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INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X	
In the Matter of the Petition of:	:
	:
238 FOOD CORP.	:
(T/A RIVERDALE DINER),	:
	:
Petitioner,	:
	:
To review under Section 101 of the New York State	:
Labor Law: Two Orders to Comply with	:
Article 19 of the Labor Law, both dated August 22, 2005	:
	:
-against-	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR-05-068
RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 19, 2005. The Answer was filed on October 27, 2005. Upon notice to the parties a hearing was scheduled and held on November 28, 2006 and continued on January 16, 2007 in the Board's New York City office before Board Member Susan Sullivan-Bisceglia.

Petitioner 238 Food Corp. was represented by Colleran, O'Hara & Mills, LLP., John S. Groarke of counsel, and Respondent Commissioner of Labor (Commissioner) was represented by Jerome Tracy, Counsel to the Department of Labor (DOL), Benjamin T. Garry of counsel. 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 Commissioner issued the two Orders to Comply under review in this proceeding on August 22, 2005. One Order directs compliance with Article 19 of the Labor Law, payment to the Commissioner for wages due and owing to a named employee (Complainant) in the amount

of \$30,477.96 for unpaid overtime from March 14, 1997 to January 19, 2003, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$12,625.39, and assesses a civil penalty in the amount of \$7,620.00, for a total amount due of \$50,723.35. The other Order directs compliance with Article 19 of the Labor Law, payment to the Commissioner of civil penalties for failure to furnish true and accurate payroll records in the amount of \$500.00 and failure to give each employee a complete wage statement in the amount of \$500.00.

The Board has considered the parties' arguments, the pleadings, the testimony, the hearing exhibits and the post hearing submissions.

I. SUMMARY OF EVIDENCE

Petitioner 238 Food Corp. is a restaurant doing business as Riverdale Diner in the Bronx, New York. 238 Food Corp. is owned by George and Anna Kaperonis. Brian Antash is the general manager of the diner. On March 3, 2003, a named Complainant filed a claim against the Petitioner with DOL for unpaid wages for the time period from March 3, 1997 to January 19, 2003. DOL initiated an investigation of the Petitioner after receiving the Complainant's claim and following its investigation issued the Orders under review.

The parties agree that Messrs. Kaperonis and Antash are present at the diner almost everyday and oversee its operations. It is undisputed that the Petitioner originally hired the Complainant in June 1996 to work as a line cook. It is also undisputed that the Complainant worked as a line cook until May 1, 1999, and that he typically worked six days per week 10 hours per day during that time period, and was paid \$600.00 per week in cash. The parties agree that as a line cook, the Complainant punched in and out each day on a time clock. It is further undisputed that during this time period, the time and wage records related to the Complainant were incorrect – showing that he worked 35 to 40 hours per week and also listing a much lower weekly wage.

The parties further agree that on or about May 1, 1999, the Petitioner promoted the Complainant to chef and that there was a short period of time during which Mr. Kaperonis and his sister¹ taught the Complainant all of the recipes on the diner's menu. While working as chef, the Complainant did not need to punch in and out on the time clock and could leave for the day whenever he finished his work. The Complainant worked as a chef until January 19, 2003 when the Petitioner terminated him. The parties, however, disagree on the nature and duties of the Complainant's work during his tenure as the Petitioner's chef.

A) Training period

The Complainant testified that after he was promoted to chef Mr. Kaperonis and his sister trained him from May 1, 1999 to mid August 1999. During this time period Mr. Kaperonis and his sister taught the Complainant how to cook all the items on the Petitioner's menu. During the training period, the Complainant worked six days per week from 6:00 a.m. to 5:30 p.m. He was not paid for the first three weeks of training. The Petitioner paid the Complainant \$500.00 per

¹ The name of Mr. Kaperonis' sister is not in the record of this proceeding.

week beginning May 22, 1999. Mr. Kaperonis explained to the Complainant then that half of his wages were being paid to Mr. Kaperonis' sister for teaching the Complainant the recipes.

Mr. Kaperonis, however, testified that he paid the Complainant \$800.00 per week during the training period.

B) Complainant's job duties as chef

The Complainant testified that Mr. Kaperonis instructed him to follow the recipes that were taught to him and not to change anything. The Complainant did not have the culinary skills to create his own recipes and had no input into the development of the Petitioner's menu. The Complainant's duties as chef consisted of following recipes taught to him by Mr. Kaperonis and his sister, many of which were the same recipes used at the restaurant for over 30 years, taking inventory of the food stocks, and ordering food supplies.

The Complainant testified that he did not have the authority to hire or fire employees, nor to set work schedules for other employees. He supervised one other employee, the chef's assistant. The Complainant stated that Messrs. Kaperonis and Antash were responsible for all hiring and firing at the diner, and that on one occasion after the Complainant attempted to discipline an employee, Mr. Kaperonis instructed him to leave all personnel matters to Mr. Antash.

The Complainant testified that although he had no fixed schedule and could leave when he finished his work for the day, he worked approximately 11 hours per day during the first two years that he was chef and 8 hours per day during his last year as chef.² He typically worked six days per week. The Petitioner initially paid the Complainant \$800.00 per week in cash. The Complainant's salary was raised to \$900.00 per week in approximately September 2002.

Mr. Kaperonis testified that the Complainant's duties as chef included ordering food supplies, hiring and firing kitchen workers, and supervising the line cooks and dishwashers. Mr. Kaperonis, although he is present at the diner everyday, could not recall any specific individual hired or fired by the Complainant. Mr. Kaperonis testified that he paid the Complainant \$900.00 per week plus an annual Christmas bonus of \$5,000.00.

Mr. Antash testified that the Complainant's duties as chef included scheduling the kitchen workers, overseeing the operation of the kitchen, ordering food supplies, and supervising the food runners. Mr. Antash stated that the Complainant had hired a dishwasher and a line cook, although he could not recall their names. Mr. Antash further testified that all firing of the kitchen staff was done by the Complainant, although he could not recall any specific instances of the Complainant firing anyone.

Mr. Antash testified that the Complainant was paid \$800.00 per week after his promotion to chef, and that he was earning \$1,000.00 or close to it by the time he was terminated.

² The Complainant testified that he typically arrived at the restaurant before 6:30 a.m. and would finish at 5:00 p.m. or 5:30 p.m. during the first two years he was chef and that eventually, during his last year as chef, once he had become more efficient, he would finish at 2:30 p.m. or 3:00 p.m.. He testified that he had no time to take a break.

Several of the Petitioner's employees also testified. Humberto Molina testified that he was the Complainant's assistant chef and that the Complainant gave him daily instructions concerning the daily menus. Mr. Molina stated that the Complainant's hours of work were 7:30 or 8:00 a.m. to 1:30 or 2:00 p.m. According to Mr. Molina, the Complainant set the work schedules for all of the kitchen employees.

Rafael Fernandez testified that he has been employed by the Petitioner as a cook for 28 years. Mr. Fernandez did not often see the Complainant at the diner because they worked in separate areas, but he nonetheless stated that the Complainant left the diner at noon or 1:00 p.m. each day. Although Mr. Fernandez testified that the Complainant set his work schedule, he clarified that he had worked the same schedule for 21 years, starting long before the Complainant was promoted to chef.

Mihail Tsimplakis testified that he has been employed by the Petitioner as a baker for close to 20 years. Mr. Tsimplakis stated that the Complainant was the "boss of the kitchen" although Tsimplakis worked in the basement which is downstairs from the kitchen. The Complainant's hours of work were 7:30 a.m. to 12:30 or 1:00 p.m. according to Mr. Tsimplakis.

Mr. Molina testified that he did not remember anybody who had been hired or fired by the Complainant. Mr. Molina further explained that prospective kitchen help reported to Mr. Antash first before being brought to the Complainant. Mr. Fernandez stated that a co-worker whose name he could not recall had told him that he had been fired by the Complainant, although Mr. Fernandez himself had never personally witnessed the Complainant hiring or firing any employee. Mr. Tsimplakis testified that he had seen the Complainant hire a couple of dishwashers although he could not recall their names.

C) DOL's investigation

The DOL initiated an investigation of the Petitioner after receiving the Complainant's claim. DOL originally determined that the Complainant's claim should be limited to only the time period when he worked as a line cook because the original DOL investigator who met with the Complainant believed without further inquiry that the Complainant's own representation that he was a "chef" excluded him from the coverage of the Minimum Wage Act as an "executive employee."

However, Labor Standards Investigator Leo Lewkowitz, the investigator eventually assigned to the case subsequently re-interviewed the Complainant and determined that the initial intake was inaccurate due to the Complainant's limited English proficiency. Mr. Lewkowitz determined that the Complainant was not an exempt executive employee during his time as chef because he did not have authority to hire and fire.

Mr. Lewkowitz conducted an unannounced on-site visit to the Petitioner's restaurant on July 19, 2004. At that time he attempted unsuccessfully to interview several employees and to obtain time and payroll records. Mr. Lewkowitz issued a records request to the Petitioner on December 15, 2004 demanding the production of payroll records including daily and weekly hours worked, gross and net wages paid and statutory deductions for all employees for the period

September 1, 1998 to December 21, 2004. The Petitioner failed to respond in a timely manner to the records request and although some records were eventually produced, DOL determined that they were insufficient as no time cards were produced for any of the Petitioner's employees indicating hours worked and the records that were produced appeared inaccurate since, for example, the Petitioner admitted that the Complainant worked 54 to 60 hours per week when he was a line cook, but the records produced listed him as working only 35 to 40 hours per week during that time period. The Petitioner's records also under-reported the weekly wages earned by the Complainant during his time as a line cook.

Additionally, the Petitioner supplied DOL with several written statements from the Petitioner's employees. DOL discredited these statements because they contradicted the verbal statements originally given by the employees to Mr. Lewkowitz.

DOL issued the Order under review based on the hours and wage rates declared by the Complainant because the Petitioner failed to produce adequate or credible records.

II. GOVERNING LAW

A) Standard of review

In general, 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 shall presume that an order of the Commissioner is valid. Labor Law § 103(1) provides, in relevant part:

"Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]: "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.

B) The Commissioner's authority to issue Orders to Comply and to assess civil penalties

When the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

“If the commissioner determines that an employer has violated a provision of article nineteen (minimum wage act) . . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation.”

The Commissioner is also authorized to assess a civil penalty and interest based on the amount owing. The civil penalty is in addition to, or concurrent with, any other remedies or penalties provided under the Labor Law (Labor Law § 218[4]). Labor Law § 218 further provides:

“1. In no case shall the order direct payment of an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . the failure to comply with recordkeeping or other non-wage requirements.”

C) Recordkeeping requirements

Labor Law § 661 states in relevant part that “[e]very employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time.”

12 NYCRR 137-2.1 further provides, *inter alia*, that:

“(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) occupational classification and wage rate;
- (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) the amount of gross wages;
- (6) deductions from gross wages;
- (7) allowances, if any, claimed as part of the minimum wage;
- (8) money paid in cash; and
- (9) student classification.”

In addition, 12 NYCRR 137-2.2 mandates that every employer “shall furnish to each employee a statement with every payment of wages listing hours

worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages.”

In the case of an employer who fails to keep adequate records, “[t]he employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements” (Labor Law § 196-a).

D) Premium pay for overtime

Under the minimum wage order for the restaurant industry, “[a]n 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 hours in one workweek” (12 NYCRR 137-1.3 [2003]).

III. FINDINGS

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

A) Executive exemption from overtime in the restaurant industry

Petitioner asserts that for the period, May 1, 1999 to January 18, 2003, the Complainant worked as a chef in an executive capacity and therefore was subject to the executive exemption and not entitled to overtime wages. We find this argument unpersuasive.

Only employees who work in a “bona fide executive capacity” are excluded from overtime protection by the executive exemption under the minimum wage order for the restaurant industry. The then applicable regulation states:

“c) Employee also does not include any individual permitted to work in, or as:

(1) Executive, administrative or professional capacity

(i) Executive. Work in a *bona fide executive* . . . capacity means work by an individual:

- (a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
- (b) who customarily and regularly directs the work of two or more other employees therein;

- (c) who has the authority to hire or fire other employees on whose suggestion and recommendations as to the hiring or firing and as to the advancement or promotion or any other change of status of other employees will be given particular weight;
- (d) who customarily and regularly exercises discretionary powers and
- (e) who is paid for his services a salary not less than . . . \$386.25 per week on or after March 31, 2000, inclusive of board, lodging, other allowances and facilities” (12 NYCRR 137-3.2 [2003]).

An employer bears the burden of establishing that an employee is subject to the executive exemption (*Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 [1974]), and such exemptions are narrowly construed to be applied only where “it plainly and unmistakably comes within the statute’s terms and spirit” to deny an employee overtime coverage (*Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388, 390 [1960]; *see also Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 [1959]).

i) Primary duty

Although he held the title of “chef,” the Complainant’s primary duty was not the management of the Petitioner’s kitchen, it was cooking (*see Kahn*, 331 F.Supp.2d at 119 [“an employee’s title is not determinative of his status as an exempt employee . . .”]). He prepared sauces, meats, and other food based on recipes taught to him by the Petitioner, and ordered supplies, and maintained the kitchen inventory according to those recipes. Indeed, the Complainant was instructed not to change the recipes because they had been cooked the same way for over 30 years. The Complainant was not a graduate of a culinary school and by his own admission was incapable of creating his own recipes. Because the Complainant’s primary duty was cooking, he is not excluded from overtime protection under the executive exemption (*see Cowan v. Treetop Enterprises Inc.*, 120 F.Supp.2d 672 [M.Dist. Tenn. 1999] [unit managers of a restaurant franchise whose primary duty was cooking are not exempt from overtime coverage]).

ii) Customarily and regularly direct the work of two or more other employees

Petitioner failed to meet the second criteria. The evidence establishes that the Complainant supervised only one employee, the chef’s assistant. Furthermore, there is no credible evidence that the Complainant set the schedules, job duties, or rates of pay for any of the Petitioner’s employees including his assistant.

iii) Authority to hire and fire

We find that the Complainant did not have the authority to hire or fire employees, and that after reprimanding a kitchen employee he was specifically told by the owner that the help was the general manager's "business." We are mindful of the testimony from several of the Petitioner's witnesses that the Complainant did have the authority to hire and fire kitchen workers, but do not find such testimony credible in light of Mr. Lewkowitz's testimony that several employees had changed their original statements, coupled with the Petitioner's inability to produce any witness who had been hired or fired by the Complainant or who were able to identify with specificity any such employee. We find that the owner, Mr. Kaperonis, and the general manager, Mr. Antash, were the only individuals who had the authority to hire and fire employees, to set work schedules and to determine pay rates.

iv) Customarily and regularly exercise discretionary powers

The factors to consider when determining whether an employee regularly exercises discretionary powers include, but are not limited to:

"Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances" (29 C.F.R. 541.202 [b] [2005]).

There is no credible evidence that the Complainant had any of these discretionary powers. He was told what to cook and shown how to cook it using recipes that had been unchanged for over 30 years. The menu was set by the owner, and the Complainant had no input into creating or changing that menu.

v) Earn a salary of not less than \$386.25 a week

It is undisputed that the Complainant earned more than \$386.25 a week. However, in order to qualify as an executive employee exempt from the overtime requirements of the restaurant industry minimum wage order, the Petitioner must show that all of the factors set out at 12 NYCRR 137-3.2 (c) (1) (2003) applied to the Complainant. Only the salary requirement

applied to the Complainant, and therefore he is not exempt from overtime coverage as an executive employee.

B) Overtime liability

The Petitioner failed to prove its claim that the Complainant was an exempt employee and therefore he must compensate him for his overtime hours at a rate of one and one-half times his regular rate. We find that the Petitioner violated Article 19 of the Labor Law by failing to pay overtime to the Complainant and affirm the Commissioner's Order.

C) Recordkeeping violations

Labor Law § 196-a provides in relevant part that “. . . [f]ailure of an employer to keep adequate records . . . shall not operate as a bar to filing a complaint by an employee. In such a case the employer in violation of [Labor Law articles 6, 19 or 19-a] shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.” Having failed to maintain accurate time and payroll records as required by 12 NYCRR 137-2.1, DOL's calculation of the overtime wages due based on the Complainant's statement must be credited unless Petitioner meets its burden of proving that the Complainant was paid the disputed wages (*see e.g. Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 [3d Dep't 1989] [“When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer”]). The Petitioner has failed to meet this burden.

The Petitioner by its own admission paid the Complainant's wages in cash and has produced no records demonstrating the amount paid to him during the time period that the Order covered. Additionally, although the Petitioner admitted that as a line cook the Complainant worked 54 to 60 hours per week, the time records that the Petitioner produced for the relevant time period list the Complainant as working only 35 to 40 hours per week, and no time records were produced of the Complainant's hours of work for the time period he was a chef. Finally, the Petitioner admitted that the wage records it produced were inaccurate and reflected a lower weekly wage rate than was actually paid to the Complainant.

We find that DOL's method of calculating the amount of unpaid overtime was reasonable (*see Giles v. City of New York*, 41 F.Supp.2d 308, 318 [S.D.N.Y. 1999] [“unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime . . .”]). The recollection of the Complainant concerning the hours he worked and the wages he was paid was a sufficient basis for DOL's findings (*Doo Nam Yang* 427 F.Supp.2d 327, 335 [S.D.N.Y. 2005]), and the Petitioner has simply not produced any reliable or credible evidence to contradict DOL's determination of the overtime wages owed to the Complainant.

D) *The limitations period on the Commissioner's Order to Comply*

The Order directs Petitioner to pay unpaid overtime wages to Complainant for the period of March 3, 1997 to January 19, 2003. Complainant filed his claim on March 3, 2003 and DOL issued its Order directing payment of unpaid wages due for the six year period prior to the filing of the claim. Petitioner questions the reasonableness and validity of the Order based on the length of the period that Petitioner owes wages.

Arguing that the six year statute of limitations found at Labor Law § 663(3) applies to orders issued by the Commissioner of Labor, the Petitioner asserts that the Commissioner's Order to Comply directing payment for wages due to the Complainant for work performed prior to August 22, 1999, or six years from the date of the Order, is invalid and barred.³ That statute provides that “[n]otwithstanding any other provision of law, an action to recover upon a liability imposed by this article must be commenced within six years” (Labor Law § 663 [3] [emphasis added]). However, as this limitations period applies only to “actions” it is not applicable to orders issued by the Commissioner of Labor.

The Civil Practice Law and Rules (CPLR) define an “action” as a “judicial proceeding” (CPLR § 103). As the U.S. Supreme Court has observed, the term “action” is “ordinarily used in connection with judicial and not administrative proceedings” (*BP America Production Co. v. Burton*, 127 S.Ct. 638, 643 [2006]). This is clearly the case in New York where administrative proceedings, such as the Commissioner's issuance of orders to comply, are not judicial proceedings governed by the CPLR (*see Matter of Friedman v. State Dep't of Health*, 58 NY2d 80, 82 [1983] [CPLR § 2103's provision allowing for extensions of time where service is made by mail do not apply to administrative proceedings because “an administrative proceeding is not an action”]; *see also Matter of IESI NY Corp. v. Martinez*, 8 AD3d 667, 669 [2d Dep't 2004] [administrative proceedings arising out of Vehicle and Traffic Law are not actions under CPLR]; *Matter of Syracuse v. PERB*, 279 AD2d 98, 104 [4th Dep't 2001] [improper practice charge is administrative proceeding and therefore not an action or special proceeding governed by the CPLR]; *Matter of Taylor v. Vassar College*, 138 AD2d 70, 72 [3d Dep't 1988] [proceedings under the Workers' Compensation Law are not actions or special proceedings under the CPLR]).

We find that the Commissioner's collection of unpaid wages in this matter for a six year period commencing at the time the complaint was filed with DOL is reasonable. Penalizing employees such as the Complainant who make wage complaints to DOL by not allowing them to recover unpaid wages for the time period during which DOL conducts its investigation would cause the unintended consequence that employees seeking redress through DOL's administrative process would be at a disadvantage to similarly situated employees seeking a remedy in court. Under the Petitioner's theory, two employees who each worked for six years with the same employer and were underpaid by the same amount would receive different amounts dependent on whether they filed a complaint with DOL or commenced an action in state court. The employee who filed with DOL would have his wage award reduced by, for example, one year, if DOL investigated the complaint for one year prior to issuing an order to comply, whereas the

³ The Petitioner argues that the Commissioner may only collect wages for the time period commencing six years before the date the Orders were issued, whereas the Commissioner asserts that wages can be collected for the time period commencing six years prior to the date the Complainant's claim was filed.

employee who commenced an action in state court would receive an award of six years of wage underpayments even if the judicial proceeding lasted several years before judgment. Such a result would be contrary to the remedial purposes of the Labor Law and would frustrate the law enforcement authority granted to the Commissioner by the Legislature (*see* Statutes § 95 [remedial statutes to be broadly construed to consider the mischief to be remedied]).

We find the Order providing for six years of unpaid wages from the time of the filing of the claim to be in keeping with the Commissioner's powers under Labor Law § 196 (1) (a) to "investigate and attempt to adjust equitably controversies between employers and employees relating to this article" dealing with the payment of wages.

The Petitioner further argues that the requirement to keep employment records for only six years supports its position that a six year statute of limitations is applicable to the Commissioner's orders. The minimum wage order for the restaurant industry requires every employer to establish, maintain and preserve weekly payroll records for not less than six years for every employee (12 NYCRR § 137-2.1 [a]). However, Petitioner does not claim or prove that it has disposed of relevant records it would have otherwise retained due to the fact that it was not notified of the claim immediately or that it was prejudiced in any way. In fact, the record shows that DOL and the Petitioner agreed on Complainant's hours worked and wages received for the relevant period, including the period for which Petitioner now claims he should not be liable.

E) Recordkeeping violations

It is clear from the record before the Board that the employer records maintained by the Petitioner and produced to DOL not only failed to meet the requirements of 12 NYCRR § 137-2.1 but were false. It is likewise clear that the Petitioner failed to provide the Complainant with an accurate weekly wage statement as required by 12 NYCRR § 137-2.2. Accordingly, we find that part of the Commissioner's Order finding that Petitioner violated 12 NYCRR §§ 137-2.1 and 2.2 reasonable and valid.

IV. CIVIL PENALTIES

The first Order to Comply additionally assessed a civil penalty, in the amount \$7,620.00 and the second Order to Comply assessed a civil penalties totaling \$1,000. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amounts set forth in the herein Orders are proper and reasonable in all respects particularly in light of the Petitioner's admission that its time and wage records for the time period that the Complainant worked as a line cook were false.

V. 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."

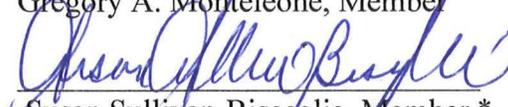
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders to Comply with Article 19 of the Labor Law, each dated August 22, 2005, under review herein, are affirmed consistent with this decision; and
2. The Petition for Review be and the same hereby is, denied.

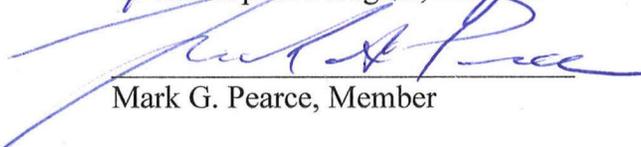

Anne P. Stevason, Chairman

ABSENT

Gregory A. Monteleone, Member


Susan Sullivan-Bisceglia, Member *


J. Christopher Meagher, Member


Mark G. Pearce, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 23, 2008

Filed in the Office of the
Industrial Board of Appeals
at Albany, New York on
April 25, 2008