STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

T'AMO ENTERPRISES INC.
(T/A TAJA RESTAURANT),

Petitioner,

To review under Section 101 of the Labor Law: An Order to Comply with Article 6, an Order to Comply with Article 19, and an Order under Article 19 of the Labor Law, dated February 10, 2006

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR-06-023

RESOLUTION OF DECISION

WHEREAS:

1. The above proceeding was duly commenced by the filing of a Petition for review pursuant to Labor Law Section 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66 on April 11, 2006; and

2. Thereafter, on January 26, 2006, Respondent served and filed a Motion to Strike Exhibit "B" from the Petition, as frivolous, and to dismiss the Petition pursuant to the Rules § 65.13 (d)(l)(iii), for failure to comply with the Rules, and by fax dated and received June 23, 2006, Petitioner responded to Respondent's Motion to Strike; and

3. The Board by Interim Resolution of Decision, dated June 28, 2006, denied said Motion and directed the Respondent to serve and file her Answer pursuant to the provisions of the Rule § 66.5; and

4. An Answer was duly served and filed by the Respondent on April 24, 2007; and

5. Upon notice by the Board to the parties, a hearing was duly scheduled and held at the Department of Labor offices in New York City on May 16, 2007; and

6. Both parties were present during the course of the hearing and were provided sufficient opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues raised in this proceeding; and

7. The Board has considered the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed herein; and

8. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference in its entirety in this Resolution of Decision; and

9. All motions and objections made on the record of this proceeding that are not consistent with this determination are deemed denied.

NOW, THEREFORE, IT IS HEREBY RESOLVED:

1. That the Orders to Comply under review herein are hereby affirmed in all respects.

2. That the Petition for review filed herein, be and the same hereby is, denied.

Anne P. Stevason, Chairman

Mark S. Perla, Member*

Gregory A. Monteleone, Member

ABSENT
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on September 26, 2007.

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MEMORANDUM OF DECISION

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 11, 2006. The Answer was filed on April 24, 2007. Upon notice by the Board to the parties, a hearing was duly scheduled and held at the Department of Labor (DOL) office in New York City on May 16, 2007 before Mark S. Perla, Member of the Board and designated Hearing Officer in this case.

Petitioner, T'Amo Enterprises Inc. (T/A Taja Restaurant), was represented by attorney Anthony F. LeCrichia, and Respondent, Commissioner of Labor (Commissioner), was represented by Maria A. Colavito, Counsel to DOL, Jeffrey G. Shapiro, of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The first Order to Comply under review, dated February 10, 2006, was issued by Respondent to Petitioner pursuant to the provisions of Article 6, Section 196-d (unpaid tip appropriations) of the Labor Law, and directs payment to the Commissioner of wage supplements

found due to claimant Hicham Ibn Alkadi (Alkadi or claimant), for the period October 15, 2001 through June 15, 2002, in the amount of $18,900.00, with continuing interest thereon at the rate of 16% calculated to the date of the Order in the amount of $11,060.38, and assesses a civil penalty in the amount of $4,725.00, for a total due of $34,685.38.

The second, dated February 10, 2006, Order to Comply under review, was issued by Respondent to Petitioner pursuant to the Provisions of Article 19, Section 652 (1) (minimum wage underpayments) of the Labor Law, and directs payment to the Commissioner of wages found due to claimant, for the period October 15, 2001 through June 15, 2002, in the amount of $6,612.55, with continuing interest thereon at the rate of 16% calculated to the date of the Order in the amount of $3,869.70, and assesses a civil penalty in the amount of $1,655.00, for a total due of $12,137.25.

The third Order dated February 10, 2006, was issued by Respondent to Petitioner pursuant to the provisions of Article 19, Section 661 of the Labor Law and of the minimum wage order of Part 137 of Title 12 of the New York Code of Rules and Regulations (12 NYCRR Part 137), for failing to keep or furnish true and accurate payroll records for each of its employee, for the period on or about October 15, 2001 through June 15, 2002. The Order assessed a civil penalty in the amount of $1,000.00.

The Board having given due consideration to the pleadings, the testimony, documentary evidence and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of the Board's Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

FINDINGS OF FACT

The Petitioner is a private employer doing business in the State of New York, as defined by Article 1 of the Labor Law, and is subject to the jurisdiction of the Commissioner. It is also an employer as defined in Labor Law § 651.6.

The Petitioner called the Claimant as its first witness. Alkadi testified that he worked for the Petitioner's business, TAJA Restaurant, in 2001 and 2002 as a waiter. The Petitioner questioned him about the exact location of the restaurant, and about its physical layout. Alkadi answered all the Petitioners questions satisfactorily. The witness went on to say that he worked there between October 2001 and June 2002. He was asked about the other employees of the restaurant. Alkadi stated that he worked with one person from Brazil, whose name was Joe, and another person from Morocco who was named "Laraby". He gave a physical description of some of the other workers, whose names he was not sure of. He testified that there were two waiters, one "runner" (delivery man), one busboy, a hostess and a bartender working at the time. He said that the restaurant contained approximately 14 tables. He also described the layout of the tables. The witness was very precise as to the physical layout of the restaurant and even described the decorations inside the restaurant.

Upon further examination by Petitioner's counsel, Alkadi described the chef, the owner and the owner's father. He said that an exact hourly wage was not set when he was hired, and he was told that he was just going to be paid tips. He said he worked for Petitioner for 8 months, was not paid an hourly wage and that the tips he was given were only a portion of the tips that were brought in. He said he was usually paid about $30.00 to $40.00 per day in cash, Monday through Thursday and about $70.00 per day on Friday, Saturday and Sunday. The Claimant testified that he should

have gotten at least $120.00 a day in tips during the week and as much as $200.00 to $250.00 on weekends.

The Claimant was then questioned by Respondent's counsel and restated that he received no hourly wages and that the tips he got, he gave to Taja, the owner. She then paid him a portion. He said on average she gave him about $50.00 per day.

The Petitioner's next witness was Adi Erwteman who testified that she was employed by the Petitioner as the bookkeeper in 2001 and 2002. She admitted that she had never seen the Claimant before. She disputed the Claimant's description of the other workers. She said she can't recall "100 percent" but her recollection was that some of the employees were paid by checks, but she wasn't sure if this applied to the waiters.

On cross examination, Ms Erwteman admitted that she didn't have any records for Petitioner and that she did not know where the records were. She was unsure as to when the business closed and was not certain as to the restaurant's policy with regard to tips. She believed that the tips were pooled and then distributed by Taja the following day. She admitted to having no tip records either.

The Respondent called Milton Vera, a Labor Standards Investigator who testified as to the DOL investigation. He said that the investigation began with a complaint form signed by the Claimant, which was admitted into evidence. He said that after a complaint comes in, DOL typically visited the premises that gave rise to the complaint. The investigator testified that he visited the Petitioner's restaurant and took statements from various employees of the Petitioner, copies of which he identified. He said that he had a telephone conversation with the owner of the restaurant in which he told her that he planned a second visit to the premises and advised her that she needed to produce payroll records.

The investigator testified that he also spoke with an individual named Alan Shapiro, who said he was the accountant for the Petitioner. He said he told Mr. Shapiro exactly what records the DOL was seeking and that Mr. Shapiro subsequently told him that the Petitioner had no records.

Investigator Vera identified various documents from the investigator's file including a computation sheet used to calculate the amount of money owed the Claimant. Since the employer produced no records, he relied upon the figures from Alkadi to compute the amount owed to him. After preparing the computation sheet, Vera sent it to the Petitioner and their accountant. He used 50.5 hours per week, the figure given him by the Claimant, to calculate wages owed. As for the tips, Vera explained that he relied upon the Claimant's unrefuted estimate as to the average amount of tips collected in total on a given day, minus the amount the Claimant was actually given. The investigator explained that the figure $18,900 represented the balance due the Claimant, and emphasized that the amount the Claimant already received was subtracted out in arriving at that figure.

STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order of Compliance made by the Commissioner upon the filing of a Petition. 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.

When reviewing an Order of Compliance, the Board shall presume that the Order 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 Rule 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.

EMPLOYER'S FAILURE TO KEEP ADEQUATE RECORDS

An employer's obligation to keep adequate employment records is found in the Labor Law, at § 195, as well as in the regulations which provide, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:... the number of hours worked daily and weekly, ... [and] the amount of gross wages...
> "...
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

12 NYCRR 137-2.1. Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

In addition, Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

"[T]he burden of disproving amounts sought in the employee claim fell to [the employer]." *See Angello v. National Finance Corp.* 1 AD3d 850, 854, 768 NYS2d 66 (3d Dept. 2003). Here, the employer has failed to meet its burden. The Petitioner admits to having no wage or tip records concerning the Claimant, Hicham Ibn Alkadi. The Petitioner claims that Alkadi never worked for it. The Board is not persuaded. Alkadi testified credibly about the physical layout of the restaurant, the other employees he worked with, his dealing with Taja, the owner, and the hours that heworked and monies received.

The DOL investigator's computations and findings based upon his on-site interview of other employees and, principally, upon what the Claimant told him are reasonable. The Petitioner has not

met its burden of proof. Its witness, while credible, had limited knowledge of the day to day working of the Petitioner's restaurant and its dealings with its employees

EMPLOYERS ARE FORBIDDEN FROM TAKING EMPLOYEE TIPS

Labor Law § 196-d provides:

> "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee...".

Therefore, Petitioner's practice of collecting and retaining Alkadi's tips was in violation of the law. Again, Claimant's testimony concerning the amount of tips he asserted that he was entitled to was reasonable and credible and the DOL audit based thereon was also reasonable.

CIVIL PENALTIES

The Order of Compliance additionally assessed 25% of the amount of unpaid wages, in civil penalties. An additional amount of $4,725.00 was assessed in the first Order and $1,655.00 in the second order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalties set forth in the Order are reasonable.

Similarly, the Commissioner's Order under Article 19 of the Labor Law which assessed $1,000.00 in civil penalties for failure to keep records is also upheld. The Board further finds that the considerations and computations required to be made by the Respondent in connection with the imposition of the civil penalty amounts set forth in the Order are proper and reasonable in all respects.

INTEREST

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

Let a Resolution of Decision issue accordingly.

Anne P. Stevason, Chairman

Mark S. Perla, Member *

Gregory A. Monteleone, Member

ABSENT
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

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