STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	Docket No.	2010-948
Stephen Conn, Christal Bonner, Enid Childers, Regina Dixon, et al., Petitioners	Agency No.	154933
v	Agency:	Wage Hour Division
Wage Hour Division DELEG & Detroit Public Schools, Respondent	Case Type:	Wage Hour Determination Order

In the matter of	Docket No.	2010-949
Stephen Conn, Christal Bonner, Enid Childers, Regina Dixon, et al., Petitioners	Agency No.	154817
v	Agency:	Wage Hour Division
Wage Hour Division DELEG & Detroit Public Schools, Respondent	Case Type:	Wage Hour Determination Order

In the matter of	Docket No.	2010-950
Stephen Conn, Christal Bonner, Enid Childers, Regina Dixon, et al., Petitioners	Agency No.	155050
v	Agency:	Wage Hour Division
Wage Hour Division DELEG & Detroit Public Schools, Respondent	Case Type:	Wage Hour Determination Order

In the matter of	Docket No.	2010-951
Stephen Conn, Christal Bonner, Enid Childers, Regina Dixon, et al., Petitioners	Agency No.	155053
v	Agency:	Wage Hour Division
Wage Hour Division DELEG & Detroit Public Schools, Respondent	Case Type:	Wage Hour Determination Order

Issued and entered
this 22nd day of April, 2011
by Tyra Wright
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

PROCEDURAL FINDINGS

This is a proceeding held under 1978 PA 390, as amended, the Payment of Wages and Fringe Benefits Act (Act 390 or the Act), MCL 408.481; and in accordance with 1969 PA 306, as amended, the Administrative Procedures Act (APA), MCL 24.201 *et seq.*

The purpose of this review is to examine Agency case nos. 154933, 154817, 155050 and 155053. The Petitioners filed complaints with the Wage & Hour Division on or about March 10, 2010.

In response to the complaints, the Michigan Department of Energy, Labor & Economic Growth, Wage & Hour Division (Department or Wage & Hour), issued letters dismissing the complaints. Petitioners filed timely appeals. A hearing was scheduled for November 18, 2010 at 9:00 a.m. at the State Office of Administrative Hearings and Rules (SOAHR) in Detroit, Michigan. Wage & Hour, then the only Respondent, requested instead that a pre-hearing conference be conducted by telephone on that date. The request was granted on November 5, 2010 and a telephone prehearing conference was held on November 18, 2010. During the conference the parties agreed that the Petitioners represent "test cases" for all those who filed complaints and that the factual findings and conclusions of law reached in this case would be controlling in the other cases because the same material facts exist.

An Order Following Prehearing Conference was issued on November 23, 2010, adding the Detroit Public Schools as a Respondent. The Order scheduled a

hearing for February 24, 2011 at SOAHR's Detroit office. On February 11, 2011, Wage & Hour requested the hearing scheduled for February 24, 2011 be adjourned and rescheduled. The request was granted.

A hearing was held on April 5, 2011 at the SOAHR office in Detroit. Attorney George Washington represented the Petitioners. Stephen Conn, Enid Childers and Christal Bonner appeared and testified. Assistant Attorneys General Emily McDonough and Thomas E. Warren represented the Wage & Hour Division. Assistant General Counsel Timothy Gardner represented Detroit Public Schools. Jack Finn, Administrator of the Wage Hour Division, appeared as a witness for Respondents. Administrative Law Judge Tyra Wright presided.

ISSUES AND APPLICABLE LAW

Did the Respondent Wage Hour Division err in dismissing the Petitioners' claim on the grounds that deductions from their paychecks involved a collective bargaining agreement?

Does Respondent Detroit Public Schools owe wages to Petitioners?

Sec. 2(1) requires employers to pay employees in a regular, periodic manner.

Sec. 2(3) requires an employer who has established a regularly scheduled weekly or biweekly payday to pay employees on the established payday and that such payday occurs on or before the fourteenth day following the end of the work period in which the wages are earned.

Sec. 6(1) requires employers to pay wages to an employee by any of the following methods: (a) United States currency, (b) a negotiable check or draft payable on presentation at a financial institution or other business, and (c) direct deposit or electronic transfer to an employee's account at a financial institution.

Sec. 7(1) prohibits employers from deducting from the wages of an employee, directly or indirectly, any amount

> including an employee contribution to a separate segregated fund established by a corporation or labor organization without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge, except where the deductions are required or expressly permitted by law or a collective bargaining agreement.
>
> Sec. 7(2) requires that a deduction for the benefit of the employer requires written consent from the employee for each wage payment subject to the deduction.
>
> Sec. 8(1) prohibits an employer from demanding or receiving, directly or indirectly from an employee, a fee, gift, tip, gratuity or other remuneration or consideration, as a condition of employment or continuation of employment.

EXHIBITS

Petitioners submitted the following exhibits at the hearing.

Exhibit	Description
1	Sections of the Settlement Proposal to The Detroit Federation of Teachers, Local 231 dated December 3, 2009, referred to as the tentative agreement
2	Stephen Conn's paystub dated January 12, 2010 for the pay period ending January 1, 2010
3	Stephen Conn's paystub dated March 22, 2011 for the pay period ending March 11, 2011
4	Enid Childers' paystub dated March 22, 2011 for the pay period ending March 11, 2011

Respondents submitted the following exhibits at the hearing.

Exhibit	Description
A	Correspondence from the Wage & Hour Division dated February 8, 2010 sent to Detroit Public Schools to notify DPS that a complaint had been filed involving claim number 153944
B	Settlement Proposals from the School District of the City of Detroit and The Detroit Federation of Teachers, dated December 3, 2009

FINDINGS OF FACT

The Petitioners are teachers employed at the Detroit Public Schools (DPS) and belong to a union, the Detroit Federation of Teachers (union or DFT). The Petitioners filed complaints with the Wage & Hour Division on or about March 10, 2010. Several hundred DPS employees have filed complaints. The parties agreed at the pre-hearing conference that the Petitioners represent "test cases" and that the factual findings and conclusions of law reached in this case would be controlling in other complaints because the same material facts exist in the other complaints.

DPS pays teachers biweekly. Teachers can opt to receive their pay during the academic year, resulting in 22 paychecks, or receive pay during a 12-month period, resulting in 26 paychecks. The later option allows teachers to receive paychecks during the summer break.

DPS and the union entered a collective bargaining agreement (CBA or agreement) that was finalized on December 18, 2009. Article 9 of the agreement addresses professional compensation and contains a Termination Incentive Plan (TIP). The TIP provision states the following:

> **Beginning January 12, 2010 and ending with the fourth (4th) pay of the 2011-2012 school year (for a total of 40 payments), all salaried members of the bargaining unit (except assistant attendance officers, accompanists and members who work less than .50 FTE) shall have $250 per pay deducted from their pay and deposited into a Termination Incentive Plan (TIP) account. (Deductions shall not be made for the four (4) summer checks for members on 26 pays – checks numbered 23-26). A total of all deposits into an individual member's TIP account shall be shown on the member's pay stub. Exempted salary, hourly and daily rated members shall not be required to pay into the TIP account but shall have the option of doing so.**

For those employees who work the entire TIP period, from January 12, 2010 through the fourth pay period of the 2011-2012 school year, a total of $10,000 will

be deducted from their paychecks.

Under TIP, teachers who resign or retire may receive a termination of service "bonus" of $1,000 for each year of service, with a cap of $10,000 or the amount the employee has contributed, whatever is less. (Petitioners' Exhibit 1, Respondents' Exhibit B). Employees with 10 years of service or more when they resign or retire will receive the full amount taken from their paychecks over the full TIP period -- $10,000. Those with less than 10 years of service at resignation or retirement will receive less than the amount deducted from their paychecks. Neither those who resign nor those who retire will receive any interest on the money deducted from their paychecks.

For those teachers who leave by resigning or retiring, there is no guarantee or security that the deductions from their wages will be repaid. The amount deducted from the paychecks will not be repaid prior to resignation or retirement. Teachers who are fired, or leave by any means other than resignation or retirement, will never receive the TIP deductions from their paychecks.

Petitioners allege in their complaints that wages of $250 per pay period were deducted from their paychecks by DPS in violation of Act 390.

On or about March 16, 2010, the Wage & Hour Division notified the Petitioners by letter that it was dismissing their complaints because the deductions were expressly permitted by a collective bargaining agreement between DPS and the Petitioners' union.

CONCLUSIONS OF LAW

Administrative Rule 1982 AACS, R 408.22969 places the burden of proof on the appellants, which in this case are the Petitioners.

Section 7(1) of the Act covers deductions from wages and provides the general rule that a deduction from an employee's wages requires the employee's "full,

free, and written consent" to the deduction. Stephen Conn, Enid Childers or Christal Bonner did not give their written consent for any of the deductions from their paychecks. An exception, however, is made "for those deductions required or expressly permitted by law or by a collective bargaining agreement."

In this case, Wage & Hour notified DPS of the complaints and requested a response. DPS provided Wage & Hour with the collective bargaining agreement, which includes the TIP. After reviewing the complaints and the TIP provision, the Wage & Hour Division dismissed the Petitioners' claims on the grounds that the deductions were made pursuant to a collective bargaining agreement.

The Wage & Hour Division contends that when a collective bargaining agreement allows for deductions from employees' paychecks, the employer may make any deduction without limits on the amount, purpose or duration of the deductions. The Respondents' witness, a Wage & Hour administrator, asserted that deductions can be made for any purpose "depending on what the parties negotiated." He added that the employees are deemed to have consented when a collective bargaining agreement is involved. Petitioners contend that this is not the law because deductions permitted under a collective bargaining agreement are intended to allow for deduction of dues and other fees associated with union representation.

Petitioners assert that deductions pursuant to a collective bargaining agreement cannot be for the benefit of employers, or otherwise violate Act 390. Even where employees give their written consent to a deduction, Section 7(2) of the Act does not allow the "cumulative amount of the deductions" to reduce gross wages to less than the minimum rate under the minimum wage law. Consequently, employers are not allowed to make deductions from wages that result in minimum wage law violations simply because such deductions are allowed under a collective bargaining agreement.

The Respondents' witness asserted that employees cannot waive, not even by a collective bargaining agreement, their right to (1) receive the minimum wage, (2) be treated fairly in accord with civil rights laws, (3) work in a safe environment, and (4) get paid their wages. Petitioners contend, that DPS should not be allowed to violate Act 390 by reliance on a collective bargaining agreement.

I find Petitioners have provided sufficient evidence to establish the Wage & Hour Division erred in dismissing their claims without reviewing the merit of the claims.

In addition to their contention that employers cannot violate the law by use of a collective bargaining agreement, Petitioners also point to the Section 7(2) requirement that any deduction for the benefit of the employer requires written consent. According to Section 7(2), "a deduction for the benefit of the employer requires written consent from the employee for each wage payment subject to the deduction. . ." No written consent was given. Moreover, Petitioners argue that the deductions amount to a tax-free, unsecured "loan" to DPS which is a benefit to DPS. In response, Respondents contend there is "zero evidence" that the deductions are for the benefit of DPS. Respondents also deny the deductions are a loan.

In this case, I find deductions from Petitioners' paychecks are being made for the benefit of the employer, Detroit Public Schools. Whether called a gift, loan or forfeited deduction, DPS is the beneficiary. Terminated employees will have worked for but not received their full wages due to the deductions. Teachers who resign or retire -- if they are paid the total amount deducted from their paychecks under TIP – will receive only the amount deducted with no interest or consideration, and then only if they have ten years of service with DPS. Those teachers leaving under other circumstances such as discharge or death, receive nothing. Under either circumstance, the Petitioners'

assertion that the deductions are for the benefit of the employer prevails.

Finding anything other than a benefit to DPS is nonsensical, considering that a new teacher hired shortly before January 12, 2010 when the TIP deductions began, who works through the end of the 2011-2012 school year, would have a total of $10,000 deducted from his or her wages. If this teacher resigns with less than two years of service, the teacher's termination of service "bonus" would be $1,000 for the one year of service. The result is a loss of $9,000 in wages for this teacher or a $9,000 benefit to DPS.

Respondents did not offer any evidence that the deductions were made for the benefit of the Petitioners. Nevertheless, Section 8 prohibits an employer from receiving, directly or indirectly, from an employee "a fee, gift, tip, gratuity or other remuneration or consideration" as a condition of employment. Again, teachers (and other workers subject to the TIP deductions) who are terminated will not receive the wages deducted from their paychecks under TIP. Consequently, for these employees, the deductions effectively constitute wages they will never receive.

Both Sections 7(2) and 8 make clear the purpose of Act 390, which is to protect employees' wages from employers' whims, carelessness or financial challenges. Employees are to be paid their wages in a regular, periodic manner under Section 2. Section 2(3) provides that where an employer has established a regularly scheduled weekly or biweekly payday, that employer is in compliance with Section 2(1) when wages are paid on the established regular payday and "such payday occurs on or before the fourteenth day following the end of the work period in which the wages are earned."

Section 6(1) requires employers to pay wages by either (a) United States currency, (b) a negotiable check or draft payable on presentation at a financial

institution, or (c) direct deposit or electronic transfer. There is no provision in the Act for the circumstance of owing an employee wages where the employee has not been paid full wages in accordance with Section 2 of the Act, nor is there provision for paying employees with promissory notes or illusory promises which come due, if at all, only in the uncertain future.

In this case, DPS is withholding a portion of Petitioners' wages resulting in Petitioners failing to receive a portion of their wages in a timely manner. The $250 deduction from each paycheck is being withheld until some future time – weeks, months or years – depending on when a teacher retires or resigns; never, in those cases where a teacher is terminated. In short, there is no approval under the statute of an I.O.U or option to not pay full wages to an employee who has worked his or her full schedule.

For the reasons stated above, I find the Petitioners met the burden of proving that the Wage & Hour Division should not have dismissed their claims on the grounds the deductions were allowed by a collective bargaining agreement. Furthermore, I find that the employer violated Sections 2(3), 6(1), 7(2) and 8(1) of Act 390.

DECISION

The Department's decision to dismiss these matters represented by Agency Nos. 154933, 154817, 155050 and 155053 is REVERSED.

Respondent Detroit Public Schools is ordered to pay the Petitioners the entire amount that has been deducted from their individual paychecks under the Termination Incentive Plan, which totaled $8,500 for each individual Petitioner as of the date of this Decision. Respondent DPS also is ordered to pay a 10% per annum interest of $2.32 commencing March 16, 2010 until the determined amount is paid. The amount found due plus interest is ordered made payable to the Petitioners but sent to the Wage

Hour Division for processing at the following address:

Department of Energy, Labor and Economic Growth
Wage & Hour Division
7150 Harris-1st Floor-A Wing
PO Box 30476
Lansing, Michigan 48909
ATTN: KIMBERLI WRIGHT

In the event the Wage Hour Division files a civil action to collect the amount found due after this decision becomes final, Rule 33(2), being 1979 AC, R 408.9033, requires assessment of a civil penalty equal to 50% of the amount found due not to exceed $1,000.00. The civil penalty that will be assessed Respondent is $1,000.00 if the amount found due is not voluntarily paid.

Tyra Wright
Administrative Law Judge

APPEAL PROCEDURE

The parties may appeal decision based on MCL 408.481(9), which provides:

> ***MCL 408.481(9)*** *A party to the proceeding may obtain judicial review of the determination of the hearings officer pursuant to Act No. 306 of the Public Acts of 1969, as amended. Venue for an appeal under this act shall only be in the circuit where the employee is a resident, where the employment occurred, or where the employer has a principal place of business.*
>
> ***MCL 24.304*** *requires an appeal to be filed "within 60 days after the date of mailing notice of the final decision or order of the agency. "*

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 22nd day of April, 2011.

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