Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785 Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
IFA INC., AND/OR ANDREY KOROSHIKH AND/OR FELIKS ANDREYEV (T/A PERSONAL TOUCH CAR WASH),	
Petitioner,	
	DOCKET NO. PR-07-025
To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 19 of of the Labor Law, dated April 6, 2007,	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 April 6, 2007 and amended on June 13, 2007. Upon notice to the parties a hearing was held on February 5, 2008 before Anne P. Stevason, Chairman of the Board and designated Hearing Officer in this proceeding.

At hearing, Petitioners Andrey Koroshikh and Feliks Andreyev represented themselves and IFA, Inc., 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 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 April 6, 2007. The Order directs compliance with Article 19 of the Labor Law, payment to

the Commissioner for wages due and owing to three employees, Villanor Jean Dorcena (Dorcena), Pedro Garcia (Garcia) and Edgar Mejia (Mejia) in the amount of $4,334.65 for unpaid overtime from April 19, 2003 to October 8, 2005, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $1,234.96, and assesses a civil penalty in the amount of $1,085.00, for a total amount due of $6,654.61. Petitioners challenge the validity and reasonableness of the Order and allege that one of the named employees, Garcia, never worked for them, that no overtime wages are due to the employees because they did not work overtime and that the civil penalty is unwarranted.

SUMMARY OF EVIDENCE

On March 5, 2005, Dorcena filed a complaint against the Petitioner for unpaid wages for his last day of work and for unpaid overtime wages. Dorcena states in his complaint and testified at the hearing that he worked on Wednesdays from 8:00 a.m. to 6:00 p.m. and on Thursdays through Saturdays from 8:00 a.m. to 7:00 p.m. at the Petitioners' car wash. He was paid $4.15 per hour in cash, and received no overtime premium. Dorcena was employed at the premises since 1982 and for Petitioner since 2003. On November 3, 2004 Dorcena was fired when he contested a wage deduction for damages to a car. Dorcena was owed 8 hours of pay for November 3, 2004 and has not been paid, although he has requested his wages. Dorcena testified that he received tips with his wages. Since the fact that Dorcena received tips was not factored into the calculation of wages due to him, at the hearing, DOL agreed to recalculate the amount of Dorcena's unpaid wages and to modify the Order accordingly. Dorcena reported to the cashier when he came to work but did not check out when he left and never saw any time records. He witnessed Garcia and Mejia working at the car wash.

On October 10, 2005, three DOL investigators including Iris Rivera visited the Petitioners' premises and interviewed the employees of the car wash. The investigators observed Garcia working at the car wash on that day. Garcia was interviewed and stated that he worked at the car wash for 5 years, 6 days per week from 8:00 a.m. to 6:00 p.m. and was paid $4.25 per hour. Mejia was interviewed and stated that he worked there 2 years, 6 days per week from 8:00 a.m. to 8:00 p.m. and received no overtime. Another employee named Angel was interviewed and reported that he worked 5-6 days per week from 8:00 a.m. to 5 or 6:00 p.m. at $5.25 per hour. They all stated that they were paid in cash and did not receive wage statements.

Rivera served the manager with a Notice of Revisit which indicated that DOL would revisit the car wash on October 19 to review the payroll and time records covering the period of January 2002 to 2005. Rivera was informed that the records were at the accountant's office so instead of revisiting the car wash, she met with the accountant and Petitioner Andreyev at the accountant's office. Payroll records were provided but they did not contain Garcia's name or the number of hours worked for each employee. Later that day Andreyev emailed electronic time records to Rivera. Petitioners maintain that time records are kept on a computer system which records the time an employee starts and ends each work day. Rivera testified that she did not find the time records credible since they were not produced immediately upon request, did not list Garcia as an employee, and no one in the records were recorded as having worked more than 35 hours per week.

On June 7, 2006, DOL sent a letter notifying Petitioner that it was in violation of Labor Law § 195.3 for failing to provide a wage statement with each payment of wages; § 195.4 for failing to maintain payroll records for each employee showing hours worked, deductions, gross and net wages; § 661 for failing to maintain clear and accurate records of daily and weekly hours worked; and § 652.1 for failing to pay overtime whenever applicable. In addition, the letter contained a recapitulation sheet indicating the amount of unpaid overtime wages that were due and owing to four of Petitioners' employees – Dorcena, Garcia and Mejia.

Rivera 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 Petitioners' time records were not credible. Mejia was interviewed again and the audit for his wages was recalculated based on the second interview.

Senior Investigator Sue Chan-Leung testified that she determined the appropriate civil penalty to assess Petitioners based on a number of factors including the length of time the business was in existence, its size, and Petitioner's cooperation. The minimum penalty of 25% of the unpaid wages was deemed appropriate.

Petitioner Andreyev testified that the car wash's hours are Monday through Saturday 8:00 a.m. to 8:00 p.m. and Sunday 8:00 a.m. to 5:00 p.m., however, it is not usually open all of those hours because business is slow. The employees are paid in cash every Monday and are given a pay stub. There are no designated shifts or schedules. The employees come in every day at 8:00 a.m. and some are sent home depending on the weather and the amount of business. A sophisticated computer timekeeping system is used to keep track of employee hours. Usually the time is logged in by the cashier but some employees log themselves in. Dorcena never worked overtime. In fact, Andreyev testified that Dorcena worked only part-time, never more than 20 to 25 hours per week, and that was why he was fired when business slowed down. The time records that Petitioner produced to DOL were entered into evidence.

GOVERNING LAW

Standard of Review

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, Petitioners have the burden to prove that the Order under review is not valid or reasonable based on the claims they raised in their Petition that its employees did not work overtime, that Garcia was never Petitioners' employee and that the assessed penalties are unreasonable.

Premium Pay for Overtime

12 NYCRR 142-2.2 requires an employer 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. 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."

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).

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]).

Petitioners' time and payroll records are not accurate. First of all, Garcia is not listed in the records. Dorcena and DOL Investigator Rivera both testified that they witnessed Garcia working at the car wash. In addition, although Andreyev testified that the car wash was open 7 days a week from 8:00a.m. to 8:00 p.m. on all days but Sunday, the records of all the employees for the period of March 2003 to May 2005 contains less than 6 instances of employees working until 8:00 p.m. All of the starting and ending times are on the hour. It is incredible that all of the employees always started and ended their work day exactly on the hour. Petitioner Andreyev testified that Dorcena worked no more than 20-25 hours per week but the records undermine this

testimony by showing that Dorcena worked 35 hours many weeks. We therefore find Petitioners' evidence unreliable and credit the testimonies of Dorcena and Rivera.

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 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 required by 12 NYCRR § 142-2.6, DOL's calculation of the overtime wages due based on the employee statements must be credited unless Petitioners met their 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.

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 (Labor Law § 218 (4).

The Order additionally assessed a civil penalty, in the amount $1,085, 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 set forth in the Order is proper and reasonable in all respects. However, since the amount of wages due will be recalculated by DOL based on the fact that Dorcena received tips, the civil penalty amount, based on 25 % of the wages due, must also be recalculated.

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 April 6, 2007, is affirmed, subject to the DOL recalculation of wages, interest, and penalties due taking into account that Dorcena was a tipped employee; 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.