STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROBERT LOVINGER AND MIRIAM LOVINGER AND EDGE SOLUTIONS, INC., Petitioners, To review under Section 101 of the Labor Law: An Order to Comply with Article 6 and An Order to Comply under Article 19 of the Labor Law, both dated March 14, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-059 RESOLUTION OF DECISION

APPEARANCES

Robert Lovinger and Miriam Lovinger, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of counsel, for Respondent.

WITNESSES

Robert Lovinger, Miriam Lovinger, Tammy Burnett, Joyce J. Dalessandro.

WHEREAS:

On May 8, 2008, Petitioners Robert Lovinger and Miriam Lovinger filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66), seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner or Respondent) issued against them on March 14, 2008. The first Order is an Order to Comply with Article 6 of the Labor Law (Wage Order) which finds that Petitioners failed to pay wages to two claimants, Tammy Burnett and Joyce J. D'Alessandro, and demands payment of $1,610.00 in wages due and owing, interest at the rate of 16% calculated to the date of the Order in the amount of $109.00 and a civil penalty in the amount of $805.00 for a total amount due of $2524.00. The second Order (Penalty Order)

finds that the Petitioners failed to keep and/or furnish accurate payroll records for the period from December 5, 2006 through April 9, 2007, in violation of Article 19 of the Labor Law and demands payment of $500.00.

The Petition filed by Mr. and Mrs. Lovinger challenges the Orders as unreasonable because "our companies Edge Solutions, Inc., Money Cares, Inc., and Pay Help, Inc. were placed under receivership...and it is our position that we should not be held personally liable for wages not issued" because it was the Receiver's obligation to pay employees after the imposition of the receivership on October 11, 2007. The Petition also states that at a company meeting on October 4, 2007 conducted by the Lovingers, Mr. and Mrs. Lovinger notified the employees that the company might be placed under receivership and their continued attendance at work was voluntary, and challenges the Orders "based on the employees' willful attendance with the full knowledge of the possible ramifications." At the hearing, however, Petitioners abandoned this claim. Lovinger testified:

> "I never disputed that they should get paid. I am going to consent to that. The dispute here is our personal liability in the matter...As I said in that meeting on the morning of October 11, I would have loved nothing better than to pay the employees, but unfortunately we couldn't do that, and I made a promise to them, no matter what happens, if I get back on my feet, whether it's a year, 10 years, 20 years later, if the receiver does not pay them, I will do my best to pay them."

Mrs. Lovinger testified: "We never said you guys should not get paid...we begged the receiver to pay everybody, begged them." [1] The Respondent Commissioner filed an Answer to the Petition denying its material allegations.

Upon notice to the parties, the Board held a hearing in Garden City, New York on February 24, 2009 before Board Member Jean Grumet, Esq., the designated hearing officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Robert Lovinger testified that Edge Solutions, Inc. was a debt settlement company.[2] He testified that there were actually two corporations named Edge Solutions, Inc. -- a corporation incorporated in New York in 1995, and a second corporation incorporated in Delaware in June 2005. He stated that the two companies had separate tax ID numbers, and that the Edge Solutions, Inc. incorporated in Delaware filed a certificate to do business in

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[1] Even if Petitioners had not abandoned the claim that employees were not entitled to wages for work performed after the October 4, 2007 meeting, such a claim is untenable. The statute protects employees who are permitted or suffered to work. An employer who has knowledge that an employee is working and does not desire the work done, has a duty to make every effort to prevent its performance. *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir 2008).

[2] Although the Petition refers to only one corporation entitled "Edge Solutions, Inc.," much of Petitioners' evidence and argument at the hearing related to the existence of two corporations with that name, and a contention that the Orders (which likewise refer to only one corporation entitled "Edge Solutions, Inc.") relate to the wrong one.

New York as a foreign corporation under the name "Edge Solutions International." He further testified that the New York corporation was winding down in 2005, when the Delaware Edge Solutions, Inc. was incorporated, but the New York corporation was never officially dissolved. According to Robert Lovinger, Edge Solutions, Inc., the Delaware corporation which he testified operated after the New York corporation wound down, had 18-20 employees. Robert Lovinger testified that the Claimants were employed by the Delaware corporation, and were not employees of the New York corporation.

All of the Petitioners' businesses, (including both Edge Solutions, Inc. corporations, Money Cares, Inc. and Pay Help, Inc.) were located in the same office in Medford, New York. Robert Lovinger testified that he was the CEO of the New York corporation, and that Miriam Lovinger was its sole shareholder and President. He testified that he was the sole shareholder, President and CEO of the Delaware corporation and that Miriam Lovinger was its Chief Financial Officer, and strictly an employee, responsible for payroll, bookkeeping, and Human Resources.

Robert Lovinger testified that on a daily basis, he "managed the overall company as far as the financials" but mainly worked on developing a new product called "On Track."

> "I can't honestly say that I did not manage the everyday operations of Edge Solutions, Inc.... My focus was elsewhere. I felt that I had good management, and the management was taking care of the everyday affairs of that company. I was the CEO, so when there were meetings, company meetings, I certainly participated in company meetings, but I was not the everyday manager of those companies."

Robert Lovinger testified that he hired Richard Mauro, the Chief Operating Officer, and Michelle Seppe, the Director of Operations, and retained the ability to fire Mauro and Seppe. According to Lovinger, Mauro "basically managed the companies" and hiring was done by Mauro and Seppe, both of whom reported directly to Lovinger. Lovinger stated that Claimant Joyce D'Allesandro was initially hired by the Edge Solutions, Inc. incorporated in New York, but was switched over to the Delaware corporation sometime in 2005 or 2006. He stated that Claimant Tammy Burnett was hired by the Edge Solutions, Inc. incorporated in Delaware.

Robert Lovinger testified that on October 5, 2007 he, Miriam Lovinger and Mauro conducted a company meeting during which the employees were told that the Federal Trade Commission (FTC) might put the company into receivership and there was a possibility that the employees might not get paid if the FTC was successful in getting that remedy. According to Lovinger, he and Miriam Lovinger conducted a second company meeting on October 11, 2007 to notify the employees that the companies were being placed in receivership. During this meeting, Robert Lovinger promised the employees that he would pay them when he could.

On October 11, 2007 the companies were placed in receivership pursuant to a Stipulated Order of Preliminary Injunction issued by the United States District Court for the Eastern District of New York. The Court appointed a temporary receiver who took control

of the Petitioners' companies. Petitioners claim that as a result of the receivership, the employees who were scheduled to be paid their biweekly paycheck on October 12, 2007 were never paid. Robert Lovinger testified that he asked the receiver to pay the employees and requested that the DOL's Unemployment Insurance Division compel the receiver to pay the employees but his efforts were unsuccessful. Lovinger testified that he never made any attempt to get employee records back from the receiver. He testified that because mail was going to the Medford address, he first became aware of the employees' claims in January 2008.

Miriam Lovinger testified that she was in charge of Human Resources, and did the bi-weekly payroll, health insurance, accounting, and maintained the corporate books. She testified that prior to awarding a raise, managers obtained her approval, but the review process was "something we left to our managers. We trusted our managers." Miriam Lovinger was the signatory of the employer's NYS-45-MN "Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, dated July 16, 2007, which lists the employer's legal name as "Edge Solutions, Inc." and contains an attachment which lists wage reporting information for several employees including the Claimants. According to Miriam Lovinger, employee pay stubs listed the company name as "Edge Solutions, Inc."

Miriam Lovinger testified that the only reason that the Petitioners claimed at the hearing that the "wrong" Edge Solutions, Inc. was named in the Orders was that the Orders found her personally liable. She testified that she was not a shareholder, and was only an employee of the Delaware Edge Solutions, Inc., and "I don't believe you can go after me personally for something I'm not even a shareholder of." When asked whether she was Chief Financial Officer, she replied, "Yes, they gave me a fancy title."

Miriam Lovinger testified that on October 2, 2007, "we were served with papers by the FTC" and "we were accused of running a fraudulent business, that we were not doing." The Lovingers hired an attorney and realized that they did not have enough money to fight and would have to settle. On October 5, 2007, the Lovingers met with their employees:

> "We very clearly discussed with everybody...that if things went the way we hoped they would not go, and we were fighting like hell to save it, that we would not have control of the company, and while we understood people wanted to start looking for jobs that weekend...and things went well, we would not hold that against anybody; that we would certainly understand and welcome everybody back and there would be no hard feelings.
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> "In the event that it went the way we hoped it would not, which sadly is the way it went, we would not have control and we would not have the means to pay, so anyone who came to work beyond that Friday, the day of the initial meeting, was told and was aware of the fact that we would be unable to pay."

A second meeting occurred on October 11, 2007 during which "we told everybody essentially that it was over."[3] Miriam Lovinger testified that their attorney suggested that the Lovingers collect letters from employees to give to the Court. At the Lovingers' behest, both Claimants wrote letters. Claimant D'Alessandro's letter stated in part, "I have worked for Bob and Miriam Lovinger for the past several years. During that time, they always tried to make their employees feel like part of a family." Claimant Burnett wrote her letter "on behalf of Miriam and Bob Lovinger," and stated, in part, "it was with great confidence that I took pride in Miriam and Bob's business they worked so hard to achieve... I learned all this from seeing the way that Bob and Miriam did business every day, and did so one individual at a time."

Miriam Lovinger testified that after the receivership was imposed, "we begged the receiver to pay everybody." She stated that she contacted all of the employees who were covered by the company's health insurance to notify them that their health insurance was being cancelled, and told them that they might be eligible for Healthy New York.

Miriam Lovinger testified:

> "I lost a job a month ago and [my former employer] had no clue what it was like to have employees that valued them and treated them accordingly and made them want to come to work every day. That's what we tried to do for you. The joke in our company was we could not get rid of people unless we fired them, and that was an ongoing thing."

Claimant Burnett testified that before she was hired as a program advocate, she was interviewed by Miriam Lovinger, and subsequently met with two other supervisors. Burnett stated that her job entailed working with customers who were in debt and wanted to sign onto a program with one of the company's affiliates. Her duties as a program advocate included maintaining customer accounts, notifying customers when settlements came in or if they missed a payment, and explaining settlement options.

Burnett stated that she saw both of the Lovingers on a daily basis, and assumed that Robert Lovinger was President of the company because he called every company meeting during the time that she worked there, and "would take into consideration pretty much anything that you needed to do within the company." Burnett testified that she was never aware that there were two different corporations called Edge Solutions, and testified that Edge Solutions had always been located at the same location.

Burnett testified that Miriam Lovinger did payroll, and when Burnett had her six month review, it was conducted by the Lovingers and her manager, Cathy Mazzulo. Burnett passed her probation and was given a raise during this review. Reviews were usually given after an employee worked for a year, but the process was expedited for her. When Burnett called in sick, she called either Cathy Mazzolo, or Miriam Lovinger.

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[3] Miriam Lovinger testified that one of the provisions of the settlement with the FTC required the Lovingers to post a one million dollar bond if they sought to re-enter the debt consolidation business.

Burnett testified that on October 5, 2007, the Lovingers called a meeting to explain some pending legal proceedings. Robert Lovinger announced to the employees that they received a summons from the FTC and that they had retained attorneys and were going to fight the case. The employees were told to go back to work. On the morning of October 11, 2007, the Lovingers came to the call center where Burnett worked and announced to the employees that they were holding a meeting. The Lovingers told the employees about the FTC's allegations, and stated that they did not have the money to fight a case against the FTC, and they were advised to settle. Robert Lovinger told the employees that they would be paid one day, "no matter what."

Claimant D'Alessandro testified that she was not aware of any changes in ownership in Edge Solutions during the time she worked there, and that she was never told that the corporation she worked for had changed names: "It was always Edge Solutions, Inc." Her pay stubs were always the same. She testified that her duties entailed doing the mail, filing, and photocopying and doing projects that Michelle Seppe assigned. D'Alessandro testified that she brought the Lovingers their mail.

D'Alessandro testified that she was present at two meetings conducted by the Lovingers. At the first meeting, they explained that they were having problems with the FTC and said they would do their best to resolve them. At the second meeting, the Lovingers explained that because of the FTC lawsuit, the company would have to close. Robert Lovinger told the employees that he would pay them one day. Although D'Alessandro's claim states that her last day of work was October 10, she testified that she now realizes she filled in the wrong date, because she was present at the meeting when the Lovingers announced that the company was closing, which occurred on October 11, 2007.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [Petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]; *Angello v Natl. Fin. Corp.,* 1 AD3d 850, 854 (3d Dept 2003): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Orders under review are not valid or reasonable.

If the Petitioner meets its burden and establishes by credible evidence that the order is invalid or unreasonable, the burden then shifts to the Commissioner to rebut the Petitioner's evidence and establish that the orders under review are reasonable and valid (*In the Matter of Richard Delldone,* Board Docket No. PR 08-145 [July 22, 2009]).

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

Petitioners Robert and Miriam Lovinger are employers within the meaning of the Labor Law

We find that the record evidence amply demonstrates that Mr. and Mrs. Lovinger were employers within the meaning of the Labor Law and were responsible for wages earned by their employees during the periods cited in the Wage Order. We affirm the Orders as modified below.

"Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Under Labor Law §2(6) the term "employer" is not limited to the owners or proprietors of a business, but also includes agents, managers, supervisors, and other subordinates.

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employer" to mean "...any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 USCA §203[d]). The FLSA defines "employ" as "suffer or permit to work" (29 USC § 230 [g]). "The terms are expansively defined, with 'striking breadth,' in such a way as to 'stretch ... the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles' (*Nationwide Mut. Ins. Co., v Darden,* 503 U.S. 318, 326, [1992];" *see also Ansoummana v Gristedes Operating Corp.*, 255 F Supp 184, 188 [SDNY 2003]; *Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61, 66 [2d Cir 2003] ["This definition (of employer) is necessarily a broad one, in accordance with the remedial purpose of the FLSA."]

It is well settled that the test for determining whether an entity or person is an employer under the New York Labor Law is the same test for analyzing employer status under the FLSA (*Shim v Millenium Group,* 2010 US Dist LEXIS 6407 [EDNY 2010]; *Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]; *Jiao v Chen,* 2007 US Dist LEXIS 96480 at *30-31, 2007 WL 4944767 [SDNY 2007] [and cases cited therein]). In analyzing this definition of employment, the Supreme Court has observed that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

The central inquiry in determining whether one qualifies as an employer under these expansive definitions is "whether the alleged employer possessed the power to control the workers in question, . . . with an eye to the 'economic reality' presented by the facts of each case." *Herman v RSR Sec. Servs. Ltd.,* 172 F3d 132, 139 (2d Cir 1999). Factors to consider when examining the "economic reality" of a particular situation include: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records," though no single factor is

dispositive. Instead the "economic reality" test encompasses the totality of the circumstances, no one of which is exclusive. "[E]conomic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition" (*id.*). Under this broad definition of "employ," more than one entity can be found to be an employee's employer. *Zheng v. Liberty Apparel Co., Inc.,* 355 F3d 61(2d Cir 2003); *Moon v. Kwon,* 248 F Supp 210, 237 (SDNY 2002); *Rutherford Food Corp. v McComb*, 331 US 722 (1947). For example, in *Jiao v. Chen,* 2007 U.S. Dist. LEXIS 96480 (SDNY, Mar. 30, 2007), the Court found not only that an individual defendant was personally liable as the employer of an underpaid worker, but also that this personal liability "would not be affected" by a finding that a corporation of which the defendant was president, and which was not named as a defendant in the case, actually owned the hotel where the worker worked "and therefore could also be considered his employer" (*id.* at *36). As the Court explained, "it is possible for multiple entities to function as 'joint employers' for purposes of the statute" (*id.* at 32; *cf. Zheng,* 355 F.3d 61 [an employee may have more than one employer].

The individual officer's control "need not have been absolute: control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence." *Jiao v. Chen, supra* at *33 (citations omitted). This analysis, the *Jiao* Court made clear, applied to the New York Labor Law as well as the FLSA. (*Id.* at *36.) The principle applied in *Jiao* to declare responsible corporate officers liable as employers even if the corporation is not itself a party to the litigation – that "Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA" – is well settled and has been applied in numerous cases. *See Herman,* 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.,* 672 F2d 528, 531 [5th Cir 1982]); see also *Carter v Dutchess Community College,* 735 F2d 8, 11-12 [2d Cir 1984] (fact that control may be "qualified" is insufficient to place employment relationship outside statute); *Moon v Kwon,* 248 F Supp 2d 201, 237 [SDNY 2002] (fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence).

Applying the standards outlined above, the Board finds that each of the Lovingers was an employer of the Claimants and was properly found liable as such, regardless whether the Edge Solutions, Inc. incorporated in Delaware and/or any other corporation could also be held liable as a joint employer. Robert Lovinger, by his own testimony, was the Delaware corporation's sole shareholder, President, CEO, and "can't honestly say that I did not manage [its] everyday operations," while Miriam Lovinger, by her own testimony, was its Chief Financial Officer and in charge of Human Resources, payroll, health insurance and accounting. Miriam Lovinger signed the July 16, 2007 "Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return" for Edge Solutions, Inc. The two Lovingers, by their own testimony, jointly conducted the October 5, 2007 meeting at which employees were told that the Lovingers could lose control of the company if the FTC put the company in receivership, as well as the October 11, 2007 meeting at which Miriam Lovinger "told everybody essentially that it was over" and Robert Lovinger promised to "do my best to pay them." The Lovingers, by Miriam Lovinger's own testimony, solicited the letters to the Court in which Claimant D'Alessandro stated that she had "worked for Bob and Miriam Lovinger for the past several years" and Claimant Burnett wrote "on behalf of

Miriam and Bob Lovinger" that she "took pride in Miriam and Bob's business they worked so hard to achieve" and learned "from seeing the way that Bob and Miriam did business every day."

The Petition does not allege that the Orders incorrectly named the Edge Solutions, Inc. incorporated in New York rather than the one incorporated in Delaware which Petitioners testified was the only Edge Solutions, Inc. operating in 2007. Nor does the Petition even state that two different corporations called Edge Solutions, Inc. existed. Under Labor Law § 101, objections to the Orders that are not raised in the Petition are waived. Like the Petition, the Orders simply refer to "Edge Solutions, Inc." without further modification. Indeed, Miriam Lovinger testified that the only reason Petitioners claimed for the first time at the hearing that the "wrong" Edge Solutions, Inc. was named in the Orders was because the Orders found her personally liable, which she considered untenable if the Edge Solutions, Inc. incorporated in Delaware was the one active in 2007. Yet Miriam Lovinger's own testimony discussed above makes clear her continuing role as employer right up to the time the company was placed in receivership. Likewise, Claimant Burnett testified that her initial hiring interview was with Miriam Lovinger, her six-month review (which resulted in her passing probation on an expedited basis and receiving a raise) was conducted by both of the Lovingers, and that she saw both of the Lovingers on a daily basis.

The Board finds that the issue of which Edge Solutions, Inc. was active in 2007 or was referred to in the Orders was not raised in the Petition and that to the extent there may have been confusion between the Edge Solutions, Inc. incorporated in New York (of which, according to Robert Lovinger's testimony, Miriam Lovinger was sole shareholder and president while he was CEO) and the one incorporated in Delaware (of which, according to Robert Lovinger's testimony, he was sole shareholder and president while she was CFO), it was created by the Lovingers. In any event, under the broad statutory definitions of "employ" and "employer" included in the Labor Law and elucidated in the cases discussed above, both Lovingers were Claimants' employers regardless which corporate entity was also liable as a joint employer.

We find no merit in Petitioners' allegation that the court-appointed receiver, rather than they, was responsible for the wages owed to employees prior to the imposition of the receivership. In analogous situations where a financing factor seized an employer's assets (*In the Matter of David Schlockman and/or Mitchell Zimmerman and/or D.A.M. Clothing, Inc.,* Board Docket No. PR 07-047 [June 25, 2008]) and when an employer was put into foreclosure by its financier, (*In the Matter of Mark Hochlerin*, Board Docket No. PR 08-055 [March 25, 2009]) the original employers remained responsible for wages and benefits earned while they were in control of their companies. The same result is warranted in this case.

We credit the testimony of Claimant D'Alessandro that she worked on October 11, 2008, and modify the Order to include an additional $91.00 of wages due for the extra day.

IMPOSITION OF CIVIL PENALTIES IN THE WAGE AND PENALTY ORDERS

The Commissioner included a 50% civil penalty in the Wage Order and a $500.00 penalty in the Penalty Order, however no evidence was presented to demonstrate that the considerations and computations required to be made by the Commissioner in connection with the assessment of the civil penalties were reasonable (*see* Labor Law § 218).

At the hearing, Petitioners presented proof challenging the reasonableness of the penalties. Robert Lovinger testified that once the company was put into receivership, the Lovingers were not allowed on the premises, and only became aware of the employees' claims for the first time in January 2008. Lovinger stated that Petitioners had no prior labor law violations, and Petitioners submitted statements made by the Claimants themselves to demonstrate their good faith as employers. The Commissioner countered this testimony through a Respondent exhibit entitled "Background Information – Imposition of Civil Penalty." The responses in this form document were typewritten and were apparently filled in by Labor Standards Investigator Annemarie Culberson, who recommended a 10% penalty on January 28, 2008, based in part, on the fact that the Petitioners were cooperative and that they were "closed down by the FTC who has impounded all records, bank accounts, etc." On March 10, 2008, the 10% penalty assessed by Culberson was increased to 50% through a handwritten notation on the form initialed by "PJP." Although a DOL investigator named "Carol" was present in the hearing room for most of the hearing, she was not called as a witness, and the Commissioner failed to produce testimony particularizing how the applicable factors were weighed to assess the 50% penalty in the Wage Order and the $500.00 penalty in the Penalty Order, or to explain what factors led to increasing the penalties from the original 10% recommended by Labor Standards Investigator Culberson.

In a matter that requires the exercise of discretion and judgment, Respondent asks the Board to find as reliable evidence, a form with various options checked and no explanation. Respondent also asks the Board to rely exclusively on this form to determine that the civil penalty here is reasonable. We are unable to find the civil penalty reasonable because of the paucity of evidence in support, which itself is not reliable. More importantly, however, we are troubled that Respondent has prevented Petitioner from conducting any meaningful cross-examination concerning the document supporting the civil penalty by failing to produce any witness who might have personal knowledge of the document, its contents, and the considerations that led to the boxes that were checked and factors which led to increasing the recommended civil penalty in the Wage Order from 10% to 50%. Further, by failing to produce such a witness, Respondent has also prevented Petitioner from producing evidence that might controvert the reasons that particular boxes were checked and the recommendation to assess the civil penalty. Respondent may not have it both ways; she may not ask for documents to be found reliable evidence while preventing meaningful examination of the documents by failing to produce a witness with personal knowledge of them. *In the Matter of Abdul A. Saadat,* Board Docket No. PR 08-098 (October 21, 2009).

Similarly, the Commissioner failed to produce any proof supporting the determination in the Penalty Order to assess a $500 civil penalty for Petitioners' failure to keep and/or furnish payroll records required by the Labor Law. Labor Law § 218 requires the Commissioner to duly consider the same statutory factors for non-wage violations as for wage violations.

We therefore revoke the civil penalties assessed in both Orders.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, dated March 14, 2008, under review herein, is modified to provide that Petitioners owe $1701.00 in wages due and owing;

2. The Order to Comply with Article 6 of the Labor Law is further modified to annul the civil penalties.

3. The Order Under Article 19 of the Labor Law (Penalty Order), dated March 14, 2008 is revoked.

4. The Petition for Review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 24, 2010.