STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: AKIHIKO HIRIHATA (T/A TORIGO JAPANESE RESTAURANT), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, and an Order Under Article 19 the Labor Law, both dated November 20, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-021 RESOLUTION OF DECISION

APPEARANCES

Akihiko Hirihata, petitioner pro se.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael Paglialonga of counsel), for respondent.

WITNESSES

Akihiko Hirahata for the petitioner; Senior Labor Standards Investigator Frank King for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on January 25, 2010 and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioner Akihiko Hirihata on November 20, 2009. Upon notice to the parties a hearing was held on March 28, 2012, in Hicksville, New York, with the Commissioner appearing by video from Albany, New York, before Devin A. Rice, the Board's Associate Counsel, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The first order is an order to comply with Article 19 of the Labor Law (wage order), which finds that the petitioners failed to pay overtime wages in the amount of $9,701.72 to three named claimants from June 8, 2006 to April 17, 2009. The wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $1,772.85, and assesses a civil penalty in the amount of $4,850.86, for a total amount due of $16,325.43.

The second order is an order under Article 19 of the Labor Law (penalty order), which finds that the petitioners failed to keep and/or furnish true and accurate payroll records from June 1, 2006 to April 30, 2009, and failed to give each employee a complete wage statement with every payment of wages from June 1, 2006 to April 30, 2009. The penalty order charges the petitioners with a civil penalty of $500.00 for each violation, for a total due and owing of $1,000.00.

SUMMARY OF EVIDENCE

Senior Labor Standards Investigator Frank King testified that on January 10, 2009, Santos Herrera filed a claim with the Department of Labor (DOL) alleging that he worked at Torigo Japanese Restaurant in Floral Park, New York, six days a week for a weekly salary of $450.00. The claim, which was written in Spanish, specifically alleges that from June 8, 2006 to June 6, 2008, Herrera worked Monday, Tuesday, Thursday and Friday from 10:30 a.m. to 10:00 p.m., and on Saturday and Sunday from 3:00 p.m. to 10:00 p.m. A notation written in English in the margins of the claim form states "don't work bet 0300 to 0500."

King testified that he assigned the case to former Investigator Maloney. Once Maloney completed the investigation, she handed it back to King for review. As part of her investigation, Maloney conducted an interview with Felipe Bonilla on April 8, 2009. He informed her that he started working for the petitioner on November 8, 2008, and that he worked Monday to Saturday from 10:30 a.m. to 10:00 p.m., and that he received $410.00 every Friday. On the same day, she also interviewed Clementino Sanchez, who stated that he also worked Monday to Saturday from 10:30 a.m. to 10:00 P.M., and was paid $550.00 every Friday. He started working for the petitioner on May 24, 2008. The interview sheets for Bonilla and Sanchez each indicate "2 hours off in between from 0300 to 0500."

King testified that the petitioner did not provide DOL with daily and weekly payroll records or demonstrate that "proper overtime wage compensation had been made." King met with Hirihata on July 7, 2009, at which meeting Hirihata contended that he paid all employees above minimum wage.

King explained that DOL relied on the employees' statements in calculating the wages owed. Sanchez stated that he worked 57 hours a week for $550.00, so Maloney:

> "divided 57 hours into the $550 of wages earned to arrive at an hourly rate of $9.64 as the regular rate of pay, and $14.47 as the overtime rate of pay. Then the $9.65 was multiplied by the first 40 hours of his work week to arrive at the regular salary of $365.60 for the first 40 hours, and then the overtime rate of $14.47 was

> multiplied by 17 hours of overtime work to arrive at the overtime wages of $246.06, and a combined weekly earning of $611.45. Subtracting the $550 already paid to the employee on a weekly basis would result in an underpayment on weekly basis of $61.65.[1]"

King further explained that since Sanchez stated he worked from May 24, 2008 to April 8, 2009, which included 40 weeks, the weekly underpayment amount of $61.65 was multiplied by 40 to determine that the petitioners owed Sanchez $2,566.00. The calculations for Bonilla and Herrera were done in the same manner using the information they had provided to DOL.

Petitioner Akihito Hirihata, testifying through an interpreter, testified that he hired Santos Herrera in June 2006, and told him at the time that the work hours would be "like 52 hours per week, and the minimum rate that is set by the government is $7.15 so I am going to give you $7.15 per hour." He also told Herrera that the restaurant's business hours were weekdays from 11:30 a.m to 10:00 p.m., Saturday from 5:00 p.m. to 10:30 p.m., and Sunday from 5:00 p.m. to 9:30 p.m. Hirihata told Herrera to arrive at work at 10:30 a.m. on weekdays, to do "preparation" before the restaurant opened, and that "when we finish at 10:30, you can go home." Herrera left many times before 10:00 p.m, and Hirihata did not deduct from Herrera's wages when he left early or arrived late.

Hirihata testified that the restaurant was closed from 3:00 p.m. to 5:00 p.m. on weekdays, and that Herrera did not work during that time. When customers stayed later than 3:00 p.m., Hirihata told the kitchen staff that the waiters could take care of those customers, and they could go on their break.

Hirihata testified that he paid the employees their wages on a weekly basis:

> "because I thought it is more stable for them to [be paid] on a weekly basis than paying on a daily basis . . . . But I always covered their weekly pay, although it was $7.15 per hour so it was normally 52 hours plus overtime, and with all that, I covered. So the fixed hours, 40 hours, and including overtime it was 52 hours. . . . the salary per week, 40 hours at $7.15, $286. Overtime per week is 12.5 hours, and it is 1.5 times, which is $10.73 so the overtime is $134.12. So the total of these two is $420.12, but the actual payment is $450, plus meal is $20. That included meal so the actual payment was $450 per week . . . . So including the meal with the $20, you can say it was $470, and their wage for work was $420.12 so this is a much bigger amount than they are working. So I made it a fixed $450 in order to stabilize his life, because if it is up and down, if there is fluctuation between wages, then it is not stable in his life. Because if I count the fact that he comes late or he leaves

[1] Although it does not impact our decision, we note that the explanation provided by King and contained in DOL's audit is mathematically incorrect: $550.00/57 = a regular rate of $9.65 and an overtime rate of $14.47. The amount earned in 40 hours is $385.96 (40 x $9.65), not $365.60. The overtime earned is $246.05 (17 x $14.47). The total earned is, therefore, $632.02, and the amount owed is $82.02 ($632.02-$550.00).

early, then his salary will be smaller, but I gave him anyway $450 fixed in order to stabilize his life."

Hirihata testified that Sanchez and Bonilla were each paid $420 a week, and worked about the same hours as Herrera. He explained to the employees when they were hired that they were going to be paid $7.15 an hour and $10.73 for overtime. If an employee worked more than his scheduled hours, they were paid extra for it. Hirihata did not keep track of the hours the employees worked, but did inform DOL that the employees did not work 57 hours a week. He further testified that on Saturday, the restaurant was not open for lunch, so the employees did not start work until 4:00 p.m. Finally, Hirihata testified that he posted the minimum wage in the changing room and the employees' locker room and orally explained minimum wage to them, "so they must know."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30). The petitioner, for the reasons set forth below has not met his burden of proof with respect to the wage order; and the penalty order is affirmed.

The Commissioner found that the petitioner violated Article 19 of the Labor Law by failing to properly compensate employees paid on a weekly salary basis for overtime hours worked in excess of 40 in a work week. The Commissioner, after an investigation, determined that claimants Clementino Sanchez, Felipe Bonilla, and Santos Herrera each worked 57 hours a week for a weekly salary of $550.00, $410.00, and $450.00 respectively. In the absence of any records of the hours the employees worked, the Commissioner calculated the wages due based on the employees' statements, which was the best available evidence (Labor Law § 196-a; *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989]). Sanchez and Bonilla each stated to DOL that they worked from 10:30 a.m. to 10:00 p.m. on Saturdays. The petitioner, however, credibly testified that the restaurant was open only for dinner on Saturdays, and that the employees did not start work until 4:00 p.m. on that day. Furthermore, Herrera's claim form only states that he worked 52 hours a week, not 57 as determined by the Commissioner. Accordingly, since the claimants did not testify to rebut the petitioner's credible testimony, we find that Sanchez and Bonilla worked 52 ½ hours per week. We find that Herrera worked 52 hours as stated in his claim form.

The overtime provisions of the Labor Law, which require that a covered employee be paid a premium rate for overtime hours, are found at Labor Law § 652 (2). The wage order for the restaurant industry, which was applicable during the time period relevant to this proceeding, but which has since been superseded by the wage order for the hospitality industry, 12 NYCRR Part 146, provided that "an employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked in excess

of 40 in one workweek" (12 NYCRR 137-1.3 [2009]). "Regular rate" was defined by the regulation as "the amount that the employee is regularly paid for each hour of work. When an employee is paid on a . . . salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings" (12 NYCRR 137-3.5 [2009]).

We explained in our decision in the petition of Cayuga Lumber, Inc. that there is a rebuttable presumption that a weekly salary does not include a premium for overtime hours unless there is an explicit agreement between the parties that the salary compensates the employee for regular and overtime rates (*Matter of Cayuga Lumber, Inc.*, PR 05-009 [decision on application for reconsideration, September 26, 2007]). In *Cayuga Lumber*, we found that in the absence of evidence of an explicit, mutual agreement between the employer and an employee that the employee's salary provided for a premium rate for overtime hours, the regular rate of pay for the nonexempt salary employee was computed by dividing the weekly salary by the number of hours worked, and that the premium wage due for the overtime hours was then computed by multiplying the overtime hours by half of the regular rate (*Id.*). Although the petitioner testified that the agreement between himself and the claimants was to pay them the hourly minimum wage rate, the evidence shows that he, in fact, paid them a weekly salary that did not depend on the number of hours the employees actually worked. Furthermore, the weekly salary the petitioner paid to the claimants was more than the minimum hourly wage rate, which suggests that the agreement was for some rate other than minimum wage. It was, therefore, reasonable for the Commissioner to determine that the claimants were salaried employees and to use the method approved by *Cayuga Lumber* to compute the overtime wages owed to them; however, as discussed above, the wage order must be modified as follows:

	Hours	Weekly Salary	Regular Rate (12 NYCRR 137-3.5)	Overtime Rate (12 NYCRR 137-1.3)	Earned	Owed	Weeks Worked	Total Owed
Sanchez	52.5	$550.00	$10.48	$15.71	$615.48	$65.48	40	$2,619.05
Bonilla	52.5	$410.00	$ 7.81	$11.71	$458.81	$48.81	18	$ 878.57
Herrera	52	$450.00	$ 8.65	$12.98	$501.92	$51.92	92	$4,776.92
							Total:	**$8,274.54**

Civil Penalty

The wage order imposes a 50% civil penalty. The petition does not object to the civil penalty, and it is therefore affirmed (*see* Labor Law § 101 [2] [objections not raised are deemed waived]).

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

The penalty order

The Commissioner also issued a penalty order finding that the petitioner violated Article 19 of the Labor Law by failing to maintain required records of hours worked and wages paid, and for failing to provide each employee with a complete wage statement with each payment of wages. The petitioner admitted that he failed to maintain required records and provide wage statements. Accordingly, the penalty order is reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages owed to $8,274.54, to reduce the civil penalty to $4,137.27, and to recalculate the interest due and owing based on the new principal; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

Anne P. Steyason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 30, 2012.

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Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.