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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ZODIAC KIDS, INC.,	
Petitioner,	
	DOCKET NO. PR-06-074
To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 19 of the Labor Law, dated September 22, 2006:	RESOLUTION OF DECISION
-against-	
THE COMMISSIONER OF LABOR,	
Respondent.	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 13, 2006. Upon notice to the parties, a hearing was held on May 31, 2007 in the Board's Albany office before Khai H. Gibbs, then Associate Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner Zodiac Kids, Inc. was represented by Henry Reininger, CPA, Esq., and Respondent Commissioner of Labor (Commissioner), was represented by Maria Colavito, 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 Order to Comply (Order) under review in this proceeding on September 22, 2006. The Order directs compliance with Article 19 of the Labor Law, payment to the Commissioner for wages due and owing to three employees in the amount of $15,916.64 for unpaid overtime from May 27, 2002 to April 10, 2005, with interest continuing

thereon at the rate of 16% calculated to the date of the Order, in the amount of $4,510.99, and assesses a civil penalty in the amount of $3,980.00, for a total amount due of $24,407.63. The Petition's main challenge to the validity and reasonableness of the Order is the claim that no overtime wages are due to the employees because they did not work overtime.

SUMMARY OF EVIDENCE

DOL Senior Labor Standards Investigator Geovanna Giraldo testified concerning the investigation that led to the issuance of the Order based on the reports, notes, claims and two interview statements contained in the DOL's investigative file.

On January 9, 2004, Marcelino Santos and Adolfo Castro filed complaints against the Petitioner for unpaid overtime wages. On April 14, 2005, DOL Investigators Howard Chinsky and Milton Vera visited the Petitioner's premises and interviewed workers as a result of the initial complaints. Employees stated that they were paid in cash, were not given wage statements, worked six days per week and worked overtime hours without being paid a premium. Adrian Alvarez gave a written statement that Petitioner employed him as a shoe salesman from 9:45 a.m. to 8:00 p.m. Monday through Saturday, with one hour per day off for meals. Guadulupe Echeverria's statement provides that he was employed as a shipping and receiving stock clerk and worked 10:30 a.m. to 7:30 or 8:00 p.m. Monday through Saturday with one hour per day off for meals. The manager told the investigators that the employees were paid a set salary which included overtime hours.

In May 2005, DOL Investigator Chinsky met with the Petitioner's accountant, Henry Reininger, to inspect payroll records. The payroll records were inadequate because they did not indicate the number of hours worked or rate of pay for each employee. On May 25, 2005, DOL sent a letter notifying Petitioner that it was in violation of Labor Law § 661 for failing to maintain clear and accurate records; and in violation of Labor Law § 195 (3) for failing to provide a wage statement with each payment of wages. In addition, the letter contained a recapitulation sheet indicating the amount of unpaid overtime wages that were due and owing to four of Petitioner's employees – Santos, Castro, Alvarez and Echeverria.

Giraldo testified that the amount of unpaid wages was determined by using the figures obtained from the employees during their interviews or when they filed complaints because Petitioner's records did not contain the number of hours worked or rate of pay. The rate of pay was calculated by dividing the total weekly wages by the number of hours worked. This rate was then used to compute the overtime rate.

After receiving the Notice of Labor Law violations, Petitioner requested a meeting with DOL. Present at the meeting were Reininger and Castro. Castro indicated that he worked from 9:45 a.m. to 8:45 p.m. 6 days a week as a security guard. At the end of the conference there was an agreement that Castro would be paid his entire claim for overtime.

No one with personal knowledge of the hours that the employees worked testified at the hearing. Reininger testified that as Petitioner's accountant he did the payroll and quarterly tax reports. However, he admitted that neither the number of hours worked or each employee's rate of pay was included in the payroll records and that he did not know how each employee's pay

rate was determined. He admitted that Petitioner paid Castro his claimed wages. Although Petitioner offered no evidence of the rates of pay of the employees, it argued that the employees were only legally required to be paid minimum wage so that all calculations should be based on minimum wage as the rate of pay. Additionally, Petitioner objected to the fact that none of the employees or the investigators who interviewed the employees were present at the hearing to testify and that the claim is supported only by hearsay evidence.

GOVERNING LAW

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 is required to 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 Order under review is not valid or reasonable based on the claim raised in its Petition that its employees did not work overtime.

Premium Pay for Overtime

An employer is required to pay nonresidential employees at a wage rate of 1 ½ times the employee's regular rate for all hours worked over 40 in a work week. (12 NYCRR 142-2.2) The term "regular rate" is defined at 12 NYCRR 142-2.16:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any other basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

There is a rebuttable presumption that salary does not include a premium for overtime hours. The burden is on the employer to prove that there is an express agreement that the salary provides a premium for overtime hours. *Cayuga Lumber, Inc. v. Commissioner of Labor*, PR 05-009 (Decision on Reconsideration, dated September 26, 2007). The employee's regular rate of pay is not presumed to be minimum wage unless there is evidence that that is the agreed rate of

pay. The regular rate is calculated based on the compensation of the employee and the number of hours worked. *Id.*

FINDINGS

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

Labor Law § 661 provides in relevant part that:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate . . . . Every employer shall keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time . . . ."

Labor Law § 195(4) requires all employers to "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee." Additionally, every employer is required to "establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee . . . wage rate; . . . the number of hours worked daily and weekly . . . ." (12 NYCRR § 142-2.6 [a] [4].)

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 shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." Petitioner admits that its payroll records do not include the required number of hours worked or rate of pay. Having failed to maintain the payroll records required by 12 NYCRR § 142-2.6, DOL's calculation of the overtime wages due based on the employee statements must be credited unless Petitioner met its burden to prove that the employees were 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 Order was based on Santos' complaint and the witness statements taken by the DOL investigators. None of these individuals appeared to testify at the hearing. However, even in the absence of testimony from the complainant or any witness with first hand knowledge of the hours that were worked, the burden remains with the Petitioner to demonstrate that the Order is invalid or unreasonable. While we are troubled by the quality of the evidence that DOL presented at hearing, the Petitioner failed to meet its burden where its only witness was Petitioner's accountant who offered no evidence of the hours of work or rate of pay. In the absence of any reliable evidence to contradict the amount of overtime that the Order finds is unpaid, we find that the Petition must be denied. *See* Labor Law § 196-a and 12 NYCRR 65.30;

see also Angello v. National Finance Corp., 1 AD3d 850, 853-854 (2003) (burden of disproving the amounts sought in an employee's sworn complaint falls to the employer).

DOL investigated the two complaints alleging that Petitioner failed to pay a premium for overtime hours. DOL visited the Petitioner's business on April 14, 2005, interviewed employees and the manager, and found evidence, consistent with the complaints, that Petitioner's employees worked overtime without being paid a premium. The number of hours worked indicated by the complainants, including Mr. Castro, whose claim was paid, were consistent. Petitioner's manager admitted that overtime was worked when he told the investigators that the salary was meant to include overtime. This is contrary to the Petition's main allegation that the Order is invalid and unreasonable because the employees did not work overtime.

Finally, hearsay evidence is admissible at Board hearings. Labor Law § 100 (5)(a) provides that "[t]he board shall not be bound by technical rules of procedure and evidence and shall conduct all hearings according to procedure proscribed by the Board." Rule 65.29 states that the "Board and the Hearing Officer shall not be bound by technical rules of procedure and evidence."

Hearsay evidence is admissible in administrative proceedings and even may form the basis for a decision where the evidence is shown to be reliable and its relevance and probative value are established. *People ex rel. Vega v. Smith*, 66 NY2d 130, 495 NYS2d 332 (1985)

The employee complaints, the interview statements and Castro's claim, which was paid by Petitioner, were all consistent. The Petition's main argument that the employees did not work over 40 hours a week was contradicted by the manager who told the investigators that overtime pay was included in the employee's salary. Other than its statement in the Petition, Petitioner proffered no evidence regarding the number of hours worked. The hearsay evidence was reliable, relevant and probative.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

If 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].)

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest based on the amount owing. Labor Law § 218 (1) continues:

> "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."

The civil penalty is in addition to or concurrent with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing.

The Order additionally assessed a civil penalty, in the amount $3,980.00, or approximately 25% of the wages due. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

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 Order to Comply with Article 19 of the Labor Law, dated September 22, 2006, is affirmed; and

2. The Petition be and the same hereby is, denied.

Anne P. Stevason, Chairman

Gregory A. Monteleone, Member

ABSENT
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 March 26, 2008.

Filed in the Office of the Industrial Board of Appeals, at Albany, New York, on March 28, 2008.