

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

KARMA GROUP LLC (T/A QUIZNOS SUB),

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Articles 4 and 6 of the
Labor Law dated April 1, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR 09-126

RESOLUTION OF DECISION

APPEARANCES

Manoj Kapur, *pro se*, for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WHEREAS:

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued an Order to Comply (Order) against Petitioner Karma Group LLC on April 1, 2009 assessing civil penalties on four counts totaling \$2,000.00. Count 1 assesses a civil penalty of \$375.00 for violating Labor Law § 142.1a on May 17, 2006 by permitting the employment of a 15 year old minor for more than three hours on a school day. Count 2 assesses a civil penalty of \$375.00 for violating Labor Law § 142.1e on March 4, 2006 by permitting the employment of a 15 year old minor after seven o'clock in the evening. Count 3 assesses a civil penalty of \$750.00 for violating Labor Law § 143.1a on May 15, 2006 by permitting the employment of a 17 year old minor more than four hours on a day preceding a school day other than a Sunday or a holiday. Count 4 assesses a civil penalty of \$500.00 for violating Labor Law § 196-d on July 12, 2006 by withholding part of the tips collected for employees to cover register shortages and/or breakage.

The petition for review in the above-captioned case was filed with the Industrial

Board of Appeals (Board) on June 2, 2009 and asserts that the students in question were not working past 7:00 p.m. but were allowed to stay at work waiting for their parents to pick them up, and that the tip money was never a concern and no employee ever had an issue with tips. An answer was filed on July 15, 2009.

Upon notice to the parties, a hearing was held on September 21, 2010 in Garden City, New York before Jean Grumet, Esq., Member of the Board and designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to make statements relevant to the issues, and to make closing arguments.

SUMMARY OF EVIDENCE

Testimony of Manoj Kapur

Manoj Kapur (Kapur or Petitioner) was the owner of Karma Group, LLC which owned and managed the Quiznos franchise in Commack, New York during the relevant period. Kapur described the business as “a small mom and pop type of operation” which sold sandwiches and fast food. Kapur, who was the manager and owner of the Quiznos store, testified that there might have been a few occasions when minors stayed on the premises beyond the legal number of hours, but “they stayed because the parents were not able to pick them up on time.”

Kapur testified that a 32 ounce courtesy tip cup was placed on the counter next to the cash register, and approximately \$15.00 to \$20.00 in quarters and small change was collected in the cup each week. Kapur testified that when the store closed in the evening, he put the tip cup in the safe, and put it back out the next morning. The tips were distributed by Kapur, who counted the money, sometimes with the help of employees. Tips were distributed once a week at the same time that paychecks were handed out. According to Kapur, most of his employees had no problem with his computation and distribution of tips. Kapur testified that tips were apportioned proportionately “by the manager,” and that an individual working forty hours would get a larger pro-rated amount of tips than someone “who just walked in the first day, put on an apron, and is just going through training.” He stated that “the manager’s” formulation for apportioning tips was fair and equitable, but no written records were maintained regarding the amount of tips or how they were apportioned. When asked who the manager was, Kapur admitted that he was both the manager and owner. He stated that in this position, he had oversight of the tips. Kapur stated that tips were not used to pay for shortages when an employee did not give a customer the proper change.

Testimony of Labor Standards Investigator Frederick M. Seifried

Frederick M. Seifried testified that he has been a Labor Standards Investigator in the DOL’s Garden City, New York office since 2003. Seifried stated that about a year before the instant case arose, he was involved in the investigation and issuance of child labor law

violations against the Petitioner. After the violations were issued, Seifried reviewed the violations with Kapur, explained what needed to be corrected, and stated that he would do a recheck in six months to a year to verify that the employer remained in compliance with the child labor laws.

On July 12, 2006, Seifried went to the Quiznos shop to verify Petitioner's compliance. Seifried found that minors were still working past the legally allowed hours: two 15 year olds told him that on school nights, they worked past 7 p.m., and one 16 to 17 year old told him that he worked past 10 p.m. without parental consent. Three minors told Seifried that deductions were taken from their tips for damages or to offset register shortages, and that tips were not divided amongst employees, but were instead distributed by management. They also reported that there was no accounting or regular schedule of when employees would receive their tips. During the July 12 visit, Seifried spoke to manager Rupa Ratta, who provided a copy of the work schedule for the week ending July 16, 2006. Ratta admitted that tips were distributed by management, but did not specify how tips were computed or distributed. Seifried gave Ratta a Notice of Revisit specifying that he would return on July 26th, and requested payroll records for the period of February 2006 to July 16, 2006 and employment certificates and personnel files for all minors.

The requested documents were provided to Seifried on his return visit to the Petitioner's premises on August 1, 2006. Seifried transcribed the hours of several employees onto computation sheets, and Kapur signed the sheets certifying that the transcriptions of the hours were a true and accurate record of hours worked. During this visit, according to Seifried, Kapur admitted that management distributed tips when they saw fit, but would not elaborate on when tips were distributed, and Kapur denied that deductions were made from tips for shortages or breakage. Seifried interviewed several more minors during this visit, and five of them gave signed statements regarding their working conditions. L.P., a 17 year old, stated that tips were sometimes used to cover breakages. Two sixteen year olds, J.D. and J.S., both stated that tips were distributed once a month by management, and if the cash register was short, tips were used to compensate for the loss. Seifried found three child labor law violations during this visit: V.M., a fifteen year old worked past 7 p.m. on March 4, 2006; G.M., a 17 year old worked more than four hours a night on May 15, 2006, when school was in session; and A.S., a 15 year old worked more than three hours on May 17, 2006.

On September 21, 2006, a Notice of Labor Law Violation was sent to Petitioner alleging three violations of Article 4 and one violation of Article 6 of the Labor Law. The Article 4 violations were the three violations that Seifried found during his August 1, 2006 visit. The Article 6 violation alleged a violation of Labor Law § 196-d for tip appropriation. On October 10, 2006, Kapur responded to the Notice and requested a district meeting. On April 1, 2009, the Commissioner issued the Order. The Background Information for the Imposition of Penalty form states that on August 11, 2005, Petitioner was issued violations of Sections 131, 132, 142.1a, 142.1e, 143.1a, 191.1d and 198.d.

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 provides, in relevant part:

"Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to the Board's Rules of Procedure and Practice 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable in the respects asserted in its Petition.

FINDINGS AND CONCLUSIONS OF LAW

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

The Civil Penalty for the violation of Labor Law § 142.1a is affirmed

Section 142.1a of Article 4 of the Labor Law provides that when school is in session, fourteen and fifteen year old minors are prohibited from working more that three hours on any school day. The Order cites Petitioner for \$375.00 for a violation of Labor Law § 142.1a for permitting the employment of A.S. more than three hours on a school day. Kapur claimed that the minor may have stayed on the premises beyond the legally allowed hours, but it was "only because [her] parents were not picking [her] up on time." On August 1, 2006, Petitioner provided LSI Seifried with payroll records showing hours worked and wages received demonstrating that A.S. worked and was paid for four hours from 4:00 p.m. to 9:00 p.m. on May 17, 2006. A.S.'s employment certificate indicated that she was 15 years old. The payroll records demonstrate that the time worked in excess of the legal limit was treated as work time and remunerated as such by the Petitioner. We find that the record amply demonstrates that the Petitioner failed to meet its burden of proving that the Order is invalid or unreasonable. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty pursuant to Labor Law § 141 were proper and reasonable in all respects, and we affirm the civil penalty.

The Civil Penalty for the violation of Labor Law Labor Law § 142.1e is affirmed

Section 142.1e of Article 4 of the Labor Law provides that when school is in session, no fourteen and fifteen year old minor shall be employed after seven o'clock in the evening. The Order cites Petitioner for \$375.00 for a violation of Labor Law § 142.1e for permitting the employment of V.M. after seven o'clock in the evening. Kapur claimed that the minor may have stayed on the premises beyond the legally allowed hours, but it was "only because [her] parents were not picking [her] up on time." On August 1, 2006, Petitioner provided LSI Seifried with payroll records showing hours worked and wages received demonstrating that V.M. worked and was paid for four hours, from 4:00 to 8:00 p.m. on March 4, 2006. V.M.'s employment certificate indicated that she was 15 years old. The payroll records demonstrate that the time worked in excess of the legal limit was treated as work time and remunerated as such by the Petitioner. We find that the record amply demonstrates that the Petitioner failed to meet its burden of proving that the Order is invalid or unreasonable. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty pursuant to Labor Law § 141 were proper and reasonable in all respects, and we affirm the civil penalty.

The Civil Penalty for the violation of Labor Law § 143.1a is affirmed

Section 143.1a of Article 4 of the Labor Law provides that when school is in session, no sixteen or seventeen year old minor shall be employed more than four hours on any day preceding a school day. The Order cites Petitioner for \$750.00 for a violation of § 143.1a for permitting the employment of G.M. more than four hours on a day preceding a school day, other than a Sunday or a holiday. Kapur claimed that the minor may have stayed on the premises beyond the legally allowed hours, but it was "only because [his] parents were not picking [him] up on time." On August 1, 2006, Petitioner provided LSI Seifried with payroll records showing hours worked and wages received. The documents demonstrate that G.M. worked five hours from 4 p.m. to 9 p.m. on Monday, May 15, 2006. G.M.'s employment certificate indicated that he was 17 years old. The payroll records demonstrate that the time worked in excess of the legal limit was treated as work time and remunerated as such by the Petitioner. We find that the record amply demonstrates that the Petitioner failed to meet its burden of proving that the Order is invalid or unreasonable. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty pursuant to Labor Law § 141 were proper and reasonable in all respects, and we affirm the civil penalty.

The Civil Penalty for violation of § 196-d is affirmed

Section 196-d provides that an employer may not demand or accept "directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee." The Order cites Petitioner for \$750.00 for withholding part of the tips collected by employees to cover register shortages and/or breakage.

Petitioner denied that tips were used to offset shortages or breakage. We do not accept the Petitioner's testimony that employees had no problem with the appropriation of tips because the record demonstrates that several of the Petitioner's minor employees raised the issue of tip appropriation with LSI Seifried during his investigation. Seifried testified that on his first revisit to the Petitioner's premises on July 12, 2006, three employees told him that the Petitioner used tip money to offset register shortages or breakages. When he returned to the premises, on August 1, several other employees voiced the identical complaint. L.J.'s signed Computation sheet states, "Sometimes breakage comes out of tips, rarely." Likewise, J.D.'s signed Computation Sheet noted that if the register was short, Petitioner would use the tip jar to even the shortage out. We find that the record amply demonstrates that the Petitioner failed to meet its burden of proving that the Order is invalid or unreasonable. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty pursuant to Labor Law § 218 were proper and reasonable in all respects and we affirm the civil penalty.

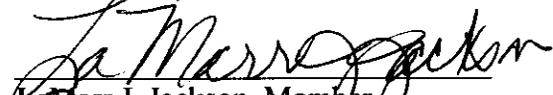
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Articles 4 and 6 of the Labor Law issued April 1, 2009 is affirmed in all respects; and
2. The petition be, and the same hereby is, denied.


Anne P. Stevenson, 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
April 27, 2011.