STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DOUBLE R. ENTERTAINMENT, LLC (T/A RICK'S TALLY-HO), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order to Comply with Article 19 of the Labor Law, both dated August 29, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-156 RESOLUTION OF DECISION

APPEARANCES

Woods Oviatt Gilman, LLP, Lorissa D. LaRocca, Esq. of Counsel, for the Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 24, 2008, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against the petitioner Double R Entertainment, LLC (T/A Rick's Tally-Ho) (Rick's or petitioner) on August 29, 2008. Upon notice to the parties hearings were held on April 27 and 28, and October 12, 2010 in Rochester, New York, before Anne P. Stevason, Esq., the Board's chairperson and the designated Hearing Officer in this proceeding and LaMarr J. Jackson, Member of the Board. 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 file post-hearing briefs.

The first order is an order to comply with Article 19 of the Labor Law (minimum wage order or wage order), which finds that the petitioner failed to pay minimum wages in the amount of $89,817.10 to several named employees from August 1, 2004 to June 25,

2007. The minimum wage order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $20,213.57, and assesses a civil penalty in the amount of $179,634.00, for a total amount due of $289,664.67.

The second order is an order to comply with Article 6 of the Labor Law (deductions order), which finds that the petitioner unlawfully deducted $20,312.00 from the wages of numerous named employees from June 8, 2004 to January 2, 2006. The deductions order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of $9,718.63, and assesses a civil penalty in the amount of $40,624.00, for a total amount due of $70,654.63

BACKGROUND

Petitioner Double R Entertainment, LLC, which is owned by Dr. Robert W. Bright and Rick Snowden, who were not named in the orders, operates, according to Dr. Bright's testimony, a "full service bar with exotic dancers as entertainment" in Rochester, New York, trading as Rick's Tally-Ho. Rick's is open to the public seven days a week from Noon to 2:00 a.m.

On March 4, 2005, the Department of Labor received a complaint from Peter Haag, a former employee of Rick's, alleging that the petitioner charged him a $5.00 "house fee" during each shift that he worked as a bartender. Haag's complaint prompted DOL to investigate the petitioner. DOL found during its investigation that exotic dancers employed by the petitioner, who were not paid wages and, in fact, paid the petitioner to dance at the club, were misclassified as independent contractors. DOL investigators reviewed the contract the petitioner required its dancers to sign and took statements from seven named dancers, all of whom described their general conditions of employment, including that they worked only for gratuities, and issued the minimum wage order finding that the seven named dancers were collectively underpaid $89,817.10 for the time period from August 1, 2004 to June 25, 2007. The petitioner disputes that the dancers are employees and maintains that they are independent contractors not covered by Article 19 of the Labor Law.

Additionally, DOL found that the petitioner unlawfully deducted house fees from waitresses and bartenders for each shift they worked from June 8, 2004 to January 2, 2006 for a total of $20,312.00, which is the basis for the deductions order. By the time of hearing, the petitioner had conceded that their practice of charging waitresses and bartenders what they characterized as a "drink fee" to cover the cost of non-alcoholic beverages the employees consumed during their shift was unlawful, but contested the amount of liability DOL found due and owing.

THE MINIMUM WAGE ORDER

A. Summary of Evidence

The contract[1]

It is uncontested that the dancers were required to sign a contract with the petitioner prior to working at the club. The contract provides as follows:

[1] The contract is reproduced here unaltered.

- The Contractor states that she is self-employed independent contractor, has no employees working for her, and as such will have full control over the method and means of her stage conduct.
- The Contractor will select, at her options, the shifts and days during which she will perform her services. She understands shifts begin at 11:30am, 4pm, or 8pm. (Minimum 6 hour shift) (Mid shift is 8 hours) (Mandatory 1 day shift).
- The Contractor will provide at her own expense, her costume, props, select her own music, and pay any and all expenses incurred by the Contractor in the performance of this contract.
- As a self-employed independent contractor, the Contractor has the right to perform her services for other clients as long as they do not interfere with her contractual agreement with the club.
- The Club, in recognizing the independence of the Contractor, understands the Contractor, may elect to "perform" for other clients while she is not "performing" on stage. As such the Club will access a fair market rent to the Contractor in order that the Contractor may perform for other clients while she is not on stage fulfilling her contractual "performances" for the club.
- The Contractor may rent, at her option, the Club's Facilities, including but not limited to, changing area and musical equipment from the Club during each shift the Contractor wishes to "perform" at the Club.
- The PERFORMER understands that as a self-employed independent contractor, she alone is responsible for filing and paying any and all Local, State, and Federal Income taxes. As a self-employed independent contractor, she is also solely responsible for securing, at her option, and at her own expense any Unemployment Insurance, Disability Insurance's, Social Security payments, and Health/Medical Insurance, and as a self-employed independent contractor, hold the CLUB harmless for and past, present, and future liabilities regarding these matters.

Rules and Regulations for Independent Contractors

- Any Entertainer that makes her schedule will be held accountable for being at the club ready to go and dressed at that assigned time. If at anytime said Entertainer can not fulfill this obligation she must contact a member of management.
- Entertainers MUST wear pasties at all times, this is part of your costume and is not optional, you are responsible for covering you nipples by State Law.
- Garter are to be worn at all times, once again this is not an option.
- Each contracted individual is responsible for there own belongings. The club provides a locker for security. Said individual will provide her own lock for daily use. If the locker is assigned for permanent

use, there will be a weekly locker fee of $20, or $75 per month (30 days). The club is not responsible for any lost or stolen property.

- The dressing room provided for the Entertainers use will be kept CLEAN. All your personal belongings should either be put in your locker or taken home with you at night. NOTHING left out. All items left our will be disposed of. Any boxes from food orders will be thrown away when you are done eating.
- No DRINKS from the bar other than bottled water are allowed in the dressing room. Consumption of alcohol by a minor is illegal.
- It is the Entertainers responsibility to make it known the rules and laws of the club to the customers and each other.
  - The patron is not allowed at any time to time to touch the Entertainer(s), and vice versa. This includes sitting in the patrons lap. This is not permitted and will not be tolerated. The Entertainer will be subject to double rental fees up to and including a breach in contract.
  - The Entertainer is not to walk the floor n a g-string or thong only; she must be covered at all times unless performing.
  - The Entertainer must have shoes on at all times. (NO-EXCEPTIONS)
  - At no point can the Entertainer show the inside pubic area of outfit. This is highly illegal and will not be tolerated. Entertainers will accept tips from the patrons in their garters.
  - Patrons are not allowed to lie on their backs on stage to give tips. Said entertainer must instruct said patron to stand.
- Female on Female shows on or off stage are not allowed, contact between two or more dancers in a provocative manor. This includes tip giving.
- Any Entertainer that does a dance will report to the Bar or to the Door first. You must pay for the dance BEFORE you do your dance in the DEN. NO EXCEPTIONS! If any Entertainer is in a FOX DEN and has not paid for it will be charged the FOX DEN rental fee.
- The lap dance count is done by either a manager or the doorman, this count is not negotiable. You are responsible for paying the appropriate fees.
- At no time can the entertainer go out the front door in her work attire. If she must go out to her car she must be covered up so that no one can see your outfit.
- The CONTRACTOR will retain, within limits of the Law, Club policies, and Club hours, the right to determine the details in the conduct of her work, including but not limited to, choice of costumes. Selection of music and style of dance, and admits her work, although performed in the furtherance of the "business" of the CLUB, remains the sole "business" of the CONTRACTOR.

- The CONTRACTOR, even though she will select the shifts and days of her performances, agrees that the CLUB is in the "business" of managing an adult entertainment business, does NOT have the knowledge, nor the costume, props, or music to perform the "business" of the contractor.
- Any rents incurred by the CONTRACTOR, i.e., changing room, VIP room, sound system, etc. will be paid by the CONTRACTOR to the Club for each shift that she contract these rents. These rents will be paid, based on the shifts selected by the Contractor on a weekly basis. If the CONTRACTOR fails to perform her "work" in the shifts that she has selected, the CONTRACTOR will still be liable for the rents incurred. Upon request the CLUB will issue a receipt, each week, to the CONTRACTOR for her payments.
- The CONTRACTOR while understanding she retains full control over the method and means of her conduct agrees to fully abide by and all, existing Local, State, and Federal Laws which may affect the nature of her conduct.
- The CONTRACTOR understands that if she violates Local, State, and/or Federal Laws the CONTRACTOR'S contract becomes null and void.
- The CONTRACTOR agrees to obey and follow the Stat of New York Statutes (Laws) which she must follow and the CLUB must enforce.
  - A strict NO DRUG policy – this means NO DRUGS EVER IN THE CLUB!!
  - PROSTITUTION is defined by law as "A person engages or offers to engage in sexual conduct for a fee" can interpret the CONTRACTOR, leaving with, or meeting a client outside the CLUB anytime after dancing for her client.
  - Law as actual or simulated defines OBSCENITY: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretions, or lewd exhibition of genitals.
- The CONTRACTOR agrees to conduct herself in a manner that while OFF STAGE that she will NOT conduct herself in a way that can, in any way, new interpreted by the courts as being illegal.
- The CONTRACTOR and the CLUB agrees that self-employed independent contractor, the CONTRACTOR cannot be terminated for any reason during the duration of the contract, EXCEPT for violation of these Laws and Club Policies.
- Each entertainer of LEGAL AGE will moderate her consumption of alcohol.
  - Any Entertainer UNDER THE AGE OF 21 found to have consumed or be under the influence of alcohol will result in a breached contract.
- Any Entertainer found under the influence of any controlled substance will result in a breached contract.

SHOW RULES

- There will be 2, 3, or 4 songs sets, to be determined by the DJ.
- The DJ has the final say over all music that is played.
- Read the crowd and play to them, for instance if there is an older generation crowd, playing rap music would not fit the genre.
- Stay on stage your entire set. This includes getting off the stage and into the laps of customers.
- Topless dancer is your title; if you are not getting tipped, you still have to take your top off. Tips are voluntary.
- You will be given a three song notice before you have to go on stage. If you are late and do not pick out your music the DJ has the right to play anything that he sees fit.
- Entertainers are to purchase their Fox Dens before the end of 1st or 2nd song of dancer prior to their set. In the event that we are short on girls please ask your client to do your dance after your set.

Violations of these policies will result in voiding the contractual agreement between Tally-Ho and the Contractor

Testimony of Dr. Robert W. Bright

Dr. Robert W. Bright testified that the dancers are independent contractors who rent space from the petitioner to perform. They perform stage dances and contract directly with the petitioner's customers for private dances. According to Dr. Bright, the dancers "pay a house fee for the privilege of working in our facility." The petitioner provides lights, music, the stage, a dressing room, and lockers, and the dancers provide their attire, props, and their own music if they so choose.

The dancers are contracted by the petitioner if, after an audition, they are deemed acceptable as entertainment for the petitioner's customers. The petitioner solicits dancers to audition by placing ads in local newspapers. Dr. Bright explained that "we pay them absolutely nothing. They, in fact, pay us a house fee." The dancers' income is solely from tips.

The dancers may choose any of the three daily shifts that are available – noon to 6:00 or 7:00 p.m., 4:00 p.m. to 10:00 p.m., and 7:00 or 8:00 p.m. to 2:00 a.m. The petitioner is involved with the schedule to the extent that they don't want to have too many dancers at the club at one time and not enough at another and to ensure continual stage dancing throughout the petitioner's business hours:

> "Once the roster is full, we don't add additional girls because they can't earn sufficient income in that situation, so we try to the number of dancers during the day shift at five or six. We have maybe three or four that are added at midshift that cover the transition in the evening and then the night shift we normally have eight to ten dancers scheduled and we expect them to keep that once

> they make that schedule, unless they have some event and they notify us, but we ask them to let us know at least three hours in advance because we may have some backup, we may have a girl who calls in and says may I come in and dance. We'll check and see if we have an opening and so, yes, you're welcome or no we have got too many already."

Dr. Bright testified that there could be exceptions to the general scheduling "framework" for dancers who needed to be home at a certain time to take care of a child or who had college classes to attend. Dr. Bright also testified that although the contract says that each dancer was required to work one mandatory day shift per week that provision was never enforced because enough dancers volunteered for the day shifts. Dr. Bright testified that, therefore, dancers could elect not to work any day shifts. Dr. Bright further testified that dancers had to work a full six hour shift and could not leave early without authorization from a manager.

With respect to stage dances, there is a rotation of the available dancers and they each perform a two or three song stage routine when it is their turn. The dancers identify the music they want to dance to in advance or bring their own cds; however no songs containing offensive language could be played and at some point Snowden requested that no hip hop could be played. Each dancer chooses her own costume and choreographs her routine. The petitioner provides no training.

Dancers could also perform private dances for customers in a private room called a "fox den." Dr. Bright testified that the price of a private dance is negotiated between the dancer and the customer. The dancer must pay for use of the fox den. The price charged by the petitioner to rent the space varied from $30.00 for 15 minutes to $90.00 an hour and is set forth in the contract. Once the dancer paid for the space, she could perform the private dance for the customer. For private dances paid for by credit card, an additional 10% fee was charged. Dr. Bright believed that at some point there may have been a sign in the club advising customers of the suggested prices for private dances.

Dr. Bright testified that some of the club's rules were based on state laws related to lewd conduct and/or sale of alcohol. The dancers are allowed to dance at other clubs while working for the petitioner.

Dr. Bright testified that the petitioner had no prior Labor Law violations and that the industry standard was to treat topless dancers as independent contractors. Indeed, Dr. Bright testified that DOL had classified the dancers at a Rick's Tally-Ho in Buffalo, that he is not an owner of, as independent contractors for Unemployment Insurance purposes.

Dr. Bright testified that he had personal knowledge that one of the dancers covered by the wage order, Miranda T., did not start working for the petitioner until Spring 2005, not August 1, 2004 as determined by DOL.

Testimony of Kathy Scott

Kathy Scott testified that she has been a dancer at Rick's Tally-Ho since August 2004. She decides when she wants to work, can choose the hours and days that she works, can work as many hours as she likes, and is not required to give a reason if she leaves early. Scott also testified that she is allowed to work at other clubs.

Scott further testified that the petitioner has suggested prices for private dances. She is allowed to dance in whatever shoes she wants, including boots.

Scott testified that her best friend, Miranda T., did not start working at Rick's until April 2005.

Testimony of John Day, Jr.

John Day, Jr. worked for the petitioner for three years starting in September 2004. Day worked various jobs for the petitioner including as a disc jockey, doorman, and eventually as a bartender and assistant manager.

Day testified that his duties as a disc jockey included collecting house fees from the dancers, assisting in the auditioning and hiring process for the dancers, and enforcing the club's rules.

Day testified that the dancers were sometimes told, following complaints from customers, that they could not play hip hop music.

Day testified that the petitioner set the prices for the private dances and that there was a sign in the club stating the prices, and that the disc jockeys announced the prices from the microphone throughout their shifts as part of their regular "spiel." Indeed, according to Day, if a customer complained that a dancer charged more than the set price for a private dance, then the dancer had to return the additional money to the customer. Sometimes this was accomplished by threatening the dancer that she would no longer be allowed to dance at the club if she refused to return the money.

Day testified that 15% was charged to the dancer when a customer paid for a private dance by credit card. He further testified that dancers were required to pay 10% of their gratuities to the disc jockey after each shift.

Day testified that the dancers were required to wear open toed high heel shoes and that this was common knowledge. Day further testified that Snowden told him once to fire a dancer because he did not like the way her shoes looked.

Testimony of Labor Standards Investigator Terence S. Dusseault

Labor Standards Investigator (LSI) Terence S. Dusseault testified that on or about August 2006 he was assigned to work on a DOL investigation of the petitioner after the

investigator originally assigned was promoted. Dusseault along with other investigators, working under the supervision of Senior LSI Alice Littler, interviewed seven dancers who were working or had worked for the petitioner. The dancers' names and contact information were found in documents provided to DOL by the petitioner. Additionally, the investigators made a field visit to Rick's Tally-Ho where they observed two to three dancers working and attempted to interview them. Those dancers were not cooperative.

According to narrative reports in evidence, Sara P. spoke to DOL on May 23, 2007. She stated that she danced at Rick's from August 2005 to March 2007. She worked a minimum of three six hour shifts a week. She stated that she worked Saturday and Sunday nights from 8:00 p.m. to 2:00 a.m. from February 2007 to March 2007, Noon to 6:00 p.m. from August 2005 to November 2006, and 8:00 p.m. to 2:00 a.m. from November 2006 to January 2007. She further stated that she could show up anytime to dance, but could be turned away. She did not advertise herself as a business, was required to wear "stripper" shoes, and stated that the owner set the price for the private dances. LSI Dusseault testified that he calculated wages due to Sara P. based on her statement that she worked three shifts per week; however, Dusseault also testified that DOL computed the wages due to Sara P. based on five shifts a week.

Chau N. spoke with DOL on August 15, 2006. The narrative report of her statement indicates that she had been working as a dancer for the petitioner 15 hours a week for one year. She did not advertise herself as a business and was free to dance at other clubs.

Mallory L. spoke to DOL by telephone on March 8, 2007. She stated that she worked as a dancer from May 2006 to the end of August 2006 and also one week in September 2006 and during Thanksgiving break the same year. She was required to work three six hour shifts a week. She had to call a manager to tell him when she would work. If there were already ten girls working, she could not work that shift and would have to a "double" shift next time she worked. She was allowed to bring her own music, but the types of songs she could dance to were limited. She stated that in the Fox Den there was a two song special for $45.00 that ran until 9:00 p.m. She was allowed to dance at other clubs.

DOL spoke with Clarissa G. by telephone on May 23, 2007. She started dancing for the petitioner in November or December 2005. She worked there sporadically until February 2007, then worked more regularly. LSI Dusseault testified that it does not appear from the narrative report of DOL's interview of Clarissa G. that she was asked what she meant when she said she had worked "sporadically" and then "more regularly."

Margo F. was interviewed by DOL on June 26, 2007. She stated that she worked on June 6, 9, 11, 14, 21 and 25, 2007 from noon to 7:00 p.m. She stated that the dancer, owner, and DJ set the schedules together. She was not able show up anytime she wanted and was required to report to the club 20 minutes before the start of her shift. She was not incorporated or otherwise registered as a business. She was allowed to work other places. She stated that the owner set the fees for the private dances and that the petitioner can fine dancers for violating the club's rules. The petitioner did not give her a 1099 tax form.

A document attached to her interview sheet provided the petitioner's "guidelines and expectations" for the dancers to be upbeat and friendly in conversations with customers, not

to use street slang, to work a minimum of three shifts per week, to pay fees prior to or during the shift, to encourage and clap for fellow dancers, to smile and say thank you after receiving a tip, not to engage in questionable behavior, and to pay private dance fees prior to providing the dance to the customer. The same sheet provides fines or "breach in contract consequences" to be imposed on the dancers for using cell phones on the floor, being late without calling, not showing up for a shift without calling, calling off without replacing a shift, failing to schedule for the minimum required days without speaking to management, and leaving before the end of a shift.

Miranda T. was interviewed by DOL on May 31, 2007. She stated that she worked off and on from August 2004 to May 19, 2007. The petitioner did not give her a 1099 tax form. She did not advertise or register herself as a business. She set her own work schedule but could not show up to work whenever she wanted. She stated that the dancers were required to wear open toed stiletto shoes and that the petitioner set the fees for the private dances. LSI Dusseault testified that the narrative report of Miranda T.'s interview does not specify the hours she worked or what she meant when she said she worked "off and on." Dusseault testified that DOL calculated the underpayments due to Miranda T. based on working five days a week, although her narrative report does not state that she listed that as her hours of work.

DOL interviewed Christina B. on December 13, 2005. She stated that she worked as a dancer for the petitioner from October 1, 2005 to "present". She worked Monday to Friday Noon to 6:00 p.m.

Shawna B. spoke to DOL on March 7, 2007. She worked as a waitress, dancer and assistant manager. She was a dancer from June 2004 to December 28, 2006[2]. She found the job as a dancer through a newspaper advertisement. The petitioner did not give her a 1099 tax form for the time period she worked as a dancer. She could walk into the club and dance anytime she wanted and had her own business called "Sweetness Entertainment." She could work at other clubs. She was not allowed to wear boots when she danced. The petitioner required her to notify a manager if she was going to be late to work and she could be fined for coming late, not showing up at all, or using a cell phone on the floor. She stated that "Mike and Jeremy from Vegas" held a meeting and told them that if DOL came to the club to tell the investigators they were making minimum wage. She further stated that when she worked as an assistant manager her duties included scheduling the dancers to ensure that there were enough for each night.

LSI Dusseault testified that his supervisors were responsible for determining the civil penalty assessed against the petitioner. He did not know whether the determination by the Unemployment Insurance division that the dancer's at Rick's Tally-Ho in Buffalo were independent contractors was considered in assessing the civil penalty, although he agreed that emails sent by one of his supervisors suggested that would be the case. He was not sure whether 200% was the maximum civil penalty that could be imposed.

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[2] We note that although DOL had information that Shawna B. worked as a dancer during a substantial portion of the claim period, she was not included in the minimum wage order.

Testimony of Senior Labor Standards Investigator Alice Littler and Supervising Labor Standards Investigator Andrew Cahill

Senior Labor Standards Investigator Alice Littler testified that the maximum civil penalty that DOL could impose against the petitioner was 200%, which was the amount assessed by the wage order. She was not sure whether the Unemployment Insurance determination was discussed as a factor in determining the civil penalty.

Supervising Labor Standards Investigator Andrew Cahill testified that he supervised DOL's investigation of the petitioner. He explained that at some point he was informed that the Unemployment Insurance division considered exotic dancers to be independent contractors. Accordingly, he contacted his superiors for advice and was advised that the dancers should be considered employees. Cahill further testified that DOL "takes a broad view on who an employee is."

B. Findings and conclusions of law

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

The burden of proof in this proceeding is on the Petitioners to show that the Orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30). For the reasons set forth below we affirm the Commissioner's finding that the petitioner employed the seven dancers named in the minimum wage order.

Under Article 19 of the Labor Law, also known as the Minimum Wage Act, the term "employer" means any individual, partnership, association, business trust, legal representative, or any organized group of persons acting as employer (Labor Law § 651 [6]). The term "employee" means any individual employed or permitted to work by an employer in any occupation (Labor Law § 651 [5]). "Employed" is defined by the Labor Law as "permitted or suffered to work" (Labor Law § 2). This definition is expansive and has long been recognized as protecting workers who may not have been considered employees at common law (*see e.g. People v Sheffield Farms*, 225 NY 25 [1918]).

The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" as "suffer or permit to work" (29 USC § 203 [g]). The Supreme Court has recognized that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" than the FLSA's definition of "employ" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

Because the New York and federal definition of employ is the same, "the test for determining whether an entity or person is an 'employer' under New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Ansoumana v Gristedes Operating Corp.*, 225 FSupp2d 184, 189 [SDNY 2003]; *see also Zheng v Liberty Apparel*, 355 F3d 61, 78 [2d Cir 2004]; *Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]; *Gustafson v Bell Atlantic Corp.*, 171 FSupp2d 311, 324 n4 [SDNY 2001]; *Lopez v Silverman*, 14 FSupp2d 405, 411 n4 [SDNY 1998]).

Courts outside of New York have found, without exception, that dancers are employees and not independent contractors (*see Reich v Circle C. Investments*, 998 F2d 324, 327 [5th Cir 1993]; *Harrell v Diamond A. Entertainment, Inc.*, 993 FSupp 1343 [M Dist Fla 1997]; *Reich v ABC/York-Estes Corp.*, 1997 US Dist LEXIS 2531 [ND Ill 1997]; *Reich v Priba Corp.*, 890 FSupp 586 [N Dist Tex 1995]; *Martin v Priba Corp.*, 1992 US Dist LEXIS 20143 [N Dist Tex 1992]; *Martin v Circle C. Investments, Inc.*, 30 Wage & Hour Cas [BNA] 1417 [W Dist Tex 1991]; *Donovan v Tavern Talent & Placements*, 104 Lab Cas [CCH] 34, 773 [D Colo 1986]; *Oregon v Bomareto Ent., Inc.*, 956 P2d 254 [Ore Ct of Appeals 1998]; *Jeffcoat v State Dept of Labor*, 732 P2d 1073 [Alaska Sup Ct 1987]).

In New York, state courts have affirmed determinations of the Unemployment Insurance Appeal Board that found dancers employees under the stricter common law definition of employment[3] (*See e.g. Matter of Enjoy the Show Management, Inc. v Commissioner of Labor*, 287 AD2d 822 [3d Dept 2001]; *Matter of PNS Agency, Inc. v Roberts*, 110 AD2d 822 [3d Dept 1985]). The Workers Compensation Board has likewise held dancers to be employees under the Workers Compensation Law (*see [ ] v American Dream Girls of Syracuse*, WCB Case # 69411630; *Matter of Club Mateem, Inc.*, ALJ # 004-11787 *aff'd* Appeal Bd # 521409 [February 4, 2005]; *Matter of Playtime Boutique Inc.*, Appeal Bd # 521409 [March 22, 2005]; *Matter of Pros Tavern*, Appeal Bd # 432051]).

Finally, the Second Circuit Court of Appeals has found dancers to be employees for federal tax purposes (*303 West 42nd St Enterprises, Inc. v Internal Revenue Service*, 181 F3d 272 [2d Cir 1999]).

Against this backdrop, the petitioner alleges that the dancers who worked in the club that it operated in Rochester were independent contractors. However, the petitioner's own characterization of the dancers as independent contractors is not dispositive (*Ansoumana*, 255 FSupp at 190). Indeed, putting aside the way the petitioner has classified its dancers, we must consider several factors in deciding whether the Commissioner's finding that the dancers are employees, and not independent contractors, is reasonable. These factors are: (1) the degree of control exercised by the petitioner over the dancers; (2) the dancers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is integral to the petitioner's business. (*Brock v Superior Care*, 840 F2d 1054, 1058-59 [2d Cir 1988].) No one factor is dispositive and the "ultimate concern" is "whether as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Id.* at 1059).

i) The degree of control exercised by the petitioner over the dancers

An exotic dancer can be considered an independent contractor only if she "exerts such control over a meaningful part of the business that she stands as a separate economic entity" (*Priba Corp.*, 890 FSupp at 592). We find that the petitioner exercised such an

[3] Under Article 18 of the Labor Law, the common law test for employment is used in determining if unemployment insurance must be paid. That test focuses on who controls "the method, means or procedure of accomplishing the work" (*Beach v Velzy*, 238 NY 100, 103 [1924]; *cf. In re Ted Is Back Corp.*, 64 NY2d 725, 726 [1984]).

such an extent of control over its dancers that they could not possibly be considered independent from the petitioner.

The petitioner, before hiring dancers, requires them to first pass an audition to demonstrate that they are "suitable" as entertainment for the petitioner's customers. The petitioner then provides the dancers with a type-written contract detailing the various terms and conditions of working as a dancer for the petitioner. The dancers have no control over the terms of the contract or the numerous rules set forth therein. The contract includes rules such as the starting and ending time of the dancers' shifts; a requirement that the dancer contact the petitioner if she will be late or unable to work a scheduled shift; an obligation for the dancers to explain the petitioners' rules and laws to customers; a prohibition against female on female shows; requirements as to when rental fees are to be paid; a provision that the count of private dances calculated by the petitioner is not negotiable; a prohibition against going out the front door in costume; and the guidelines and rules for shows such as the DJ having final say over all music that is played; the time when rent for the fox dens for private dances must be paid; and the requirement that "if [a dancer] is not getting tipped, [she] still ha[s] to take [her] top off."

In addition to these rules, one of the dancers provided DOL with an attachment to the contract that states the petitioner will charge fines to dancers for using cell phones on the floor, being late without calling, not showing up for a shift without calling, calling off without replacing a shift, failing to schedule for the minimum required days without speaking to management, and leaving before the end of a shift.

While there is some dispute as to whether all of the rules are strictly enforced, particularly the requirement that all dancers must work one day shift a week, we find that the fact that the petitioner requires the dancers to sign a contract agreeing to these rules, at a minimum, demonstrates that the petitioner retains the discretion to enforce all of its own printed rules on the dancers. Furthermore, the petitioner produced no credible or reliable testimony to rebut the dancers' statements that the petitioner can turn them away if they show up for an unscheduled shift, that they must wear a specific type of shoe, that the petitioner limited the type of music they could play, that there were fines for showing up late or using a cell phone on the floor, and that the petitioner set the prices for the private dances. These statements were corroborated by Dr. Bright's own testimony that management is involved in scheduling the dancers and requires them to call in at least three hours in advance if they can't make it, that there were limitations on the types of music that could be played, and that at some point there was a sign in the club listing the suggested prices for private dances. John Day, Jr.'s testimony also corroborated the dancers' statements that the prices for private dances were set by the petitioner, the dancers were sometimes directed not to play certain types of music, that dancers could be fired if they did not work enough shifts, and that the petitioner required the dancers to wear specific types of shoes.

In factually similar cases, courts have found dance clubs to exercise sufficient control over their dancers that they were not separate economic entities. In *Circle C*, the court found that Circle C was an employer because it exercises significant control over its dancers by requiring them to comply with weekly work schedules, fining them for absences or lateness, fixing prices for dances and setting standards for costumes (998 F2d at 327).

We find that, like *Circle C*, the petitioner has minimum scheduling requirements and the ability to fine dancers for absences or lateness, even if those fines are not often levied.

Likewise, in *Priba Corp.*, the court found dancers to be employees where the club had set show times during which the dancers could perform, had guidelines for the dancers' conduct while at the club, deducted 20% from each dancer's credit card tips, and required dancers to sign an independent contractor agreement prepared by the club without any input from the dancers (980 FSupp at 529). Rick's had specified show times, guidelines for conduct such as no cell phone use, thanking the customers and applauding other dancers, deducted a percentage from private dance fees paid by credit card, and required the dancers to sign a contract without their input. Based on the above, we find that the petitioner exercises significant control over its dancers.

ii) Investment in the business and opportunity for profit or loss

Dr. Bright testified that the dancers pay a house fee for the "privilege" of working in the petitioner's facility where they dance on stage to receive tips or can contract directly with the petitioner's customers to provide private dances. The petitioner provides the lights, music, stage, dressing room, and lockers; and the dancers provide their own costumes, props, and, if they wish, music. Only one of the dancers who provided a statement to DOL was incorporated as her own business. While there is some dispute concerning whether the dancers can actually set their own price for private dancers, the un-rebutted statements of the dancers and testimony of Kathy Scott and John Day, Jr., shows that the petitioner set the prices for the private dances. Therefore, we find that the dancers' investment is limited to paying a house fee prior to each shift and buying clothes and shoes, whereas the petitioner's investment is substantial and includes providing lights, a sound system, a stage, maintaining the premises and other costs associated with owning and operating a business. Indeed, because the dancers work only for tips, their income depends on the petitioner's customers. As in *Circle C*, the amount of money earned by the dancers is directly dependent on the petitioner because the petitioner sets the business hours of the club, maintains the facilities, and ultimately controls the customer volume which corresponds directly to the gratuities received by the dancers (998 F2d at 328-329). We find that the petitioner's dancers are "completely dependent on the club for [their] earnings," which indicates employment, not independence (*Priba Corp.*, 980 FSupp at 592).

iii) Skill and independent initiative

Dr. Bright testified that the dancers must pass an audition demonstrating they are suitable as entertainment for the petitioner's customers, and that the petitioner doesn't provide any training to the dancers. We do not find that this evidences the skill level or training associated with an independent contractor. As the court stated in *Circle C*, a dancer's "initiative is essentially limited to decisions involving her costumes and dance routines. The dancers do not exhibit the skill or initiative indicative of persons in business for themselves" (98 F2d at 328). We agree and find, as the *Priba* court found that the scope of the petitioner's dancers' initiative is "restricted to decisions involving what clothes to wear or how provocatively to dress" and "such limited initiative is more consistent with the status of an employee than an independent contractor" (980 FSupp at 593).

iv) Permanency of the relationship

The dancers interviewed by DOL worked for the petitioner for time periods ranging from a few weeks to more than two years, with five of the eight working for the petitioner for more than a year. There is no dispute that the dancers can simultaneously work at other clubs, although we have no evidence that anybody actually did so. In cases involving exotic dancers, the transient nature of the workforce has not been sufficient to find that they aren't employees of the clubs where they work (*Circle C*, 98 F3d at 328-29; *Priba Corp.*, 980 FSupp at 593). Although some of the petitioner's dancers may be itinerant, this merely reflects the nature of the profession and does not demonstrate that the dancers are economically independent of the petitioner.

v) The extent to which the work is an integral part of the petitioner's business

The petitioner owns an exotic dance club that necessarily requires exotic dancers to operate and admits that it provides exotic dance entertainment to the public. The work performed by the dancers is "obviously essential to the success" of the petitioner and that the dancers "play such an integral role is highly indicative of their economic dependence" on the petitioner (*Diamond A. Entertainment*, 992 FSupp at 1362). As the court observed in *Martin v Circle C Investments, Inc.*, 30 Wage & Hour Cas. [CCH] 1417 at ___ (W Dist Tex 1992), "topless dancers are the 'main attraction' at a topless nightclub and are 'obviously very important to the business of the nightclub.'" Indeed, Dr. Bright himself testified that what sets the petitioner apart from other topless dance clubs is that the petitioner offers continuous topless dancing on stage the entire time the club is open.

We find based on the above, that the dancers working at the petitioner's club are employees and not independent contractors.

vi) The dancers must be paid minimum wage

Article 19 of the Labor Law provides that anybody employed by an employer must be paid the minimum wage rate in effect at the time the work was performed. Since we found above that the dancers were employed by the petitioner, the petitioner was required to pay them minimum wage for all hours they worked for the petitioner. The minimum wage order for the restaurant industry defines "restaurant industry" as, *inter alia*, including any eating or drinking place that prepares and offers food or beverage for human consumption (12 NYCRR 137-3.1 [a]). It is not disputed that the petitioner serves beverages. Therefore the minimum wage order for the restaurant industry is applicable.

The minimum wage rates required to be paid to employees in the restaurant industry during the relevant time period were: $5.15 per hour on and after March 31, 2000; $6.00 per hour on and after January 1, 2005; $6.75 per hour on and after January 1, 2006; and $7.15 per hour on or after January 1, 2007.

A service employee is an employee who customarily receives tips at the rate of $1.15 or more per hour on and after March 31, 2000; $1.35 or more per hour on and after January 1, 2005; $1.50 or more per hour on and after January 1, 2006; and $1.60 or more per hour on and after January 1, 2007 (12 NYCRR 137-3.3 [a]). An employer may take a maximum tip

allowance against the minimum wage owed to a service employee in the restaurant industry. The maximum tip allowances for the relevant time period were $1.65 an hour on and after March 31, 2000; $1.90 an hour on and after January 1, 2005; $2.15 an hour on and after January 1, 2006; and $2.30 an hour on and after January 1, 2007.

It is undisputed that the dancers received tips and it appears to us that DOL computed the minimum wages owed to the dancers using the tip allowances; accordingly, although the petitioner did not prove that the dancers earned sufficient tips to entitle it to classify the dancers as service employees (*see* 12 NYCRR 137-3.3 [d]), we find that the minimum wages due and owing to the dancers, taking into account the maximum tip allowances, must be calculated as follows: $3.50 per hour on and after March 31, 2000; $4.10 per hour on and after January 1, 2005; $4.60 per hour on and after January 1, 2006; and $4.85 per hour on or after January 1, 2007.

Article 19 additionally requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations at 12 NYCRR 137-2.1 provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; occupational classification, wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

There is no dispute that the petitioner did not keep payroll records for the dancers. The petitioner did, however, maintain PMIX (a computer program) records of all daily sales made by the petitioner. These records included beverage sales and credit card transactions for private dances. The petitioner alleges that it is possible to know which dancers worked each day by reviewing the PMIX reports. The petitioner further alleges that if a dancer does not appear on the PMIX reports, she did not work that day. We disagree. First, the PMIX reports provided to DOL and produced at hearing were incomplete. The petitioner never provided all of the PMIX reports in complete form to DOL for each day of the claim period. Instead, the petitioner appears to have only given DOL the PMIX reports for the days that the seven named dancers appear in them. Second, the petitioner admitted that it did not maintain PMIX reports for the entire claim period. Finally, the petitioner has provided no basis to believe that there is a correlation between a dancer not working and not appearing in the PMIX reports. While it certainly must be the case that if her name is in the reports, she worked, the reverse does not necessarily follow. Nothing in the record proves that it was impossible for a dancer to work a shift and make no credit card transactions. A dancer may have worked a shift and had no private dancers or the customers may have paid for private dances with her in cash. In either situation, her presence would not have been noticed by the PMIX reports.

In the absence of adequate payroll records, the Commissioner determined the amount of underpayments by using the best available evidence, which in this case was the dancers' statements (*see e.g. Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008]; *see also* Labor Law § 196-a). The petitioner had the burden to prove that the Commissioner's method of assessing liability in this case was invalid or unreasonable.

The wage order includes reimbursements for drink fees of $5.00 to $10.00 per shift and house fees of $20.00 to $25.00 per shift. There is no support for the reimbursement of drink fees to the dancers since there was no evidence that the petitioner charged a drink fee to the dancers. The drink fee reimbursements therefore must be removed from the wage order. It is, however, undisputed that the petitioner charged the dancers a house fee of at least $20.00 per day shift and $25.00 per night shift, and the petitioner did not contest DOL's reimbursement of these fees through the wage order. Therefore, the wage order is affirmed with respect to the reimbursements for house fees found due except to the extent inconsistent with the findings below concerning the time periods worked by the dancers.

Wages due to Sara P.

Sara P. reported to DOL that she worked 30 hours per week from August 2005 to January 2007, and 18 hours per week from February 2007 to March 2007. DOL calculated wages owed to Sara P. for the period from August 1, 2005 to March 1, 2007. This is the only evidence available concerning the hours Sara P. worked. Accordingly, we find that she worked 30 hours per week from August 1, 2005 to January 31, 2007, and 18 hours per week from February 1, 2007 to March 1, 2007, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

Wages due to Chau N.

Chau N. reported to DOL that she worked 15 hours per week for one year as of August 15, 2006. However, DOL calculated wages for her through January 31, 2007, although there is no evidence indicating that DOL spoke to her after August 15, 2006 or otherwise confirmed that she continued working for the petitioner after August 15, 2006. We find that Chau N. worked for the petitioner for 15 hours per week from August 15, 2005 to August 15, 2006, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

Wages due to Mallory L.

Mallory L. reported to DOL that she worked from May 2006 to the end of August 2006, and also one week in September 2006 and over Thanksgiving break of that year. She stated that she was required to work three six hour shifts per week. DOL calculated thatsshe was owed wages for the period from May 1, 2006 to November 26, 2006. We find that Mallory L. worked 18 hours per week from May 1, 2006 to August 31, 2006 plus two additional weeks in 2006 also at 18 hours per week, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

Wages due to Clarissa G.

On May 23, 2007 Clarissa G. reported to DOL she worked sporadically from November or December 2006 to February 2007 and then started to work more regularly. DOL did not obtain any additional information from Clarissa G. about her schedule and found that she worked for the petitioner from November 1, 2006 to May 31, 2007. It is not possible for us to say, based on the record, how many hours per week DOL determined that she worked or whether she worked for the petitioner after May 23, 2007. We find that since

the petitioner required in its contract that dancers must work 18 hours per week (three six hour shifts minimum per week) that she worked 18 hours per week from November 1, 2006 to May 23, 2007, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

Wages due to Margo F.

Margo F. reported to DOL that she worked six hours per day on June 6, 9, 11, 14, 21, and 25, 2007. DOL calculated that Margo F. was owed $358.70 for the time period from June 6, 2007 to June 25, 2007; however we find that Margo F. is owed $174.60 which represents the thirty six hours that she stated she worked multiplied by $4.85 an hour which was the applicable hourly minimum wage less maximum tip allowance in 2007.

Wages due to Miranda T.

Miranda T. reported to DOL that she worked on and off from August 2004 to May 19, 2007. DOL found that she worked from August 1, 2004 to May 19, 2007. There is no evidence that Miranda T. ever told DOL the number of hours she worked per day or per week, nor is it clear from the record how many hours a week DOL determined that Miranda T. worked. There is also no evidence that DOL asked Miranda T. to explain what working "on and off meant." Dr. Bright testified Miranda T. did not start working for the petitioner until Spring 2005 and that there was an eight month period that she did not work because she was suspended for bad conduct. Kathy Scott corroborated Dr. Bright's testimony, stating that Miranda T. did not start working for the petitioner until April 2005. We find, based on the testimony of Dr. Bright and Kathy Scott, that Miranda T. did not start working for the petitioner until April 1, 2005; however, the testimony concerning the eight months she did not work due to suspension was not specific enough as to the time period she was suspended to meet the petitioner's burden of proof. We find that Miranda T. worked 18 hours per week (the minimum required by the petitioner's contract) from April 1, 2005 to May 19, 2007, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

Wages due to Christina B.

Christina B. informed DOL that she worked as a dancer for the petitioner 30 hours per week from October 1, 2005 to the date of her interview, which was December 13, 2005. DOL determined that she worked from October 1, 2005 to January 31, 2007, although there is no evidence that anybody from DOL spoke to her or otherwise confirmed that she continued to work for the petitioner after December 13, 2005. We find that Christina B. worked 30 hours per week from October 1, 2005 to December 13, 2005, and direct DOL to calculate the wages owed based on those hours and time periods using the wage rates set forth above.

C. Civil penalty

DOL included a 200% civil penalty in the wage order. LSI Dusseault testified that this was due to lack of overall cooperation. Dusseault further testified that the petitioner failed to cooperate because it failed to produce complete payroll records. Dusseault also

testified that the size of the business and gravity of the monetary violation was taken into account. Additionally, Dusseault testified that his supervisors had determined the penalty amount, and he does not know whether 200% is the maximum civil penalty that can be imposed. He admitted that the Chief Labor Standards Investigator for Rochester sent an email indicating that he would take an unemployment insurance division ruling that the dancers at Rick's Tally-Ho in Buffalo were independent contractors into account when determining the civil penalty. Senior LSI Alice Littler testified that 200% is the maximum civil penalty. She did not know whether the unemployment insurance decision finding the dancers at Rick's Tally-Ho in Buffalo to be independent contractors was considered when determining the amount of the civil penalty.

Labor Law § 217 provides that a 200% civil penalty must be included in an order where the employer has previously been found in violation of the law or where the violation is egregious or willful. The evidence does not support a finding that the violation was egregious or willful, or that the petitioner had previously been found in violation of the Labor Law. There is no evidence that the petitioner had previously violated the law, and LSI Dusseault did not explain why DOL considered the violation egregious or willful, and he testified that he did not make the determination to assess a 200% civil penalty, his superiors did. None of Dusseault's superiors testified concerning the reason for the 200% civil penalty. We also note that there is evidence in the record of the existence of an unemployment insurance decision that similarly situated dancers are independent contractors for unemployment insurance purposes. Such a decision mitigates against the 200% civil penalty imposed. We find that DOL failed to properly assess the civil penalty and revoke that portion of the minimum wage order.

D. 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." We therefore affirm the rate of interest imposed but find that the amount of interest assessed must be modified based on the reduction in the amount of commissions found due.

THE DEDUCTIONS ORDER

A. Summary of evidence

Dr. Bright testified that the petitioner required its waitresses, bartenders and disc jockeys to pay a $5.00 "drink" or "house" fee each shift to pay for them to have unlimited soft drinks while working. Dr. Bright further testified that the petitioner had planned to raise the fees in January 2005, and sent a memo to the employees advising them of such, but that the fees were never raised. Indeed, according to Dr. Bright, the petitioner stopped collecting the fee in Spring 2005 because some employees did not drink soft drinks during their shift and complained that the fees were unfair. The petitioner then began simply charging its employees $3.00 per drink.

Peter James Haag testified that he worked as a weeknight bartender for seven months in 2004 and early 2005. He filed a claim with DOL concerning the house fees that the petitioner charged him for each shift he worked. Haag stated that he was never informed that the fee was for soft drinks, and that Karl, the bar manager, told him that the fees were required to work at the bar, advising that "if you're not willing to pay the money, there are more than enough people that would be willing to work your shift." Haag was fired around January 2005, at which time the petitioner was still charging house fees of $5.00 on weeknights. Haag believed the fee for weekends was $10.00, although he rarely worked weekend shifts.

John Day, Jr. worked as a disc jockey. He paid a $10.00 house fee during each shift he worked, and recalled that the petitioner stopped collecting the fee around Christmas 2005. Day, when confronted with the statement he provided to DOL, did not recall making the statement, but did recognize his signature. The statement, which was taken on December 13, 2005, states, among other things: "I don't pay a house fee – soda is free." Day testified that he would have said he paid a house fee had he been asked, although he also testified that he believed he would not have given DOL a statement because at the time of the investigation, he felt he could have been in "trouble" for collecting the house fees from the dancers. He further testified that he believed he could have been fired had he given a statement to DOL.

LSI Dusseault testified that the petitioner provided payroll records to DOL. DOL found that the petitioner charged the house or drink fees through January 2, 2006, and based the amount of the deductions on a January 2005 memo from the petitioner to its employees stating the night shift house fee would increase to $10.00 an hour effective January 10, 2005.

Dusseault conceded that DOL found that the petitioner charged the employees a $10.00 fee per shift, despite Haag's claim stating that the petitioner charged him $5.00 per shift, and the January 2005 memo advising that the night shift fees would be raised to $10.00 per shift effective January 10, 2005. Dusseault also conceded that Day's statement to DOL indicated that he was not required to pay a house fee.

The petitioner provided DOL with statements from bar manager Karl Moulton and DJ Rick McMullan. Moulton wrote that the drink fees were discontinued in Spring 2005 and that he never paid a drink fee because he was the general manager. McMillan wrote that he paid a $5.00 drink fee per shift and that the fees were discontinued in the Spring of 2005.

B. Findings and conclusions of law

The petitioner concedes its practice of charging its waitresses and bartenders[4] a fee each shift violated Labor Law § 193, which prohibits deductions from or charges against wages that aren't specifically allowed by statute; however, the petitioner disputes the amount of the deductions found due and owing by DOL.

[4] We note that the deductions order only covers waitresses, bartenders, and disc jockeys, and does not cover the dancers. The house fees paid by the dancers were covered by the wage order instead and that portion of the wage order was not specifically contested by the petitioner.

DOL found that the petitioner charged its employees the drink or house fee through January 2, 2006. However, there is no evidence that the petitioner continued to charge the drink fee after Spring 2005. Day testified that he believed the petitioner stopped charging the drink fee around Christmas 2005 which is consistent with his earlier statement to DOL that he was not paying house fees in December 2005. Dr. Bright testified that the petitioner stopped charging the fees in Spring 2005 and offered the statements of McMullan and Moulton as support. DOL offered no evidence to rebut Dr. Bright's testimony that charging house fees to employees was discontinued in Spring 2005. We find it particularly troubling that DOL had a statement from Day taken in December 2005 stating that he was not paying house fees at that time, yet he was included in the order as paying house fees through January 2, 2006. Accordingly, we find that the claim period for the deductions order must be reduced from January 2, 2006 to March 20, 2005.

With respect to the amount of the house fees, Dr. Bright testified that the waiters, bartenders, and disc jockeys were charged a $5.00 drink fee per shift, and that the petitioner intended to raise the fees effective January 10, 2005 as supported by the memo to employees that was attached to Haag's original complaint to DOL. Haag claimed that he paid a $5.00 fee per weeknight shift, and testified that he believed the fee charged for weekend shifts was $10.00. LSI Dusseault testified that DOL determined that the petitioner charged a $10.00 fee to Haag for each shift despite Haag's own statement that he was only charged $5.00 per shift. Dussealt explained that DOL determined the fees to use in computing the petitioner's liability based on the amounts set forth in the January 2005 memo. Accordingly, DOL assumed a $10.00 house fee for all night shifts. We find this unreasonable. The memo clearly states that the fees for night time bartenders will be $10.00 per shift effective January 5, 2005. It follows that the fees were less than that prior to January 5, 2005, and we note that the claimant himself claimed that the drink fee was $5.00, not $10.00.

The only evidence in the record that a $10.00 house fee was ever charged by the petitioner to any of its employees is Day's testimony that he paid a $10.00 house fee each shift. We note, however, that at the time DOL issued the deductions order, the only evidence they had available concerning the fees charged to Day were his signed statement that he did not pay house fees. We credit Dr. Bright's testimony that disc jockeys, bartenders, and waitresses paid a $5.00 drink fee per shift and direct DOL to recalculate the deductions order using $5.00 per shift for each employee named therein.

C. Civil penalty

DOL also included a 200% civil penalty in the deductions order. The petitioner did not challenge this penalty. Therefore, we affirm.

D. 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." We therefore affirm the rate of interest imposed but find that the amount of interest assessed must be modified based on the reduction in the amount of commissions found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner is instructed to recalculate minimum wages due and owing based on the findings of the Board herein, and to issue an amended minimum wage order consistent with this decision; and

2. The civil penalty portion of the minimum wage order is revoked and the order is otherwise affirmed; and

3. The Commissioner is instructed to recalculate the deductions from wages due and owing based on the findings of the Board herein, and to issue an amended wage deductions order consistent with this decision; and

4. The wage deductions order is otherwise affirmed; and

5. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, 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.