STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RAMON GONZALES AND RAMON A. RODRIGUEZ AND 261 NASSAU GROCERY CORP.,	:	
Petitioners,	:	DOCKET NO. PR 08-021
To review under Section 101 of the New York State Labor Law Two Orders to Comply under Article 19, dated February 4, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Lawrence S. Kerben, Esq., for Petitioners.

Maria L. Colavito, Counsel to the Department of Labor, Benjamin T. Garry of Counsel, for Respondent, Commissioner of Labor.

Witnesses: Cecelia Maloney, Labor Standards Investigator, Patricio Aguirre, Interpreter, Ramon Gonzalez, Ramon Rodriguez, Petitioners, Maria T. Pineda, Claimant, Heriberto Tua.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 29, 2008. The Answer was filed on April 15, 2008. Upon notice to the parties a hearing was held before Anne Stevason, Chairperson of the Board and designated hearing officer, on October 2, 2008 in Garden City, New York. Also present was Board Member Jean Grumet. 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.

There are two orders under review. The Order demanding the payment of wages (Wage Order) finds that Petitioners failed to pay all wages due to two of their employees. The Order demands payment of $32,990.00 in unpaid wages, $7,885.39 in interest at 16% and a civil penalty of $8,248.00 for a total amount due of $49,123.39. The Order assessing civil penalties of $500.00 (Penalty Order) finds that Petitioners failed to keep and/or furnish payroll records for the period from March 8, 2005 to October 30, 2005 and January 8, 2007 through June 24, 2007.

The Petition alleges that the Order is unreasonable and/or invalid for the following reasons: (1) the corporation is not an employer because it is a defective corporation; (2) Petitioner Gonzales never worked at the store, has no knowledge of the two named employees and is only a prospective purchaser of the business; (3) Petitioner Rodriguez is not an employer since he was merely an employee of the store and had no supervisory powers over the two employees; and (4) one of the named employees is a relative and never worked at the business, and the other named employee is an independent contractor and that is why no payroll records were kept.

SUMMARY OF EVIDENCE

Complainant Maria Pineda filed a claim for unpaid wages against Petitioner Rodriguez alleging that she worked at his delicatessen at 261A Nassau Road from March 8, 2005 until October 30, 2005; that she worked from 6:45 a.m. until 11:30 p.m. 7 days per week for a total of 112 hours per week; and that she was paid a salary of $275 per week. The claim was investigated by DOL Investigator Cecilia Maloney (Maloney) who testified at the hearing that after speaking with Complainant, she visited the delicatessen on June 25, 2007. While at the premises Maloney spoke with Petitioner Rodriguez who told her that he was a partner of the business with Petitioner Gonzales. He also gave Maloney a business check which indicated that the bank account was under the name 261A Nassau Road Grocery Corp. Rodriguez admitted that he had no payroll records and that the employees were paid in cash.

At the time, Maloney also interviewed Jose Collado whom she observed working at the store putting beers into the freezer. Collado told Maloney that he began working at the deli on January 8, 2007, that he worked 6 days per week from 7:30 a.m. to 9 or 10:00 p.m. with a half-hour lunch break, and that he was paid $250 per week in cash. On June 28, 2007, after calculating the amount of wages due to Pineda and Collado, Maloney revisited the store and spoke with Gonzales, who was uncooperative. Subsequently two Orders to Comply were issued against, collectively, Rodriguez, Gonzales and 261A Nassau Road Grocery Corp.

At hearing, Gonzales testified that he was not associated with the store until 2007; that he does not know Pineda, and that Collado was a relative and helped out at his store intermittently, approximately three to four days a week, a few hours per day, in exchange for Gonzales helping out at Collado's store in Brooklyn. Gonzales testified that, among other duties, Collado sometimes worked as a cashier. Gonzales testified that after he took over the

store he changed its name to Commercial Deli and Grocery, got a new taxpayer identification number and changed the bank account. However, Gonzales' accountant was called as a witness and testified that the name of the store was in fact not changed until June 2008.

Rodriguez also testified at hearing. He stated that Pineda worked for him; that he paid her $250 per week in cash but that he did not know the number of hours that she worked because she could come and go as she pleased. Rodriguez testified that he was in the store 7 days per week from 7:00 a.m. to 10:00 or 10:30 p.m. and Pineda also was in the store every day.

Pineda was at the hearing and testified that she started working at the store on March 8, 2005, and that she was hired by Rodriguez and his brother. She worked from 6:40 a.m. to 11:30 p.m. 7 days per week and was paid $275 per week in cash. She stated that she had never met Gonzales before and does not remember ever seeing him at the store during the time that she worked there.

DISCUSSION

Standard of Review and Burden of Proof

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].) 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.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, 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:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;
> (4) the number of hours worked daily and weekly, ...;

(5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
(6) the amount of gross wages;
(7) deductions from gross wages;
(8) allowances, if any, claimed as part of the minimum wage;
(9) net wages paid; and
(10) student classification.
" . . .
"(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

> "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."

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 an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. 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."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints only. In the case of *Angello v. National Finance Corp.*, 1 A.D.3d 850, 768 N.Y.S.2d 66 (3d Dept. 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the

employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Id.* at 854).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Anderson further opined that the court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (*Id.* at 688-89).

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen 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."

Definition of Employer under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]), and it is well settled that "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v. The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the 2nd Circuit Court of Appeals stated the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying the economic reality test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive" (*Id.* [internal citations omitted]).

FINDINGS

The Board, having given due consideration to the pleadings, hearing testimony, documentary evidence and legal argument makes the following findings of fact and law.

Petitioners had the burden of disproving the amounts claimed as wages due by Pineda in her complaint filed with DOL. Pineda credibly testified as to the hours that she worked and to the amount that she was paid. Her hours of 6:40 a.m. to 11:30 p.m. 7 days per week coincide to a large degree to the hours worked by Rodriguez. In the absence of the required records, Rodriguez's testimony, which was indefinite and based on the notion that Pineda could come and go as she pleased, was not credible and was insufficient to disprove the amount claimed by Pineda. However, Pineda testified that she had never met Gonzales and had never seen him at the store. This supports Gonzales' statement that he was not involved with the store until 2007. The Board finds that the part of the Order holding Gonzales liable for Pineda's wages is unreasonable because the uncontroverted evidence is that Gonzales had no connection with the store during the time that Pineda worked there, nor did he act as her employer during that time.

The Board finds that DOL acted reasonably in relying on the interview of Collado in calculating the amount of unpaid wages due to him, since Petitioners failed to maintain the required time and payroll records. Gonzales' testimony that Collado was like a brother and that Collado's work at the store was the result of each of them helping the other, was not credible and is insufficient to counter the presumption of employment where an individual is performing a service for another. The DOL Investigator witnessed Collado working, and Gonzales admitted that Collado worked as a cashier. Although hearsay, Collado's statements to the investigator concerning his hours and employment status were corroborated by the fact that the store was open during those hours and by Gonzales' statement that Collado worked there. Although there is some testimony that Rodriguez was not an owner at the time that Collado was working at the store, when the investigator visited

the store, Rodriguez was in charge and identified himself as a partner. Therefore, the Board finds that part of the Order which relates to the wages due to Collado to be reasonable.

The Board also notes that the grounds given in the Petition for revoking the Order are inconsistent with the positions taken by Petitioners at the hearing. The Board finds that this is further support of Petitioners' lack of credibility.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . 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, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount in the Order is proper and reasonable in all respects. If anything, the Board finds that the penalty is less than could have been assessed given the gravity of the violations.

THE PENALTY ORDER

The Board finds that the Order to Comply which assessed a penalty of $500.00 for failure to keep and/or furnish required payroll records was uncontroverted and therefore, is reasonable and valid.

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 § 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, dated February 4, 2008, are modified with respect to Petitioner Ramon Gonzales in that he is not responsible for the wages due to Complainant Maria Pineda and affirmed in all other respects; and

2. The Petition for review is hereby denied.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 25, 2009.