

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

PK RESTAURANT, LLC (T/A 212 RESTAURANT), :

Petitioner, :

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Articles 6 and 19 of the :
Labor Law, and an Order under Article 6 of the Labor :
Law, both dated October 5, 2007, :

DOCKET NO. PR 07-086

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Phillippe Kayadjanian, *pro se*, for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Phillippe Kayadjanian, for Petitioner.

Yong-Soon Hwang, Labor Standards Investigator, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 4, 2007. An answer was filed on July 7, 2008. Upon notice to the parties, a hearing was held on November 4, 2010 in New York City before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued two Orders against Petitioner PK Restaurant, LLC (T/A 212 Restaurant) (Petitioner) on October 5, 2007. An Order to Comply with Articles 6 and 19 (Wage Order) directs payment to the Commissioner for wages due and owing to 71 employees in the total amount of \$45,538.88, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of \$12,775.14, and assesses a civil penalty in the amount of \$45,539.00, for a total amount due of \$103,853.02.

The Order under Article 6 of the Labor Law (Penalty Order) dated October 5, 2007 assesses a civil penalty against the Petitioner in the amount of \$6,000.00: \$3,000.00 for failing to provide each employee with a wage statement with every payment of wages during the period of March 7, 2005 through March 27, 2005; and \$3,000.00 for "failing to establish, maintain and preserve payroll records showing hours worked, gross wages, deductions and net wages for each employee for the period of March 7, 2005 through March 27, 2005."

I. SUMMARY OF EVIDENCE

In December 2004, Jesse Pesut (Claimant) filed a claim with DOL against Petitioner alleging that Petitioner, a restaurant, failed to pay him any wages during his employment as a busboy and waiter, from October 2, 2004 until October 27, 2004. As is its practice, DOL sent a notice of the claim to Petitioner. After getting no response, the claim was assigned to Labor Standards Investigator (LSI) Yoon-Soo Hwang (Hwang) for investigation.

On June 16, 2006 LSI Hwang and another LSI visited Petitioner's premises at which time Petitioner's bookkeeper and three employees were interviewed and a Notice of Revisit was issued requesting that daily and weekly time records, payroll registry, cash book if any, and interim bank statements for the period of June 2004 to June 2006 be made available for inspection at a future time to be scheduled. At the inspection the LSIs noted that there were 6 employees working whose time cards were not clocked-in.

The restaurant has a kitchen staff and a wait staff. The wait staff is paid \$25 per shift plus tips and the kitchen staff is paid a salary. Phillippe Kayadjanian (Kayadjanian), who is the owner of Petitioner, testified that the kitchen staff's salary is computed based on an hourly wage and one and one half times the hourly wage for overtime hours at a rate that far exceeds minimum wage. The kitchen staff worked an average of 45 hours per week. Petitioner had a time clock but it was not always working. Some employees received wage statements with their pay and some did not but none of the wage statements included the number of regular hours and the number of overtime hours worked. Petitioner provided the employees with one to two meals free of charge each work day. The two members of the kitchen staff interviewed on June 16, 2006 indicated that they were paid a weekly salary.

On August 17, 2006, DOL returned to Petitioner's premises for a document review. According to LSI Hwang, Petitioner produced payroll records from Paychex, Petitioner's payroll company, employee schedules, and some quarterly tax reports, but no attendance

records. According to Kayadjanian, his accountant produced all the records that were requested by DOL. However, Kayadjanian admitted that he did not review the records prior to handing them over to DOL. DOL took the records with them but did not give Petitioner a receipt for them.¹ Kayadjanian stated that he was later told that DOL lost some of his records when they moved offices, but LSI Hwang denied that that was the case. On March 5, 2007 DOL returned the records, after making copies, and received a receipt from Petitioner. According to the receipt, DOL returned Payroll records by Paychex for the period of 10/28/2003 to 6/25/2006, except for September 26, 2004 to December 26, 2004, quarterly tax reports from the third quarter 2004 to the second quarter 2006, and other payroll records in the form of excel spreadsheets for October 11, 2003 to January 2, 2004.

Kayadjanian also testified that after the records were returned, he stored them in the basement of the building that housed the restaurant. There was a fire in the building and he has not as yet been allowed to reenter to obtain the records.

LSI Hwang testified that he calculated what was owed to the wait staff by using the Paychex payroll records which contained the number of hours members of the wait staff worked per week as well as the wages paid. Since Petitioner provided meals to his employees and the wait staff was tipped sufficiently, both a meal allowance and a tip allowance were credited to Petitioner in determining the amount owed. The unpaid overtime wages due to the kitchen staff was calculated by assuming that the kitchen employees worked 45 hours per week and dividing their salary by 45 hours to come up with a derived regular rate of pay, then adding half that regular rate to each of the five hours over 40 worked each week. LSI Hwang then credited the employer with a meal allowance.

The payroll records indicate that the kitchen staff were at times given two checks. Petitioner's explanation for the two checks varied each time he was asked for an explanation. At first, Kayadjanian indicated that the extra money was to offset taxes. His accountant stated that it was a draw for vacation pay and lastly, it was stated that it was extra money for when the restaurant was extra busy. LSI Hwang testified that he added the sum of both checks to determine how much the kitchen staff made each week.

Kayadjanian testified that although he and his attorney had requested a copy of the audit and calculations of wages due, he was seeing the audit for the first time at the hearing. LSI Hwang responded that the audit is not made available to the employer prior to an appeal of an order unless a FOIL request is made.

II. 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 LSI Hwang stated that it is not DOL's policy to give a receipt for records unless requested by the employer.

Pursuant to the Board Rules of Procedure and Practice (Rules) 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 are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

A. Calculation of Wages under the Minimum Wage Order.

The Minimum Wage Order for Restaurant Industries, 12 NYCRR 137-1.3, requires an employer to pay 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 137-3.5:

"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 rate basis, salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

Likewise, the Fair Labor Standards Act of 1938, as amended, (FLSA), 29 U.S.C. § 207(a)(1), requires that covered employees be paid "at a rate not less than one and one-half times the regular rate" for hours over 40 in a week. The FLSA and the New York State Minimum Wage Act are remedial legislation. The general rule in interpreting statutes is that remedial legislation is to be broadly construed. The Acts not only provide for minimum wages for workers but they also set maximum hours.

"The FLSA embodies a Congressional intent to 'give specific minimum protections to *individual* workers.' Its maximum hours provisions, "like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner" (citations omitted) *Giles v. City of New York*, 41 FSupp2d 308 (SDNY 1999).

The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

"The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v.*

Muscoda Local No. 123 et al., 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944).” *Id.* at 317.

Early on in its interpretation of the FLSA, the United States Supreme Court held that the FLSA was meant to address “the evil of overwork as well as underpay.” *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Discouraging overtime hours by requiring premium pay was viewed as a way of inducing worksharing and relieving unemployment as well as protecting workers from excessive hours. *Id.* at 577-78. In *Missel*, a transportation worker received a set salary each week for hours worked between 65 and 80. The lower court held that as long as the salary met the minimum wage standards and overtime at the minimum wage, then the employer complied with the FLSA. The Supreme Court overturned the lower court ruling and held that the “act was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum.” *Id.* at 578. The court went on to explain that where there is a fixed weekly wage for regular contract hours which are the actual hours worked “Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours.” *Id.* at fn.16. Where there is a fluctuating workweek, the regular rate will vary from week to week since it is determined by dividing the salary by the number of hours worked.

Petitioner argues that it paid its employees correctly since the employees were paid more than minimum wage and more than time and one half the minimum wage rate that is prescribed by law for overtime hours. However, as stated above, this is not the proper method of calculating premium pay for overtime. As the Board discussed in *Matter of Cayuga Lumber*, PR 05-099 (Decision on Reconsideration, September 26, 2007) the regular rate of pay, which is the basis for determining the premium pay for overtime, is calculated by dividing the employee’s weekly salary by the number of hours worked per week. The method Respondent used to determine the overtime wages owed to the kitchen staff is consistent with this formula. The wait staff were working fluctuating workweeks, therefore the regular rate was determined each week by dividing the wages earned by the actual number of hours worked. LSI Hwang testified that the overtime wages due to the wait staff were computed based on the Petitioners own payroll records, which showed the total number of hours and the wages.

B. Wages due

DOL’s audit of wages due 71 employees was based on employee interviews, claim forms and Petitioner’s records. The audit also credited Petitioner with a tip allowance and a meal allowance. The total due is \$45,538.88. We affirm the order as far as wages due.

C. Civil Penalties for failure to pay wages are modified.

The Wage Order additionally assesses a civil penalty in the amount of 100% of the wages due. LSI Hwang testified that he discussed the civil penalty with his supervisor. In determining the appropriate amount of penalty, they discussed the size of the business,

whether there were previous violations, how big the underpayments were and the cooperation of the employer. LSI Hwang speculated that his supervisor determined a 100% penalty was appropriate due to the lack of cooperation of the employer in that two conferences were held and Petitioner failed to pay.

The Board finds that the 100% penalty is unreasonable in light of the fact that DOL failed to produce the audit of wages due when requested. Petitioner credibly testified that it was only at the hearing when the audit was produced and explained that he finally understood why the amounts were due. We therefore reduce the civil penalties to 25%. It was not unreasonable for Petitioner to have the opportunity to review the audit and require a full explanation of the audit prior to paying.

D. The Civil Penalties for failure to have records.

The Penalty Order cites Petitioner for failing to keep and/or furnish true and accurate payroll records for each employee as required by Labor Law § 661 by failing to keep daily hours worked by manual workers for the period of March 7 through March 27, 2005. Petitioner was assessed \$1,000 for each week for a total due for this violation of \$3,000.

The Penalty Order also cites Petitioner for failing to provide a weekly wage statement to each employee with hours worked, rates paid, gross wages, allowances, deductions and net pay as required by 137 NYCCR 137-2.2 during the period of March 7 to March 27, 2005. Petitioner was assessed \$1,000 for each week for a total due of \$3,000.

We find the Penalty Order reasonable and affirm it in full.

E. Interest is due.

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."

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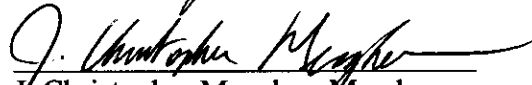
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

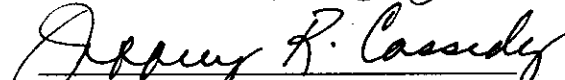
1. The Order to Comply with Article 19 (Wage Order) is affirmed with respect to the wages due in the amount of \$45,538.88 and the appropriate interest and the order is modified to reduce the amount of civil penalty due to 25% of the wages due or \$11,384.72; and
2. The Penalty Order is affirmed in all respects; and
3. The Petition is otherwise denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grunet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 7, 2011.