R·M·W

RICE, MICHELS & WALTHER LLP

Attorneys and Counselors at Law

Brian F. Rice • James P. Michels • Ann E. Walther* • Karin E. Peterson • Daniel A. Louismet

*MSBA Certified Labor and Employment Law Specialist

Writer's Direct Dial (612) 676-2301
jmichels@ricemichels.com

June 23, 2015

Angela Nalezny
200 City Hall Annex
25 West Fourth Street
Saint Paul, Minnesota 55102-1631

RE: IAFF Local 21 – Withholding of Alleged Overpayments from Pay Checks

Dear Ms. Nalezny:

I am writing in response to your letter dated June 17, 2015, which I did not receive until Monday, June 22, 2015.

The City's interpretation of Minn. Stat. §181.79 is as misguided as its reliance on the cases cited in your letter. Rather than support the City's position, the cited cases clearly reaffirm that the City violated the statute.

The statute, in relevant part, provides:

> No employer shall make any deduction, directly or in-directly, ***from the wages due or earned*** by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer …" (emphasis added)

As I understand it, the City's position is that the deduction was allowed without authorization because the "claimed indebtedness" (ie, the overpaid wages) were not "due or earned." However, the City is wrongly juxtaposing the words "from" and "for" in the plain language of the statute.

The reference in the statute to "wages due or earned" is what the deduction cannot be taken ***from*** and not, as the City asserts, in reference what the purported deduction is "for." The City made the deduction on February 20, 2015, ***from*** the payment to employees for wages that were in fact earned and due to be paid on that date. The City has not and cannot legitimately claim that the wages paid to employees on February 20, 2015, were not "due or earned."

There is no dispute that the deductions taken on February 20 from employees' payroll deposits were "for" the purpose of recouping, at least in part, amounts paid on January 23, 2015, that the

City claimed to be in excess of the actual amount owed for the wages that were payable on January 23. As such, the deduction on February 20 clearly constituted an attempt to "recover any other claimed indebtedness running from employee to employer." Thus, the facts applied to the plain language of the statute clearly demonstrate that the City violated the statute by withholding a "claimed indebtedness" ***from*** "wages that were owed."

Your reliance on the cited cases is laughable and demonstrates that you (and/or whoever is advising you) failed to actually read the cases. The legal question at issue here is whether an employer violates Minn. Stat. §181.79 by deducting from an employee's paycheck amounts allegedly overpaid in a prior payroll period. Neither of the cited cases addresses this issue.

In *Stiff v. Associated Sewing Supply Company,* a former employee sued his former employer to collect unpaid commissions allegedly owed to him. The employer alleged that the employee had embezzled funds and dismantled the employer's business records system to hide the embezzlement and, because of his misdeeds, the employee had forfeited his right to earn commissions. Thus, the question before the court was whether the commissions were "earned wages." The court held that the employee in fact had embezzled and committed other wrongful acts that terminated the employer's obligation to pay the commissions. The only reference in the case to Minn. Stat. §181.79 was a tangential discussion of whether the statute superseded the "forfeiture doctrine" (the court concluded it did not). Neither the facts nor the legal question at issue in the *Stiff* case, have anything whatsoever to do with the City's withholding of funds from employees' wage for overpayments caused solely by the City and/or its software vendors. In fact, the case, to the extent that it is relevant at all, is contrary to the City's position since, with regard to its limited discussion of Minn. Stat. §181.79, the court clearly states that "[t]he statute is only applicable to deductions taken **from** *earned* wages or commissions." (emphasis on "from" added; emphasis on "earned" in original).

Meyer v. Mason Publishing was another case in which a former employee sued his former employer to recover allegedly unpaid commissions. The court held that there were no commissions due or earned and that, even if there were, the compensation arrangement which provided for advances on commissions to be earned allowed for the employer to adjust the final payment of commissions to offset for excess advances without violating Minn. Stat. §181.79. As in the *Stiff* case, neither the facts nor the legal issue in *Meyer* are relevant to the present situation.

Moreover, your reliance on the FAQ on the Minnesota Department of Labor and Industry (DOLI) website is not only misplaced, but also is contrary to the DOLI FAQ that actually addresses the issue of withholding from wages.

The DOLI website does have an FAQ for "what happens if my employer overpays my wages." The answer to this question by DOLI is "[t]he Department of Labor and Industry policy regarding overpayment of wages is that the employer has the right to recover any overpayment caused by a bookkeeping error; therefore, an employer should be reimbursed for overpayment of wages." Neither Local 21 nor any of its members has ever asserted that employees who were overpaid get to keep the overpayment. That isn't the question. The question is whether the

employer can use "self-help" to withhold overpayments from future paychecks. The DOLI website includes an FAQ that addresses this question.

The question posed on the DOLI FAQ is: "Can my employer deduct money from my wages." The answer (cut and pasted from the website) is:

> ***Your employer may deduct money from your wages if:***
>
> you are covered by a union collective bargaining agreement that allows for deductions;
> you are a commissioned salesperson with rules regarding deductions for performance issues;
> before you made a purchase or took out a loan from your employer you voluntarily agreed in writing to have the cost of that loan or purchase taken out of your wages; or
> there is a court order requiring that deductions be taken.
>
> ***Your employer cannot deduct from your wages for broken equipment, lost money or other employer losses unless:***
>
> after the loss occurs, you give the employer your ***voluntary*** written authorization to deduct from your wages; or
> you have been found liable for the loss by a court.
>
> See Minnesota Statutes **181.79**.

The CBA between the City and Local 21 does not authorize the withholding for an overpayment of wages. Local 21 members are not commissioned sales people. The withholding was not for loans taken out pursuant to an agreement that authorized repayment of the loan by wage withholding. There is no court order requiring that deductions be taken. Thus, none of the circumstances exist in which withholding is allowed per the DOLI website. To the contrary, the FAQ provides that the employer may NOT withhold unless the employee gives voluntary written authorization or the employee is found liable in court – neither of which has occurred – meaning that the withholding was done in violation of the statute.

In further reviewing the language of Minn. Stat §181.79 to respond to your letter, it occurred to me that no court asked to interpret the statute could rationally conclude that the Legislature intended for an employer to use unauthorized withholding to recover an overpayment caused solely by the employer when the statute expressly prevents withholding even for actions caused by the employee's wrongdoing or negligence (ie, lost or stolen property or damage to property). This prompted me to research the question of the City's liability under Minn. Stat. §181.79 more thoroughly than I had before we met to seek an amicable resolution of the payroll issues.

In doing so, I found not only cases that supported the conclusion that the City violated the statute by withholding for overpayment of wages *see Brekke v. THM Biomedical, Inc.;* but also that the imposition of the statutory penalty (double the amount of withholding) is mandatory and not subject to the discretion of the court, *see Kilton v. Nadler and Associates.*

In *Brekke v. THM Biomedical, Inc.* a former employee sued his former employer for penalties under Minn. Stat. §181.79 after the employer withheld $60,000 from wages payable to the employee. The Minnesota Supreme Court found the withholding of the $60,000 to be a violation of the statute and a penalty of $120,000 appropriate even though: the company advised Brekke in advance that they were going to withhold the funds; Brekke accepted the employer's paycheck knowing that the withholding of the funds constituted a violation of the law; and, after accepting the check, Brekke represented to the entity purchasing the employer corporation that the corporation had no material liabilities. In its opinion,[1] the court expressly addressed the question at issue now facing the City and Local 21, stating:

> Section 181.79 is clear that the employer cannot use self-help to enforce a claimed indebtedness against an employee by a unilateral offset that would force the employee to take action if he disputes the indebtedness. That clear legislative directive would be seriously eroded if the prohibition against offset did not apply because the "claimed indebtedness" was based on serious misconduct by the employee. Therefore, an offset for the "claimed indebtedness" cannot be made no matter what legal theory the claimed indebtedness is based on.

Unlike Brekke, the members of Local 21 have committed no wrongdoing. Thus, there is no equitable basis for the City to avoid the imposition of the prescribed penalty for the violation of the statute.

Based on the facts and case law cited herein, the City has clearly violated Minn. Stat. §181.79 and is liable for the prescribed penalty. Although Local 21 had been willing to resolve the case by recommending that its members accept 50% of the statutory penalty, it is no longer willing to do so as a direct result of the City's bad faith in violating the statute in the first place and then sending out the communication to its members without first advising that it was going to do so and by threatening further violations of the statute against its members if they did not acquiesce to the City's demands.

Please be advised that Local 21 will be forwarding a copy of this letter to each of its members with the recommendation that:

---

[1] The Court ultimately held that even though the statute was violated, Brekke should not recover a penalty since Minn. Stat. §181.79 did not preclude the application of the common law equitable defenses of estoppel based on Brekke's breach of contract and his fiduciary duties to the company.

- they not agree to any voluntary repayment plan that does not reduce any obligation owed to the City by the full amount of the statutory penalty owed to them by the City; and

- pursuant to Minn. Stat. §181.79, subd. 1(b), even if/when they are willing to sign an authorization to allow for wage withholding to repay the City for amounts owed, no authorization may provide for withholding from any individual paycheck of an amount that is greater than the amount that could be withheld under a wage garnishment.

Please be further advised that any further attempt to withhold funds from Local 21 members without their prior written authorization will constitute an additional statutory violation(s) and subject the City to additional penalties.

Local 21 remains willing to work with the City to resolve all payroll issues amicably – but only to the extent that the City is willing to take full responsibility for its unlawful wage withholding and to pay all penalties in full.

For your convenience, I have included all cases cited in this letter.

Sincerely,

James P. Michels

Encl.
cc: Mike Smith, Local 21 President
Local 21 Members