STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF NEW YORK STATE DEPARTMENT OF LABOR

Complainant,

-vs-

Olanrewaju Lanre Olotu,
Benjamin Hiwale, and
Albion Color, Inc.,

Respondents

In a proceeding pursuant to New York Labor Law Article 25-A and 12 NYCRR Part 921 for a determination that a violation of the WARN Act (L. 2008 ch.475) has occurred.

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REPORT
&
RECOMMENDATION

WARN 10-0024

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on March 1, 2011 and March 28, 2011, by video conference between Albany, New York and Buffalo, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Division of Employment and Workforce Solutions ("Division") of the New York State Department of Labor ("Department") into whether Olanrewaju Lanre Olotu, Benjamin Hiwale, Albion Color, Inc., and/or Printing Methods, Inc. (“Respondents”), complied with the requirements of Labor Law article 25-A and/or regulations promulgated thereunder (12 NYCRR part 921) in connection with the closing of Albion Color, Inc., and Printing Methods, Inc. and the resulting termination of employment of all employees at each site, without giving the notice required by law.

HEARING OFFICER

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, Kenneth Golden, Senior Attorney, and Kevin E. Jones, Senior Attorney, of Counsel.

Olanrewaju Lanre Olotu appeared in this matter and attended the hearing, without counsel, representing himself, Albion Color, Inc., and Printing Methods, Inc. Benjamin Hiwaledid not appear in this matter or attend the hearing.

ISSUES

1. Did the Respondents violate the provisions of Labor Law article 25-A and 12 NYCRR part 921 when they ordered the closure of Albion Color, Inc. and Printing Methods, Inc.

without giving the notice required by statute?

2. Do the facts support the Respondents' argument that its failure to give the notice required by statute was caused by unforeseen business circumstances?
3. As a result of the Respondents' order to close Albion Color, Inc. and Printing Methods, Inc. without giving the notice required by statute, are the Respondents liable for the payment of wages and civil penalties as defined in Labor Law article 25-A?

JURISDICTION

The Department is a governmental agency charged with implementation and enforcement of Labor Law article 25-A together with the regulations set forth in 12 NYCRR part 921. Article 25-A and its implementing regulations became effective February 1, 2009, and are applicable to employment losses occurring on or after that date.

Creditors for Printing Methods, Inc. filed a petition for involuntary bankruptcy under Chapter 7 of the U.S. Bankruptcy Code in the Bankruptcy Court for the Western District of New York on July 15, 2010. (Hearing Officer Ex. 6; Dept. Exs. 15, 16, 17, 18, and 19; T 72-73, 128) Authority to proceed with the issuance of this determination following a petition in bankruptcy is conferred under the police and regulatory powers exception provided by 11 U.S.C. § 362 (b) (4). [See, *Fiber Optek Corp.*, *Debtor*, SDNY, 09-CV-8827 (CS) (2010)]

PARTIES

Respondent Albion Color, Inc., is a business enterprise employing fifty (50) or more full-time employees within the State of New York, (Dept. Ex. 13; T 75-76) and, therefore, an employer subject to Labor Law Article 25-A , with facilities to conduct its business located at 3815 Oak Orchard Road, Albion, New York 14411.

Respondent Printing Methods, Inc., is a business enterprise employing fifty (50) or more full-time employees within the State of New York (Dept. Ex. 14; T 76-77), and,

therefore, an employer subject to Labor Law Article 25-A , with facilities to conduct its business located at 1525 Emerson Street, Rochester, New York 14606.

Respondent Olanrewaju Olotu, is the Chief Executive Officer of Albion Color, Inc. and Printing Methods, Inc. (Hearing Officer Ex. 6; Respondents' Exs. 3, 4)

Respondent Benjamin Hiwale, was the President of Albion Color, Inc. and Printing Methods, Inc., but according to sworn testimony by Mr. Olotu was not a shareholder of either company. (T. 4-5, 101-103)

FINDINGS OF FACT

On April 27, 2010, representatives of the Department of Labor received complaints from employees of Albion Color, Inc. and Printing Methods, Inc. that they had not been paid on time and that health and dental benefits had been cancelled. (Dept. Ex. 1, 4; T. 19, 27-29, 64) The Department conducted an investigation of both companies which included a review of payroll records for March 22, 2010 through May 23, 2010, written complaints, oral statements from employees, and interviews with the principals of both Albion Color, Inc. and Printing Methods, Inc. (Dept. Exs. 2, 3, 4; T. 21-26)

On May 28, 2010, Respondents Albion Color, Inc. and Printing Methods, Inc. ceased operations at their respective facilities in Albion and Rochester, New York. (Dept. Ex. 4, T. 35, 65) The Respondents acknowledge that they failed to provide notice of the plant closing to affected employees, the State of New York, the local Workforce Investment Board, or any employee representative. (Hearing Officer Ex. 6; T. 22, 25-26, 116, 118) Mr. Olotu further acknowledged that he ceased operations and closed both companies on May 28, 2010, following a meeting he had with representatives of the Department and his attorney. (Hearing Officer Ex. 6; T. 25-26, 29-30, 34) At the time of the closures, Respondent Albion Color, Inc. employed

seventy (70) employees at its Albion site (Dept. Ex. 13; T. 75-76), and Respondent Printing Methods, Inc. employed one hundred (100) employees at its Rochester site. (Dept. Ex. 14; T. 76-77)

The Respondents allege in their Answer that their failure to provide timely notice of the plant closings as required by law resulted from unforeseeable circumstances that were beyond their control (Hearing Officer Ex. 6). Specifically, the Respondents allege that the plant closings were the result of the refusal of M & T Bank to increase the Respondents' line of credit to be used to fund the Respondents' payrolls, and that other lending institutions were unwilling to advance the Respondents credit. (HO Ex. 6)

The record contains the following evidence of the Respondents' financial difficulties and their knowledge of the same prior to the plant closures on May 28, 2010:

Respondents experienced financial difficulties in 2009 and continuing into 2010. (T. 118-119) For Example, Respondents failed to make timely payments resulting in a default in November, 2009 of a loan payable to Community Bank, N.A. (Dept. Ex. 16) Thereafter, Respondents failed to make timely payments to Community Bank, N.A. in January and February, 2010. (Dept. Ex. 16)

On March 29, 2010, Respondent Olotu advised People's Capital and Leasing Corp., one of his creditors, that he "did not have the money yet but working on it." (Respondents' Ex. 4) On April 5, 2010, this creditor's Vice-President, Vincent Cianciolo, wrote that a default on a loan would be forthcoming since timely payments were not being made and Respondents were unable to get "expenses in line with…reduced sales levels." (Dept. Ex. 16)

On April 15, 2010, Respondents advised representatives of M&T Bank that they did not have sufficient funds for that week's payroll. (Respondent's Ex. 4) On that date, Richard

Champion, the M&T Bank representative wrote the following to Respondents:

"The past several months payment history and in several instances, account overdrafts, have become indicative of a worsening financial condition for the companies. The financial statements for both confirm that revenues are stressed and therefore cash flow is impaired.

Given what appears to be a longer trend for difficulties, I am requesting that you provide me with a documented (written) business plan that will minimally include various actions that would be supportive of bringing both companies to a positive position. This should include marketing and sales, financial controls and cost cutting plans, and a 13 week cash flow projection that reflects the future position of the companies" (Respondent's Ex. 4)

Respondents did not implement a business plan as requested by their creditors, but continued to operate both Albion Color, Inc. and Printing Methods, Inc. by relying on bank overdrafts and the forbearance of M&T Bank. (T 119-120; 123-126)

Respondents failed to make timely payments for employee health and dental insurance resulting in the cancellation of those benefits in January 2010 (Dept. Ex. 4, 5; T 28-29, 64).

Respondents failed to make timely payments for employee payrolls in April and May, 2010 and wrote a series of checks dated April 30, 2010 to various employees marked "for deposit only." (T. 28-29, 64) Respondents failed to make timely payments for employee payrolls in April and May, 2010 and wrote a series of checks that were not honored when deposited. (T. 61-64)

Mr. Olotu testified that from late 2009 through the early part of 2010, the Respondents sought additional financing. (T. 92)

In January 2010, the Respondents lost contracts with Bank of America and Chase Bank worth over two million dollar per year. (T. 91-92)

In February 2010, because money was "tight," the Respondents unsuccessfully continued pursuing loans from several banks. (T. 92)

M&T Bank insisted that, and Mr. Olotu had to agree to have Printing Methods and Albion cross-guarantee each other's debt in order to continue the $500,000.00 line of credit the

Company had been relying on for operating capital. (T. 92) After agreeing to this cross-guarantee Mr. Olotu testified that "no bank would look at me" with respect to additional financing. (T. 92)

In April 2010, M&T Bank referred the Respondents to a business consultant. While they were meeting with the Business consultant, the first Labor Standards Order to Comply was received. (T. 99) Upon seeing this, Mr. Hiwale, who was the President of Printing Methods, Inc. and Albion Color, Inc., quit. (T. 99-100)

Also in April, 2010, Mr. Olotu began putting his own money into the businesses in order to allow it to continue operating. (T. 106-07; Respondent's Ex. 1)

The Respondents offered several pieces of correspondence showing that the Company was in dire financial straits. (T. 108-11; Respondent's Ex. 2-4); and Mr. Olotu testified that the companies were experiencing financial difficulties in 2009 and continuing into February 2010 that resulted from slow business and not enough work. (T. 118-119)

Respondent Olotu alleges that Department Labor Standards Senior Investigator Amy Clark ordered him to shut down his business at the meeting that was conducted on or about May 19, 2010. (T. 29) However, Ms. Clark testified that she has no specific recollection of making that statement to the Respondents. (T. 33-35)

In the Notice of Hearing (Hearing Officer Ex.1), the Department alleges that as the owner and one of the ten largest shareholders of Printing Methods, Inc., Respondent Olotu is personally liable for any debts, wages or salaries due to Respondents' employees pursuant to Business Corporation Law section 630. The Department did not offer, and the record does not contain, any evidence that Respondent Olotu is an owner or shareholder of either Albion Color, Inc. or Printing Methods, Inc.

Respondent Benjamin Hiwale, was the President of Albion Color, Inc. and Printing

Methods, Inc. (T. 101-103). However, according to the sworn testimony of Mr. Olotu, Benjamin Hiwale was not a shareholder of either company and should be dismissed as a Respondent in this matter. (T. 4-5, 101-03) The Department offered no testimony or documentary evidence that supports a contrary finding. The parties consent to the dismissal of these proceedings as against Respondent Benjamin Hiwale. (T. 101-102; Dept. Proposed Findings of Fact and Conclusions of Law, p. 3, para. 6)

Finally, in its Proposed Findings of Fact and Conclusions of Law, the Department requests an assessment of back pay due and owing to each Albion Color, Inc. and Printing Methods, Inc. affected employee, and assessment of civil penalties against Albion Color, Inc. and Printing Methods, Inc. The Department does not request a finding of personal liability against Respondent Olotu.

Conclusions of Law

The record contains sufficient credible evidence to support a finding that the Respondents' termination of its employees located within the State of New York constitutes an "order" within the meaning of Labor Law § 860-b and 12 NYCRR § 921-2.1. The order resulted in a "plant closing" and caused the termination of employment for all of the employees at each of the sites of employment within the meaning of Labor Law § 860-b and 12 NYCRR § 921-2.1. As a result of the termination of their employment by Respondents, each of Respondents' employees sustained an employment loss at their respective sites of employment.

Under the provisions of Labor Law § 860-b and 12 NYCRR § 921-2.1, an employer who orders a plant closing must provide at least ninety (90) days advance notice of the employment loss to: (1) affected employees; (2) representatives of affected employees; (3) the Department; and (4) local workforce investment boards in the locality where the plant closing will occur. It is

acknowledged that the notice required by Labor Law article 25-A was not given by the Respondents. In ordering the closing of Albion Color, Inc. and Printing Methods, Inc. without providing ninety (90) days notice of the loss of employment to: (1) each of its affected employees; (2) the Department; and (3) local workforce investment boards in the locality where the plant closing occurred, Respondents violated the provisions of Labor Law § 860-b and 12 NYCRR § 921-2.1.

An exception to the WARN Act, provided under Labor Law § 860-c(b), allows service of a notice of termination to affected employees in a shortened period of time in cases where the plant closing or mass layoff is due to "unforeseeable business circumstances." In construing the exception provided by this section, analogous federal case law requires that an employer must demonstrate: (1) that an event or condition outside the employer's control has occurred that was "sudden, dramatic and unexpected;" (2) that the employer exercising its sound business judgment could not have "reasonably foreseen" this business event or condition; (3) that the event or condition led to or caused the layoffs to occur; and (4) the employer provided as much notice as "practicable" under these circumstances. [(12 NYCRR §§ 921-6.3; *Gross v. Hale-Halsell Company*, 554 F. 3d 870 (10th Cir. 2009)] The employer bears the burden of establishing the defense that the circumstance was unforeseeable and the layoffs were caused by that circumstance. [*Hotel Employees and Rest. Employees Int'l Union Local 54 v. Elsinor Shore Assocs.*, 173 F. 3d 175 (3rd Cir. 1999); *Roquet v. Arthur Anderson, LLP*. 398 F. 3d 585 (7th Cir. 2005)]

The record contains sufficient credible evidence to find that the Respondents had experienced financial difficulties over many months prior to the plant closures with declining revenues, loss of business, and insufficient funds to meet company payrolls. At least two

creditors had advised that a new business plan was required, yet Respondents failed to explain why they did not implement the requested changes in business practices or provide employees with notice that layoffs might be imminent. The Respondents have offered no evidence to support the finding that the conditions required for sustaining the "unforeseen business circumstance" exception have been met. There was no event or condition that was "sudden, dramatic or unexpected." The financial difficulties that led to the plant closings were reasonably and readily foreseeable and they existed for a period of months before the actual plant closings. There was no specific identifiable condition or event that led to or caused the layoffs to occur. Even viewing the facts in the light most favorable to the Respondents compels a finding that the Respondents violated the provisions of Labor Law § 860-b and 12 NYCRR § 921-2.1 since the Respondents not only failed to provide the statutorily required ninety (90) day notice, but also failed to provide any notice during the shortened period of time as allowed by under Labor Law § 860-c(b). Accordingly, Respondents' defense that the failure to give ninety (90) days notice of the closing of Albion Color, Inc. and Printing Methods, Inc. is excused because of "unforeseeable business circumstances" is unavailable based upon the record as developed in this case.

As a result of the violation of Labor Law § 860-h and 12 NYCRR § 921-2.1, pursuant to 12 NYCRR § 921-7.2, Respondents Albion Color, Inc. and Printing Methods, Inc. are liable to the Department for a civil penalty in the Department's requested amount of five hundred dollars ($500) for each day of the violation up to a maximum of sixty (60) days. In addition, as a result of its violation of Labor Law § 860-b and 12 NYCRR § 921-2.1, Respondents Albion Color, Inc. and Printing Methods, Inc. are liable to each affected employee for: (1) back pay at the average rate of compensation received by the employee during the last three (3) years of employment, or

the employee's final rate of compensation, whichever is higher up to a maximum of sixty (60) days. Specifically, with respect to Respondent Albion Color, Inc., this Respondent is liable to all seventy (70) affected employees sustaining an employment loss at Albion Color, Inc. for back pay in an aggregate amount totaling $315,478.77, with a specific amount calculated for each employee up to a maximum of 60 calendar days or 44 work days as requested by the Department. (Dept. Ex. 13; T. 75-76) Furthermore, the Respondent Printing Methods, Inc. is liable to all one hundred (100) affected employees sustaining an employment loss at Printing Methods, Inc. for back pay in an aggregate amount totaling $595,033.91, with a specific amount calculated for each employee up to a maximum of 60 calendar days or 44 work days as requested by the Department. (Dept. Ex. 14; T. 75-76)

As a result of the violation of Labor Law § 860-b and 12 NYCRR § 921-2.1, pursuant to 12 NYCRR § 921-7.2, Respondent Albion Color, Inc. is liable to the Department for a civil penalty in the amount Thirty Thousand Dollars ($30,000) calculated at the rate of $500.00 per day for the maximum of 60 days; and Respondent Printing Methods, Inc. is liable to the Department for a civil penalty in the amount Thirty Thousand Dollars ($30,000) based upon the same calculation.

The parties have consented that this proceeding be dismissed as against Respondent Benjamin Hiwale. Contrary to the Department's allegations in the Notice of Hearing, Labor Law article 25-a does not provide for personal liability of an owner or shareholder of a business enterprise, and the record does not support a finding of personal liability under Business Corporation Law section 630 for back pay or civil penalties against Respondent Olotu as there is no evidence that Respondent Olotu is a shareholder in either Albion Color, Inc. or Printing Methods, Inc. .

RECOMMENDATIONS

I RECOMMEND that, based upon hearing the Parties, and reviewing the evidence received and the Department's post hearing written submissions[1], the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Respondents violated the provisions of Labor Law § 860-b and 12 NYCRR § 921-2.1 in failing to provide the notice required by law to affected employees, the Department and local workforce investment boards; and

DETERMINE that Respondent Albion Color, Inc. owes back pay to each of Albion Color, Inc.'s affected employees sustaining an employment loss in an aggregate amount totaling $315,478.77; and

DETERMINE that Respondent Printing Methods, Inc. owes back pay to each of Printing Methods Inc.'s affected employees sustaining an employment loss in an aggregate amount totaling $595,033.91; and

DETERMINE that Respondent Albion Color, Inc. owes a civil penalty of $500 per day for a total of sixty (60) days for failing to provide notice as required pursuant to Labor Law § 860-b and 12 NYCRR § 921-2.1, in an amount totaling $30,000.00; and

DETERMINE that Respondent Printing Methods, Inc. owes a civil penalty of $500 per day for a total of sixty (60) days for failing to provide notice as required pursuant to Labor Law § 860-b and 12 NYCRR § 921-2.1, in an amount totaling $30,000.00; and

DETERMINE that, with the consent of all parties, Benjamin Hiwale should be dismissed as a Respondent in these proceedings; and

[1] The Respondents were given the opportunity to serve post hearing written submissions (T. 136-137), but failed to do so.

ORDER that the Bureau compute the total amount due (back pay and benefits, interest and civil penalty) from Respondents Albion Color, Inc. and Printing Methods, Inc.; and

ORDER that upon the Bureau's notification, the Respondents Albion Color, Inc. and Printing Methods, Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Director, Division of Employment and Workforce Solutions, New York State Department of Labor, State Office Building Campus, Building 12, Room 420, Albany, NY 12240.

Dated: January 17, 2012
Albany, New York

Respectfully submitted,

John W. Scott, Hearing Officer