New Jersey Department of Labor and Workforce Development
Petitioner,

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

v.

Admiral Wine & Liquor, Inc., and Michael Zeiger, CEO,
Respondents.

FINAL ADMINISTRATIVE ACTION OF THE COMMISSIONER

OAL DKT. NO LID 00092-15
AGENCY DKT. NO. GE-687-0414-POP

Issued: July 12, 2016

The New Jersey Department of Labor and Workforce Development (the Department or petitioner) served notice upon Admiral Wine & Liquor, Inc., and Michael Zeiger, CEO and Individually (Admiral or respondents), for violations of N.J.S.A. 34:11-4.2 (unpaid wages/late payment), N.J.S.A. 34:11-4.4 (illegal payroll deductions), and N.J.S.A. 34:11A-17 (notification concerning health benefit plan). Specifically, the Department determined that respondents had permitted their employee health benefit plan to terminate without having given their employees the statutorily required notice of plan termination and then, after the employee health benefit plan had lapsed, respondents continued to take payroll deductions from its employees which deductions had earlier been authorized by the employees solely for the payment of health benefit plan premiums. On the basis of the above-listed violations, the Department assessed respondents for $12,594.35 in unpaid wages, $3,000 in penalties and a $1,259.44 administrative fee.

Respondents requested a hearing with regard to the assessment of wages, an administrative fee and penalties. The matters were transmitted to the Office of Administrative Law (OAL), where they were scheduled for a hearing before Administrative Law Judge (ALJ) Leland S. McGee. Prior to a hearing, the Department

filed a motion for summary decision. Specifically, the Department asserted that there was no need for a hearing, since respondents conceded that they had made deductions from employees' pay for health benefit plan premiums after the plan's termination and because there was no dispute as to respondent's failure to provide the statutorily required 30-day notice of health benefit plan termination. Consequently, the Department asserted that its assessment for wages, penalties and an administrative fee against respondents under the afore-cited laws was appropriate. In response to the Department's motion for summary decision, respondents asserted that although Admiral had made the payroll deductions, those deductions had been authorized by the employees and, therefore, Admiral had not violated the statute. That is, according to respondents, the making of payroll deductions, which had been authorized by employees for the sole purpose of paying health benefit plan premiums, is legal, irrespective of whether the health benefit plan had been terminated, and irrespective of whether the employer ultimately used the money deducted from its employees' wages to pay health benefit plan premiums. Respondents also maintained that the Department should not be permitted to assess Admiral for unpaid wages to one particular employee – a Mr. Aiosa – because Mr. Aiosa had commenced a private action against Admiral and that matter had been settled; should not be permitted to assess Admiral for unpaid wages to another employee – Mr. Zeiger – because Mr. Zeiger is respondent Michael Zeiger's son; should not be permitted to assess Admiral for unpaid wages to a third employee – Mr. Barbosa – because Mr. Barbosa had not had any medical expenses during the period of the health benefit plan's lapse; and, finally, respondent argued that since health benefit plan coverage had lapsed on November 15, 2013, the employees had been covered from October 1, 2013 to November 15, 2013, and, therefore, the Department's assessment for unpaid wages should be reduced on a pro rata basis.

The ALJ agreed with the Department that each of the payroll deductions described above had constituted a violation of N.J.S.A. 34:11-4.2 and 4.4. The ALJ explained, "[r]espondents' failure to pay the premiums and provide medical insurance coverage frustrates the purpose of the authorized deductions, rendering the diversions in violation of the statute." The ALJ did agree with respondents that the Department's assessment for unpaid wages to Mr. Aiosa in the amount of $611.34 should be eliminated from the overall wage assessment, because of the settlement of a private action between Admiral and Mr. Aiosa. However, the ALJ did not agree with respondents as to the Department's assessments for unpaid wages to Mr. Zeiger and Mr. Barbosa; explaining with regard to the former that, "[i]t is immaterial that Chet Zeiger is Michael Zeiger's son," adding, "he cannot opt out of employee protections provided by statute;" and regarding the latter, "the violations are not dependent on whether Mr. Barbosa incurred any medical expenses during the period of lapsed insurance coverage," adding, "[t]he violations occurred whether or not the employees from whom the deductions were taken sought medical coverage during the period when they should have been covered." As to respondents' argument in favor of a pro rata reduction in the assessment for unpaid wages, the ALJ simply found that the $12,594.35 in unpaid wages assessed by the Department had been the result of a self-audit conducted by Admiral. Based on the foregoing, the ALJ issued an initial decision ordering that the action of the Department, charging respondents with violating N.J.S.A. 34:11-4.2, unpaid wages/late payment,

N.J.S.A. 34:11-4.4, illegal payroll deductions, and N.J.S.A. 34:11A-17, notification concerning termination of health benefit plan, and assessing $12,594.35 in unpaid wages, subject to a $611.34 offset, $1,259.44 as an administrative fee, and a $3,000 penalty, be affirmed and that respondents' appeal be dismissed. Exceptions were filed by respondents. Petitioner filed a reply to respondents' exceptions.

In its exceptions, respondents restate their earlier argument that the making of payroll deductions that have been authorized by employees for the payment of health benefit plan premiums, notwithstanding that the health benefit plan has been terminated and premium payments are no longer being made by the employer to the insurer, does not constitute a violation of either N.J.S.A. 34:11-4.2 or 34:11-4.4. Specifically, respondents assert the following:

> The Department may wish that N.J.S.A. 34:11-4.4 was violated, or that it believed the Legislature must have intended the statute to implicitly include more than the expressed prohibition against unauthorized deductions or diversions. The Legislature certainly could have expanded this statute to include failure to remit, but it did not. The statute in question was only intended to codify what types of deductions and diversions are permitted, with the employee's authorization, so that an employer could not coerce an employee into agreeing to unwanted deductions and diversions. This is clear from the plain language of the statute.
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> In fact, at the top of page 6 of the Initial Decision the judge acknowledged that purpose by noting that N.J.S.A. 34:11-4.4 "provides authorized deductions for stated purposes, excluding other purposes as violative." Thus, the Initial Decision recognized that the statute in question governs what can and cannot be deducted, not what subsequently happens to an authorized, permitted deduction. This is precisely the distinction the Department and the administrative law judge failed to see, or chose to ignore.

Respondents also restate their call for a pro rata reduction in the unpaid wage assessment, based on respondents' assertion that the Department's assessment included the period from October 1, 2013 to November 15, 2013, during which the employees were, according to respondents, covered under Admiral's health benefit plan. Respondents maintain the following:

> When the State's audit figure of $12,594.35 is broken down by each pay period, it will be known what portion of that total accrued for deductions after November 15, 2013. Only that amount would constitute the fair amount to be demanded. For the purposes of this exception, the wage portion of the assessment should be only 50% of $12,594.35.

In its reply to respondents' exceptions, petitioner first takes issue with respondents' characterization of its submission as "exceptions." That is, petitioner asserts that under N.J.A.C. 1:1-18.3(c), exceptions must specify the findings of fact, conclusions of law or dispositions to which exception is taken. Petitioner states that, [r]espondents' exceptions do none of that, and thus are entirely deficient as exceptions," adding, "[r]espondents' purported exceptions, which is in the nature of a second opposition to the motion for summary decision, already submitted to the ALJ prior to the ALJ's decision being made, should thus be rejected." Petitioner also states the following:

> [T]he ALJ's decision should be affirmed and adopted because it provides a correct interpretation of N.J.S.A. 34:11-4.4 which is to hold the employer responsible for the payment of contributions authorized as deductions from pay by the employee. N.J.S.A. 34:11-4.4(b)(1) provides that the amounts deducted from pay are for "Contributions…to employee welfare, insurance, hospitalization, medical or surgical" plans, clearly manifesting plain language under the statute that the employer must not only deduct for a lawful purpose, but also actually make the payments directed. N.J.S.A. 34:11-4.4, which was enacted in 1965, was amended in 1977, 1983, 1991, 1997 and 2009. In the 1997 amendment approved March 7, 1997, section (10) was added, providing, "Payments authorized by employees for employer-sponsored programs for the purchase of insurance or annuities on a group or individual basis, if otherwise permitted by law." L.1997, c. 35, effective March 7, 1997. The Statement that accompanies Assembly Bill 2335 containing N.J.S.A. 34:1104.4 in its approved form, amended as of 1997, reads:
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> Statement
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> > This bill would allow employees to authorize employers to withhold payments from their wages for employer-sponsored group or individual insurance or annuity programs. Currently, this type of withholding is not among those statutorily authorized. This bill amends the statute listing permissible types of wage withholding to include payments for employer-sponsored insurance or annuities. (emphasis added).

Clearly, the intent of N.J.S.A. 34:11-4.4 is to require employers to make the payments for deductions authorized by employees, and any employer's failure to do so is grounds for recoupment of wages and imposition of penalties authorized under N.J.S.A. 34:11-4.9, which was enacted at the same time as N.J.S.A. 34:11-4.4. Respondents' urged narrow interpretation of the statute should be rejected.

The amounts imposed against the respondents in the ALJ's decision should be accepted and adopted as well because those amounts were

> offered by respondents as "self-audit" amounts due during the Department's investigation, and should not now be disavowed by respondents. In his Field Report Notes dated April 2, 2014, Field Representative Daniel Pope wrote, "employer performed self-audit (attached to their letter of 4/1/14)." Exhibit P-5. The self –audit referred to by Pope was attached as Exhibit P-8, and specifically states, "Medical Deductions from 10/01/2013 to 12/31/2013," totaling $12,594.35. Exhibit P-8. That company response, self-audit of the amounts the company admitted were due, was in response to an audit time frame referred to by Pope, "medical coverage for the employees had lapsed as of 11/15/13 while medical deductions from payroll continued to be made through the 1/15/14 pay period." Exhibit P-5. Thus, the company provided P-8 in response to P-5, and the amounts deducted on P-8 referring to the last three months of 2013 were for medical coverage the employees should have received as paid for coverage, but did not receive because premiums were not paid by respondents, during the last month and a half of 2013 and into the first half month of 2014. The employer furnished the amounts contained in P-8 in response to the Department's audit as the premiums deducted, and respondents should not now be able to argue the amounts are incorrect.

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by respondents and the reply to exceptions filed by petitioner, I hereby accept the ALJ's findings of fact and conclusions of law as well as his recommendation that the assessment for unpaid wages in the amount of $12,594.35, minus $611.34 (totaling $11,983.01), and penalty in the amount of $3,000 be affirmed. I differ with the ALJ only on one minor point; that is, regarding calculation of the administrative fee. N.J.A.C. 12:55-1.5 states that for a first violation the administrative fee shall be 10 percent of the amount due the employee. It is pursuant to this rule that the Department presumably assessed an administrative fee of $1,259.44, which is 10 percent of the original amount assessed by the Department for unpaid wages. With the wage assessment reduced to $11,983.01, the amount of the administrative fee should be adjusted accordingly to $1,198.30.

As to the arguments made by respondents in their exceptions to the initial decision of the ALJ, I agree with petitioner that they are without merit. That is, as suggested by petitioner, I categorically reject respondents' narrow interpretation of N.J.S.A. 34:11-4.4. Which is to say, I find respondents' interpretation of the law patently contrary to the plain language of the statute. Moreover, I find, for the reasons set forth in the well-reasoned decision of the ALJ, that respondents' narrow interpretation of N.J.S.A. 34:11-4.4 belies common sense. Finally, I agree with petitioner that respondents' should not be permitted to disavow the results of their self-audit and, so, I reject respondents' demand for a 50 percent reduction in the assessment of unpaid wages due.

ORDER

Therefore, it is ordered that respondents' appeal is dismissed and respondents are hereby ordered to immediately remit to the Department of Labor and Workforce Development $11,983.01 for wages owed, plus $1,198.30 in an administrative fee and $3,000 in penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Harold J. Wirths, Commissioner
Department of Labor and Workforce Development

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