

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2000-1552

Extended Nursing Care, Inc., and
Home I.V. Care, Inc.,
jointly & severally,
Petitioners

Agency No. 100599063

Agency: Bureau of Safety &
Regulation

v

Susan R. Gooch,
Respondent

Case Type: Wage & Hour
Determination Order

Issued and entered
this 31st day of October, 2000
by Lauren G. Van Steel
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Procedural Findings

This is a proceeding held under Section 11 of the Payment of Wages Act (Act 390), 1978 PA 390, as amended [MCL 408.481; MSA 17.277(11)]; and in accordance with the Administrative Procedures Act (APA), 1969 PA 306, as amended [MCL 24.201 et seq; MSA 3.560(101) et seq].

The purpose of this review is to examine Determination Order No. 100599063 issued by the Department of Consumer and Industry Services, Bureau of Safety and Regulation, on July 18, 2000. The Department found Petitioners Extended

Nursing Care, Inc., and Home I.V. Care, Inc., jointly and severally, in violation of Section 5(2) of Act 390 and ordered Petitioners to pay Respondent \$6,538.44 plus 10% per annum penalty. On August 1, 2000, Petitioners filed a formal appeal of the Determination Order.

A hearing was held on October 3, 2000. Lorna Bismack appeared as an agent on behalf of Petitioners, pro se. Respondent Susan R. Gooch, R.N., appeared at the hearing, pro se. John Stadel, Investigator, represented the Bureau of Safety and Regulation, Wage and Hour Division (Department). The Department also called Tonya R. Gaston, L.P.N., and Taiwo Ogunleye, P.T., as witnesses.

The following exhibits were admitted into the record at the hearing:

- Department's Exhibit 1: 5/28/99 Termination notice to Respondent Susan Gooch from Petitioner Extended Nursing Care (sent to department by Petitioners)
- Department's Exhibit 2: "Hours Worked" form submitted to the department by Respondent
- Department's Exhibit 3: Copies of pay stubs for Respondent Susan Gooch
- ALJ Exhibit 1: Employment Wage Complaint, date stamped 10/5/99
- ALJ Exhibit 2: Determination Order and Summary, dated 7/18/00 and 6/29/00
- ALJ Exhibit 3: Appeal by Petitioner, date stamped 8/1/00
- ALJ Exhibit 4: Notice of Hearing, dated 8/24/00

Issue

Whether unpaid wages are due to Respondent from Petitioners.

Findings of Fact

Lorna Bismack and her husband, Jeffery S. Bismack, a pharmacist, are principals of the corporations, Extended Nursing Care, Inc., and Home I.V. Care, Inc. (Petitioners), located at 32751 Edward Street in Madison Heights, Michigan. Extended Nursing Care, Inc., is no longer in business. Ms. Bismack stated that Extended Nursing Care, Inc., is insolvent; Medicare currently claims that it owes repayment of approximately \$700,000.00. The corporations were involved in providing health care and medical supplies to home-based patients. At one point, the corporations had five or six office employees and 45 to 50 “contract employees,” including registered nurses, licensed practical nurses, physical therapists, occupational therapists, and a social worker.

Mr. and Mrs. Bismack are also principals in another related company that is still in business: Extensive Managed Care, Inc. Although the other company is not party to the matter at hand, it is relevant to note that Ms. Bismack maintained her primary office in Suite 101 of 32751 Edward Street, the offices for Extensive Managed Care, Inc., and Home I.V. Care, Inc. The offices for Extended Nursing Care, Inc., were in Suite 102 at the same address, separated by a closed door from Suite 101. Ms. Gooch worked as administrator in Suite 102.

In or around February 1999, Petitioner Extended Nursing Care, Inc., experienced financial difficulties, in part because of reductions in Medicare and Blue Cross

reimbursements for care provided, and laid off a number of employees at that time. Respondent was one of the employees who stayed on with Petitioner Extended Nursing Care, Inc., after the layoffs. She worked as an administrator, Monday through Friday, 9:00 a.m. - 5:00 p.m., overseeing the work of the health professionals who worked for Petitioners. She was paid a biweekly salary of \$3,269.22.

Ms. Bismack testified that in early May 1999, she and her husband, Mr. Bismack, decided to terminate the rest of Petitioner corporations' employees because Medicare had ceased making payment. She gave blank termination notices to Ms. Gooch and directed her to distribute them to all of the corporations' remaining employees. At some point in May, however, she became aware that Ms. Gooch had failed to distribute the termination notices. On May 28, 1999, she personally made out termination notices to all of the employees, including Respondent, and placed the envelopes containing the notices in the mail room area of the business. The termination notices were to be effective immediately. She did not receive any of the envelopes back and assumed that they went out with the regular mail.

Department's Exhibit 1 is a copy of the termination notice that Ms. Bismack testified she mailed to Respondent; Petitioner corporations supplied a copy of this notice to the department during the course of the wage complaint investigation. Upon questioning at the hearing in the related matter of Docket No. 2000-1551, Ms. Bismack admitted that there had been problems in the past with the mailman not consistently picking up mail from Petitioner corporations.

Ms. Bismack stated that her office was in Suite 101, separate from Suite 102 where Ms. Gooch acted as administrator of Extended Nursing Care, Inc., and Extensive Managed Care, Inc. While she was not in a position to actually see employees that might have come in to Suite 102 to meet with Ms. Gooch after May 28, 1999, she was not aware of any employees working for Extended Nursing Care, Inc., or Extensive Managed Care, Inc., after that date. Ms. Bismack stated that she had no personal knowledge of whether Respondent performed the work for which the wage claim has been made but maintained that she was terminated as of May 28, 1999. She stated that she “has no idea” whether her husband, Mr. Bismack, ever told employees not to come in to work after May 28, 1999.

Ms. Bismack contended that Petitioner Home I.V. Care, Inc., should not be involved in this wage complaint matter, because Respondent only earned commissions as an independent contractor for that company and was not its employee. Upon questioning at the hearing, however, Ms. Bismack admitted that following an Internal Revenue Service audit, Respondent had been deemed a “contractual employee if you will;” her W-2 forms reflected her status as an employee. (See also, Department’s Exhibit 3, which includes a copy of Respondent’s pay stub from Petitioner Home I.V. Care, Inc., listing her as an employee.)

In contrast to Ms. Bismack’s account, Respondent testified that she never received any notice of termination dated May 28, 1999. She confirmed that the notice marked as Department’s Exhibit 1 contains her correct mailing address, but testified that she never received the notice in the mail. From May 31 to June 25, 1999, Respondent

continued to work as an administrator for Petitioners. Ms. Gooch denied that she had ever received blank termination notices from Ms. Bismack to be completed and distributed in early May 1999. While she knew that there were reimbursement problems with Medicare and Blue Cross, she thought they were being worked out by the Bismacks. She continued to have operational meetings with Mr. Bismack at least once a week during the period in question and supervised employees who continued to attend to patients in home visits. Mr. Bismack was the one who gave her direction.

Ms. Gooch further testified that on June 18, 1999, several employees were waiting around the office for their paychecks. She went to Mr. Bismack's office and spoke with him. Mr. Bismack said something to the effect, "Oh, didn't Lorna talk to you? There is no money." She then learned from Mr. Bismack that Petitioner Extended Nursing Care, Inc., was going out of business. After that point, she told the other employees that their employment with Petitioner corporations had been terminated.

Ms. Gooch testified that she stayed on with Petitioners as an employee until June 25, 1999, to complete billing paperwork. She stated that Mr. Bismack particularly asked her to stay on one week because Home I.V. Care, Inc., was going to have a survey, i.e., be inspected. She is not claiming wages for June 28 - 30, 1999, when she worked in the office to complete some matters as a volunteer only. Ms. Gooch also noted that had she and others been given earlier notification of termination, as Ms. Bismack claimed, they could have easily found other jobs because health care professionals are in demand.

Department's witnesses, Ms. Gaston and Mr. Ogunleye, supported Respondent's versions of events. They both testified that they were actively supervised by Respondent after May 28, 1999, the date of Petitioners' purported termination notices. Ms. Gaston noted that as an L.P.N., she was required to check in with an R.N., at least on a periodic basis. Mr. Ogunleye recalled seeing Respondent in the office during the week of June 21 - 25, 1999. He stopped in to the office at least three times that week to see about his paycheck.

The Department's representative, Mr. Stadel, stated that for purposes of this wage complaint, Respondent should be deemed an employee of both Petitioner corporations. She was issued W-2 forms by both corporations, had taxes withheld, including social security, and was directed as an employee by a principal of both corporations, Mr. Bismack.

Conclusions of Law

Petitioners bear the burden of proof in this matter as appellants to show why the Department's Determination Order should be modified or rescinded [1982 AACRS, R408.22969]. The Department's Determination Order in this matter found Petitioners in violation of Section 5(2) of Act 390, which provides in pertinent part:

5(2) An employer shall immediately pay to an employee who has been discharged from employment all wages earned and due, as soon as the amount can with due diligence be determined.

The record evidence in this matter supports the department's conclusion that Respondent performed the work for which she based her wage complaint. While Ms. Bismack is a principal of the corporations, she acknowledged that she did not know what employees may or may not have been working in the suite adjacent to her own.

Regarding the purported written termination of employment on May 28, 1999, Respondent credibly denied that she ever received such notice in the mail or otherwise. Ms. Bismack admitted that there were problems with mail pick-up. As Respondent pointed out, she could have sought employment as a registered nurse elsewhere. Ms. Bismack did not refute Respondent's testimony that she was directed by Mr. Bismack to stay on after the June 18, 1999, termination date.

Based on the record evidence as a whole, I find that Respondent performed the work for which wages have been claimed. Therefore, the Determination Order of \$6,538.44 plus 10% per annum interest should be affirmed for violation of Section 5(2) of the Act 390.

Decision

The Department's Determination Order No. 100599063, requiring payment by Petitioners to Respondent of \$6,538.44 plus 10% per annum interest commencing October 8, 1999, until paid, is affirmed.

Lauren G. Van Steel
Administrative Law Judge