate of 6% per annum from the date of underpayment to the date of payment, excluding the time period from January 1, 1999 through October 31, 2002" and (2) should "be assessed a civil penalty in the amount of 10% of the underpayment and interest due" (Report & Recommendation [dated 2-29-08], Petition, Exhibit A). Subsequently, the respondent Commissioner adopted the Hearing Officer's findings of fact and conclusions of law and recommended determinations and orders (see Determination & Order [dated 5-13-08], id.). Pegasus commenced this CPLR article 78 proceeding for review of that determination.

As with any CPLR article 78 proceeding seeking review of an administrative determination, such as here, where the petition does not raise a substantial evidence issue,

a court's inquiry is "limited to whether the denial of petitioner's application was arbitrary and capricious or affected by an error of law" (Matter of Senior Care Servs., Inc. v New York State Dept. of Health, 46 AD3d 962, 965 [3d Dept 2007] see Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Kirmayer v State of N.Y. Civ. Serv. Commn., 42 AD3d 848, 850 [3d Dept 2007], lv dismissed 9 NY3d 955, quoting Matter of Fortune v State of N.Y. Div. of State Police, 293 AD2d 154, 157 [3d Dept 2002]). Further, a Court "may not substitute its judgment for that of the agency or second guess its determination where such a determination is neither irrational nor arbitrary and capricious" (Matter of Sacandaga Park Civic Assn. v Zoning Bd. of Appeals of Town of Northampton, 296 AD2d 807, 809 [3d Dept 2002]; see Matter of Anderson v Lenz, 27 AD3d 942, 943-955 [3d Dept 2006], lv denied 7 NY3d 702; Matter of Fortune, 293 AD2d at 157).

In this proceeding, Pegasus notes that no dispute exists whether the contract between it and OGS involved building service work with wages to its employees governed by Article 9 of the Labor Law. Rather, it disputes the application of the prevailing wage law to the circumstances given here.

"'The fundamental public policy embodied in the bill [amending the Labor Law to include article 9] is that service employees employed by a contractor or subcontractor in the performance of a service contract with a public agency should not be paid sub-standard wages'" (Feher Rubbish Removal, Inc. v New York State Dept of Labor, 28 AD3d 1, 3-4 [4th Dept 2005], quoting Labor Comm mem approving L 1971, ch 777, at 1, Bill Jacket, l 1971,

ch 777). Labor Law § 231 (1) provides: "Every contractor shall pay a service employee under a contract for building service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee." Moreover, "wage" is defined as " (a) basic hourly cash rate of pay and (b) supplements" (Labor Law § 230 [5]). Further, the

> term 'supplements' means fringe benefits including medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability, and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs, and other bona fide fringe benefits not otherwise required by federal, state or local law to be provided by the contractor or subcontractor (id. [emphasis supplied]).

Pegasus notes that this was the first public works contract into which it had entered and, thus, it sought the advice of DOL prior to the commencement of the contract to ensure that it complied with the dictates of article 9 of the Labor Law. To that end, Pegasus points to the Hearing Officer's report that provides: "The uncontroverted evidence is that Pegasus presented a proposed 'benefit breakdown' prior to commencing work on the project and was left at that time to understand that its proposed supplemental benefit credit was acceptable" (Report & Recommendations [dated 2-29-08], Petition, Exhibit A)." Pegasus further explains that, after it began performing under the contract, DOL initiated the subject investigation due to a filed complaint, which eventually led to a December 10, 1998 meeting with DOL. Pegasus contends that, as a result of this meeting, it understood that

> the $.20 per hour that [it] listed in the Benefit Breakdown for taxes and

> insurance was improper and could not be counted as part of the prevailing wage; that the cash value of the two 15-minute breaks provided to each employee per day [was] acceptable; and that the methodology used by [Pegasus] in computing the holiday pay and sick pay made available to each employee was also acceptable (Petitioners' Memorandum of Law at 6 [dated 6-6-08]).

Further, Pegasus notes that, after the meeting it concluded the matter was closed, which appeared confirmed when previously held funds under the contract were released. Moreover, it notes that it continued to pay its employees and agreed to the contract extensions. However, Pegasus explains, in 2002, it learned of the continuing investigation and change in DOL's policy regarding the credit for breaks and its methodology for accounting for holiday and sick pay. Therefore, Pegasus contends that this change in policy – as also reflected in the eventual determination on review – is arbitrary and capricious and not sufficiently explained by the Hearing Officer's conclusion that DOL's interpretation purportedly given during the December 10, 1998 meeting was erroneous.

This argument is unavailing given the circumstances presented here. As Pegasus maintains, "[i]t is well settled that 'a decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious'" (Matter of Lantry v State, 6 NY3d 49, 58 [2005], quoting Matter of Charles A. Field Del. Servs., Inc., 66 NY2d 516, 517 [1985]). However, here, there was no prior precedent to which the Hearing Officer failed to adhere. As DOL notes, Labor Law § 235 (5) (a) provides that "upon the completion [of an

investigation] the fiscal officer[2] shall determine the issues raised and shall make and file an order in his [or her] office stating such determination" and serve it upon the parties. Thus, any statements made by a DOL representative regarding Pegasus' compliance with the prevailing wage provisions was not DOL's final determination or precedent. In any event, even if considered a shift in precedent, the Hearing Officer sufficiently explained that the earlier opinion offered was incorrect. "A shift in agency position to ensure affecting the statute's purpose serves to indicate heightened agency conscientiousness not arbitrariness" (Delese v Tax Appeals Tribunal, 3 AD3d 612, 615 [3d Dept 2004, lv dismissed 2 NY3d 793 [2004]; see Palace Co. v State, 159 AD2d 41, 44 [3d Dept 1990]). As noted above, the public purpose underlying article 9 is to ensure that building service employees are not paid sub-standard wages (see Feher Rubbish Removal, Inc., 28 AD3d at 3).

Pegasus next contends that, as a matter of law, it was entitled to credit towards the supplements for amounts it paid for Workers' Compensation, unemployment insurance and disability insurance. This argument fails given the plain language of Labor Law § 230 (5). As the Court of Appeals has noted regarding statutory interpretation, a court should "turn first to the plain language of the statute[] as the best evidence of legislative intent" (Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review, 3 NY3d 563, 568 [2004]; see Feher Rubbish Removal, Inc., 28 AD3d at 3-4). Section 230 (5), as quoted in relevant part above, excludes from the definition of "supplements" benefits that are otherwise

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[2] Pursuant to Labor Law § 230 (8), the DOL Commissioner is the fiscal officer.

required to be provided by federal, state, or local law (see Labor Law § 230 [5]). Clearly, Pegasus is required by law to pay for the such services that it now seeks to have credited as part of its supplemental benefits (see Workers' Compensation Law §§ 10 and 50 and Labor Law § 560). Accordingly, the interpretation given section 230 (5) by DOL is neither arbitrary and capricious nor irrational.

Similarly, the Court rejects Pegasus' contention that paid breaks may not be included in the computation of supplements. Pegasus contends that, in coming to that conclusion, the Hearing Officer improperly referenced regulations promulgated pursuant to article 8 of the Labor Law as well as the Fair Labor Standards Act and associate federal regulations. As to article 8 of the Labor Law, that article pertains to public work. In discussing article 8 and the prevailing wage requirements contained within it, Courts have noted that "the overriding purpose of the prevailing wage requirements is to ensure that workers on public projects receive adequate pay" (Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist., 76 Ny2d 207, 212 n 2 [1990]; see Matter of Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v McGowan, 285 AD2d 36, 28-29 [3d Dept 2001]). Further, in Feher Rubbish Removal, Inc. v New York State Dept of Labor (28 AD3d 1 [4th Dept 2005], supra), the Court reasoned that, "[i]nasmuch as the legislative history of Labor Law article 9 establishes that it was enacted to extend the protections of the Labor Law article 8, we agree . . . that the two articles should be construed together" (id. at 4). Accordingly, the Hearing Officer properly looked to article 8 of the Labor Law in determining the appropriateness or

inappropriateness of counting break-time as part of supplements. For instance, 12 NYCRR 220.4 provides:

> Rest periods of 20 consecutive minutes or less are considered as time worked upon a public work project and must be compensated as such in accordance with subdivision 3 of section 220 of the Labor Law. Rest periods include coffee breaks and time for snacks, but do not include bona fide meal periods.[3]

Therefore, DOL's determination to not allow break time as part of the supplements in this instance is neither arbitrary and capricious nor irrational.

As to the Hearing Officer's reference to federal law and regulations, DOL explains that article 9 was modeled on the Federal Service Contract Act (see 41 USC §351, et seq.). That act governs federal government service contracts and, significantly here, references the Fair Labor Standards Act (see 41 USC § 351 [b] [1]). Thus, the Hearing Officer's reference to regulations promulgated under the Fair Labor Standards Act noting that rest periods of 5 to 20 minutes duration must be counted as hours worked was neither arbitrary and capricious nor irrational (see 29 CFR 785.18).

Pegasus next argues that DOL's determination should be set aside because DOL failed to proceed expeditiously with its investigation. Further, Pegasus contends that any liabilities for under payments should be limited to the last two years of the contract, citing Labor Law § 235 (4). That section provides: "In an investigation conducted under the provisions of this section, the inquiry of the fiscal officer shall not extend to work performed more than two

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[3] Labor Law § 220 (3) provides that laborers, workmen or mechanics on public works must be paid a prevailing wage and is similar to Labor Law § 235.

years prior to: (a) the filing of the complaint, or (b) the commencement of the investigation upon the fiscal officer's own volition, whichever is earlier in the point of time." Pegasus' reliance on this provision to limit the years that would be subject to the determination is unavailing. A plain reading of this provision establishes that the time in which DOL may consider violations is judged from the filing of the complaint or commencement of the investigation and, not, as Pegasus apparently contends, from the time an investigation is completed. The record demonstrates that the inquiry here was launched within months after the wage complaint was filed.

Otherwise, Labor Law § 235 (5) (a) provides: "The investigation and hearing shall be expeditiously conducted. . . ." However, "[t]he failure of [DOL] to proceed expeditiously is not a ground for dismissal absent substantial actual prejudice attributable to the delay" (Matter of Nelson's Lamp Lighters, Inc. v New York State Dept. of Labor, 267 AD2d 937, 938 [4th Dept 1999], lv denied 94 NY2d 763 [2000]; Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 224 AD2d 989, 989 [4th Dept 1996], affd 89 NY2d 395).

Here, the record reveals that some of the delay was due in part to Pegasus' failure to timely provide certain of its payroll records. In any event, Pegasus has not shown that it is substantially prejudiced by being directed to pay wages that should have been paid in the first instance, especially given the strong public policy underlying the prevailing wage requirements. As the Court of Appeals has explained, prevailing wage requirements are "not

merely of statutory derivation but [have their] underlying basis in article 1, § 17 of the State Constitution" (Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 89 NY2d 395, 401 [1996]). The Court further noted:

> The prevailing wage/public work requirement was retained as a constitutional imperative in its present form in the 1938 State Constitution. Constitutional Convention Delegate (and State Senator) Dunnigan, a proposer of its retention, argued that inclusion of the prevailing wage mandate in the Constitution was necessary because 'it has become a fixed principle in our society, which should be embodied in our organic law so as to insure its continuance and because it should assume constitutional proportions so that this policy of state may be manifest to labor and industry as a principle of state'" (id., quoting 3 Revised Record, 1938 Constitutional Convention, at 2204).

Moreover, DOL limited the impact of the lengthy investigation time by not including any interest on the amount owed by Pegasus for the supplemental benefit shortfall during the investigation time that was not attributable to Pegasus' own conduct. Although Pegasus contends that it would not have entered into the contract renewals had it known the outcome of the investigation, Pegasus certainly had notice that an investigation had begun and that a final determination had not been rendered.

Finally, Pegasus contends that the Commissioner abused her discretion in imposing a 10% civil penalty in this matter. Labor Law § 235 (5) (b) provides:

> In addition to directing payment of wages found to be due, such order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer . . ., as determined by the fiscal officer, of such underpayment of wages or supplements. . . .

"Moreover, even in the absence of a willful violation, . . . the Commissioner is authorized not only to grant remedial relief to affected workers, but may also impose a civil penalty of up to 25% of the total additional wages and supplements due, payable to the State" (Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs., 89 NY2d at 402 [emphasis supplied]). Further, "[a]n administrative penalty must be upheld unless it 'is so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (Matter of Harp v New York City Police Dept., 96 NY2d 892, 894 [2001]).

Here, the report underlying the determination provides:

> The underpayment of nearly $200,000 to 188 workers over a 4-year period is a very serious, if unintentional violation. Pegasus failed to provide all requested records, despite those records having been subpoenaed. Nevertheless, given that Pegasus did substantially comply with the Bureau's records requests, that the Bureau's senior investigator described Pegasus as being "fairly cooperative," and that there is no history of prior violation, the assessment of a 6% per annum rate of interest and 10% civil penalty is appropriate (Report & Recommendation at 15 [dated 2-29-08], Petition Exhibit A).

Given the above-referenced explanation by the Hearing Officer and the record before it, the Court cannot say that the penalty is so excessive as to shock the sense of fairness (see Matter of Harp, 96 NY2d at 894).

Otherwise, the Court has reviewed the parties' remaining arguments and finds them without merit. The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious,

or an abuse of discretion. The Court concludes that the petition must be dismissed.

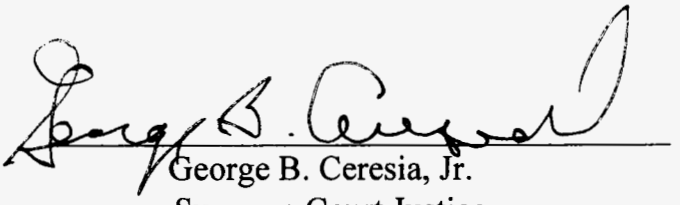
Accordingly, it is

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondents who is directed to enter this Decision and Judgment without notice and to serve all attorneys of record with a copy of this Decision and Judgment with notice of entry.

ENTER

Dated: January 2, 2009
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated June 6, 2008;
2. Petition verified June 6, 2008, with accompanying Exhibit A;
3. Affidavit of K. Michael Sawicki, Esq., sworn to June 6, 2008, with accompanying Exhibits A-D;
4. Answer verified August 17, 2008;
5. Affirmation of Meredith McGowan, Esq., affirmed August 17, 2008, with accompanying Exhibits A-D;
6. Reply Affidavit of K. Michael Sawicki, Esq., sworn to September 22, 2008, with accompanying Exhibits A-C;
7. Supplemental Affidavit of K. Michael Sawicki, Esq., sworn to September 29, 2008, with accompanying Exhibit A.