

***Dep't of Consumer Affairs v.
Sky Materials Corp.***

OATH Index No. 830/17, mem. dec. (Feb. 7, 2017)

In default proceeding, petitioner established that respondent violated Administrative Code section 20-924(c) by failing to respond to two document demands under the Paid Sick Leave Law. ALJ ordered \$1,000 civil penalty.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS**
Petitioner
- against -
SKY MATERIALS CORP.
Respondent

MEMORANDUM DECISION

JOHN W. BURNS, *Administrative Law Judge*

Petitioner, the New York City Department of Consumer Affairs (“DCA” or “Department”), brought this proceeding pursuant to sections 2203(e),(f), and (h) of the New York City Charter and section 20-924(a) of the Administrative Code. *See also* 6 RCNY §§ 6-01, 6-02 (Lexis 2017). Petitioner alleges that respondent, Sky Materials Corp., failed to respond to two separate demands for records documenting compliance with the Earned Sick Time Act (also known as the “Paid Sick Leave Law”), in violation of Administrative Code section 20-924(c).

The trial was originally scheduled for November 15, 2016. On that date, no one appeared on respondent’s behalf, but the matter was adjourned because petitioner had been informed by respondent’s Chief Financial Officer that respondent had retained an attorney, Brian Gardner (ALJ Ex. 1; Tr. 5). The matter was adjourned to December 6, 2016 at 2 p.m. On December 5, 2016 at 4 p.m., another attorney from the same law firm as Mr. Gardner, Michael Morea, e-mailed this tribunal to request a second adjournment on behalf of respondent. However, Mr. Morea specified that “we...have not yet been formally retained at this time” (ALJ Ex. 1). The

request was denied because Mr. Morea had not been retained by respondent and had not filed a notice of appearance (ALJ Ex. 1; Tr. 6). *See* 48 RCNY §§ 1-11(c),(d) (Lexis 2017) (noting that “[a]bsent extraordinary circumstances, no application may be made or argued by any attorney or other representative who has not filed a notice of appearance” and that “[a] person may not file a notice of appearance on behalf of a party unless he or she has been retained by that party to represent the party before OATH.”). Moreover, the adjournment request was untimely because the parties had been instructed to make adjournment requests at least 24 hours in advance of the scheduled trial (ALJ Ex. 1; Tr. 7).

At trial on December 6, 2016, neither respondent nor any attorney appeared. Petitioner submitted proof of service that satisfied the jurisdictional prerequisites for finding respondent in default and the matter proceeded in the form of an inquest (ALJ Ex. 2).

Petitioner’s proof, which included documentary evidence and the testimony of a Department investigator, established that respondent violated the recordkeeping requirements of the Paid Sick Leave Law. Respondent is ordered to pay a civil penalty of \$1,000.

ANALYSIS

The Paid Sick Leave Law was enacted “to ensure that employees can take time off work to address their health needs or the health needs of family members.” Statement of Basis and Purpose in City Record (July 30, 2014), 6 RCNY §7-01 (Lexis 2017). Under the law, an employer with five or more employees is required to provide employees with paid sick time, and to give employees written notice of their “right to sick time.” Admin. Code §§ 20-913(a)(1), 20-919(a) (Lexis 2017). Additionally, an employer covered by the Paid Sick Leave Law must retain records documenting compliance with the law for a period of three years. Admin. Code § 20-920.

The Department has broad power to investigate violations of the Paid Sick Leave Law. Charter §§ 2203(e),(f),(h); Admin Code § 20-924(a). As part of this investigative authority, the Department may issue a subpoena or document demand to an employer requesting records that show the employer’s compliance with the law. 6 RCNY § 7-13(c); *see also* Admin. Code § 20-920. Further, “[i]f the department issues a subpoena or document demand, an employer shall provide the department with access to records documenting its compliance with the requirements of the Earned Sick Time Act ... *upon appropriate notice*, at the department’s office.” 6 RCNY §

7-13(c) (emphasis added); *see also* Admin. Code § 20-920 (employer “shall allow the department to access such records, with appropriate notice...”).

“Appropriate notice” is defined as “30 days’ written notice.” 6 RCNY § 7-13(e); *see also* Admin. Code §20-924(c) (“Within thirty days of written notification of a complaint by the department, the person or entity identified in the complaint shall provide the department with a written response and such other information as the department may request.”). Therefore, after receiving a written document demand from the Department, respondent has 30 days to comply. If respondent fails to comply with the first document demand, the Department must send a second written demand before it can issue a notice of violation. 6 RCNY § 7-14(b)(1). Respondent once again has 30 days to comply with the second written demand. 6 RCNY §§ 7-13(c),(e).

Upon respondent’s failure to respond to the second demand, the Department may issue a notice of violation, provided that it has complied with the requirement to send two written demands and has notified respondent that failure to respond will result in a notice of violation under the Earned Sick Time Act. 6 RCNY § 7-14(b). Respondent has up until the first scheduled hearing date to cure the notice of violation by either producing the requested records or “resolving to the satisfaction of the department” the employee complaint that was the basis for the request. 6 RCNY § 7-14(d).

On August 4, 2016, petitioner received a complaint from a former employee of Sky Materials Corp. alleging various violations of the Paid Sick Leave Law (Pet. Ex. A; Tr. 14). Additionally, the petition states that on or around August 9, 2016, petitioner received six complaints from former employees of respondent alleging violations of the law (Pet. ¶ 21). In response to these allegations, Investigator Abreu sent respondent a Notice of Sick Leave Investigation and Document and Information Request on August 30, 2016 (Pet. Ex. B; Tr. 16-17). The notice outlined respondent’s possible violations of the Paid Sick Leave Law and detailed the documents respondent was required to provide to demonstrate compliance with the law (Pet. Ex. B). The notice indicated in bold that “DCA must receive the completed Employer Response Form, along with all requested documents and information, within thirty days of the date of this letter” (Pet. Ex. B) (emphasis in original). It also stated that respondent’s noncompliance could result in petitioner issuing a notice of violation subjecting respondent to monetary fines (Pet. Ex. B).

Petitioner provided a sworn certificate of mailing from Investigator Abreu stating that she sent the notice on August 30, 2016, to 5700 47th Street, Maspeth, NY, which is the business address provided by complainant and verified by the Department in a database search (Pet. Exs. B, C; Tr. 18). The delivery confirmation form shows that the notice was received on September 7, 2016, by Jessica Cordora (Pet. Ex. C). Petitioner verified by phone that Ms. Cordora is one of respondent's employees (Tr. 31). Respondent did not produce the requested documents by September 30, 2016, which would have been thirty days from the date of the written demand (Tr. 18-19).

On October 7, 2016, petitioner sent respondent the second and final written document demand, which also included a copy of the original August 30th Notice of Sick Leave Investigation and Document and Information Request (Pet. Ex. D; Tr. 22-23). A Deputy Director of Operations at the Department certified that she sent the second demand by United Parcel Service on October 7, 2016, on behalf of Investigator Abreu (Pet. Ex. E; Tr. 27-28). Delivery confirmation indicated that the package was received on October 10, 2016 (Pet. Ex. E; Tr. 29). This second demand stated that it was the final written attempt to obtain documents, noting in bolded and capitalized text that respondent's "continued failure to respond may result in fines and penalties for violating New York City law" (Pet. Ex. D). Further, the second demand stated that respondent had until October 13, 2016 to produce the requested documents, which was seven days from the date the second demand was mailed (Pet. Ex. D; Tr. 25). Respondent failed to produce the documents by this deadline, and did not produce them at any point before trial (Tr. 25, 29).

The uncontroverted evidence at trial established that respondent violated the recordkeeping requirements of the Paid Sick Leave Law. Respondent was served with two document demands, both of which warned respondent about civil penalties, and failed to provide the Department with any of the requested documents. While the Department's second document demand did not give respondent 30-days' notice as required, respondent had over 30 days until the first date of trial to cure the notice of violation but did not do so. 6 RCNY §§ 7-13(c),(e), § 7-14(d). Moreover, the record reveals that respondent was aware of the initial trial date and had consulted with an attorney, but ultimately failed to comply with the document demands or appear before this tribunal. Therefore, respondent was not prejudiced by the timeframe of the second

document demand. Accordingly, I find that respondent's failure to comply with the two document demands violated Administrative Code section 20-924(c).

FINDINGS AND CONCLUSIONS

1. Respondent was properly served with the notice of trial.
2. Petitioner established that respondent failed to respond to two separate document demands, in violation of section 20-924(c) of the Administrative Code.

ORDER

Under section 2203(h)(1) of the Charter, petitioner may impose civil penalties of up to \$500 for each violation of the Paid Sick Leave Law. *See also* 6 RCNY § 7-14(c). Here, each instance of respondent's failure to respond to the Department's document demand is a separate violation of section 20-924(c) of the Administrative Code. Since respondent failed to appear for trial and offer any mitigating evidence, a \$500 penalty for each violation is appropriate. Respondent is ordered to pay a civil penalty of \$1,000 for the violations established here.

John W. Burns
Administrative Law Judge

February 7, 2017

SUBMITTED TO:

LORELEI SALAS
Commissioner

APPEARANCES:

STEVEN T. KELLY, ESQ.
MARGARET O'HORA, ESQ.
Attorneys for Petitioner

No Appearance by or for Respondent