STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: NICOLA MARZOVILLA AND VALDOME, INC., AND VALDOME LIMITED PARTNERSHIP (T/A ITRULLI), Petitioner, To Review Under Section 101 of the Labor Law: An Amended Order to Comply with Article 6 of the New York State Labor Law, dated May 26, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-148 RESOLUTION OF DECISION

APPEARANCES

Daniel Silverman, Esq., and Barbara Deinhardt, Esq., for petitioners.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Jeffrey Shapiro of counsel), for respondent.

WITNESSES

Nicola Marzovilla, Domenica Frankland, Gianni Linardic, Eugene Orza, Alec Steidl, Andrew Gurley, and Jahandri Ahmedi, for the petitioner.

Alex Burgos, Julio Orellana, Enrique Arias, Jose Espenoza, Maria Zalewska, Luis Ortega, Milton Guaman, Freddy Andrade, Juan Pinos, and Suk Chang Leung, for the respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 18, 2009. Upon notice to the parties a hearing was held on January 10, 11, 12 and 13, 2012, in New York, New York, before Anne P. Stevason, Esq., Chairman 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 file legal briefs. In April 2013, the Board stayed its decision pending the New York State Court of Appeals decision in the cases of *Barenboim v Starbucks Corp.* and *Winans v Starbucks Corp.* The Court of Appeals issued its decision on June 26, 2013 (21 NY3d 919) after which the parties were invited to submit supplemental briefs.

The amended order to comply with Article 6 was issued by the respondent Commissioner of Labor (Commissioner) on May 26, 2009. The order directs compliance with Article 6 and payment to the Commissioner for tip appropriations due and owing to 125 past and present employees in the amount of $220,979.79 for the time period from January 2001 through December 2006, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $130,461.06, and assesses a 25% civil penalty in the amount of $55,245.00, for a total amount due of $406,685.85.

Petitioners filed a petition together with a Motion to Dismiss the Amended Order on June 18, 2009. Respondent filed an opposition to the Motion along with a Cross-Motion to Dismiss on August 4, 2009. On July 7, 2010, the Board denied both Motions to Dismiss but suspended interest on the wages in the Order to Comply between December 18, 2008 and the issuance of the Amended Order on May 26, 2009. The Board hereby adopts that interim decision.

The main issue in the case is whether two individuals, Gianni Linardic and Alec Steidl, were properly included, based on their job duties, in the tip pool maintained by the restaurant.

SUMMARY OF EVIDENCE

Petitioner Nicola Marzovilla is the owner and president of petitioner Valdome, Inc. which has been doing business since 1994 as iTrulli, an Italian restaurant located in New York, New York. Marzovilla testified that during the period from January 2001 to September 2005, he and his sister, Domenica Frankland, managed the restaurant and were the only people authorized to hire employees or approve time off. In September 2005, Marzovilla opened another restaurant and hired a general manager for iTrulli.

As is common in restaurants, the tips left by the restaurant's patrons was pooled and then distributed among the staff. The tips were divided so that the waiters each received a full share of the tips and the busboys, Linardic and Steidl each received a half-share.

When the first general manager, "Dennis," was hired, he was offered a share in the tip pool but refused the share and told the waiters that it was illegal for a manager to participate in the tip pool and suggested that they should speak with DOL concerning this policy. He subsequently left the restaurant and was replaced by another manager who did not take a share of the tip pool. At that point in time, Steidl ceased participating in the tip pool and Linardic was relegated to his own station and received a full share from the tip pool and there was no longer an issue of improper tip appropriation.

The restaurant's philosophy concerning service was that all of the staff were responsible for ensuring that all patrons were properly served. Therefore, even if a waiter or busboy had a certain station, they would tend to the needs of other customers when necessary.

1. Gianni Linardic's work for the Petitioners

Gianni Linardic testified that he worked as the head waiter at iTrulli from 1994 until 2005, and that he still works there. In 2005, the petitioners hired a general manager at which time Linardic was assigned to his own, specific station. When Linardic was the head waiter, he received a half share of the tips plus a salary. After the general manager was hired, Linardic's portion of the tip pool was increased to a full share. Linardic testified that he never personally hired any of the petitioners' employees. He explained that people often asked him about job openings, including waiters asking on behalf of their relatives, and he always consulted with Marzovilla or Frankland about the job openings and potential employees. Linardic testified that waiters were trained by trailing a more experienced waiter. If an employee wanted to take a day off or a vacation, they had to ask Marzovilla or Frankland; if the employee only spoke Spanish, Linardic asked on their behalf.

Marzovilla testified that Linardic did not have the authority at iTruli to hire employees. He stated that Linardic is experienced in the restaurant industry, having owned his own restaurant in the past. Linardic, himself, testified that he had worked in the restaurant industry for about 30 years prior to starting at iTrulli. Marzovilla described Linardic as "head waiter," and testified that he worked in the front of the restaurant, greeted customers, especially regular customers, showed important customers to their tables, recommended dishes, took orders, and acted as a floating waiter to assist the other waiters with serving customers at tables. Marzovilla testified that Linardic also did table side services such as filleting fish. Marzovilla explained that Linardic was responsible for his own small station in the front of the restaurant when it was busy. Domenica Frankland's testimony concerning Linardic's work for the petitioners was largely consistent with that of her brother. She also described Linardic as the "head waiter" and testified that his work consisted of serving customers, assisting in seating and serving regular or important customers, handling the front station, taking care of special requests, and working as a "floater." She also agreed that Linardic tended to the restaurant's garden and ran errands during hours when the restaurant was not open to customers, and stated that Linardic sometimes interpreted for her when communication with Spanish speaking employees was necessary.

Frankland further testified that when Linardic was not at the restaurant, one of the other senior waiters served important customers. Frankland stated that Linardic did not hire any employees, and that only she and Marzovilla could approve requests for vacations or time off. She also testified that sometimes employees, mostly bus boys, asked Linardic for time off. When this happened, Linardic placed a written request into a binder.

Marzovilla testified that Linardic arrived at the restaurant any time between 10:00 a.m. to 12:00 p.m. He worked in the restaurant's garden or purchased supplies during the hours before the restaurant opened. Linardic worked until closing, and often helped the other waiters by finishing serving their customers who stayed until the end of the dinner shift.

Marzovilla explained that at times employees communicated with the owners through Linardic either because they were uncomfortable speaking to the owners directly or because they spoke Spanish, which Linardic could also speak, whereas Marzovilla's Spanish is limited.

Two of the petitioners' customers – Eugene Orza and Andrew Gurley – testified. Orza testified that from 2001 to 2006, he ate at iTrulli approximately once every two weeks. Linardic was frequently his waiter and would take his order, bring food to the table, and serve him coffee. Orza observed Linardic serving other tables and expected that the tips would be pooled among

the wait staff and Linardic, although a senior waiter, would share in the tips. Gurley testified that he was a frequent customer, sometimes eating several times a week at iTrulli. Linardic assisted Gurley in entering the restaurant, escorted him to his table, took his drink orders, explained the daily specials, and sometimes took his order. Gurley also observed Linardic serving other customers in a similar manner. Gurley testified that he assumed the tips he left were primarily for Linardic.

Alex Burgos, a waiter from1996 to 2006, testified that Linardic was a "regular" waiter when Burgos started, but became a "manager" around 2000. Burgos testified that Linardic gave instructions to the busboys, assigned the waiters to their stations, although most of the time they worked the same stations each day. At lunch, Linardic greeted customers, walked around the room, talked to customers, and went out to buy supplies. Burgos also testified that Linardic served the regular and important customers who gave Linardic a separate tip which he would not share with the other waiters. Burgos' job duties included putting chairs down and setting up the dining room. Linardic did not do that type of work and was not a regular waiter, although he sometimes took orders from tables. Complaints were made that the tips should not be split with Linardic or Steidl. Sometimes, at the end of the shift, Linardic would demand a full share of the tips.

Julio Raul Orellana worked at iTrulli from 1996 to 2003. He started as a bus boy and then became a waiter at the restaurant's annex, Enoteca. Although he spent most of his time at Entoteca, he testified that he regularly went through iTrulli to get dishes and pick up food. His schedule was, more or less, the same every day. Orellana testified that Linardic was "the boss" in 2000. He explained that Linardic prepared schedules, supervised the waiters, greeted and sometimes served customers, especially the regular ones, who he greeted, seated, and took orders from. Orellana further testified that Linardic told him what to do, directed him to clean, and corrected him if he made mistakes. Orellana asked Linardic when he needed a day off, and Linardic decided right away without consulting anyone. Additionally, Orellana testified that Linardic sometimes gave the employees their wages.

Enrique Arias worked at iTrulli in 2005. He testified that he was interviewed and hired by Linardic. Arias explained that he heard there was an opening at the restaurant, went there, met with Linardic, who reviewed his resume, asked him questions, and told him he was hired and to come back the next day. According to Arias, Linardic did not consult with anybody prior to hiring him. When Arias arrived at the restaurant on his first day of work, Linardic gave him a vest, showed him the food for the day and assigned him to a waiter for training. Arias testified that Linardic also told him about the petitioners' policies, introduced him to the other employees, was responsible for assigning stations to him, supervised his work, and made sure that employees arrived on time, were properly dressed, and that their stations were ready. Arias testified that Linardic did not serve customers unless they were his friends, and even then other waiters always finished the service for those customers.

Jose Espenoza testified that Linardic hired him to work as a bus boy at iTrulli in 1995. He started work the same day he was interviewed. Linardic supervised his work and assigned him his work station. If Espenoza wanted a day off, he asked Linardic and the request would be granted or denied right away, without Linardic consulting anyone else. Espenoza testified that Linardic took orders from important customers, but other waiters served them.

Luis Ortega testified that he worked at iTrulli from 1994 to 2006. He was a waiter from 2001 to 2006. He testified that during that time, Linardic gave him orders such as which work stations or positions to work, and that he called Linardic when he wanted the day off. According to Ortega, waiters needed to call the restaurant by 3:00 p.m. and speak to Linardic, if he was there, in order to take off a dinner shift.

Ortega testified that during lunch Linardic always "checked out everything", tended to the plants in the restaurant's garden, or went shopping for the restaurant's supplies. Ortega only saw Linardic serving customers at lunch once in a while. Ortega explained that each waiter, including Linardic, had their own station, but if a regular customer came to the restaurant, Linardic spoke to them, told them the specials or made recommendations, took their order, and checked back with them later, although he did not serve them. Ortega recalled that on one occasion, he asked Linardic for a four week vacation which Linardic approved. When Marzovilla complained that it was more than three weeks, Ortega told him that Linardic had approved it. Ortega also testified that Linardic took a half share of the tips from the pool, but some days when the restaurant was busy, he would take a full share. According to Ortega, the waiters complained to Marzovilla about this. Marzovilla discussed it with Linardic, and then Linardic compiled a list of the waiters who wanted his share of the tips, but most of them were afraid to complain.

Milton Guaman testified that he worked at iTrulli from 2003 to 2007, and before that he had worked there for a few years in the 1990s. He was rehired in 2003 by Linardic to work as a busboy. Guaman testified that he worked both the lunch and dinner shifts and that Linardic assigned him to his station. Guaman stated that during lunch, Linardic was not on the floor, but worked at dinner "making sure that everything was allright." Guaman testified that Linardic supervised the "prep" work and only took orders from people he knew, who he also served. Additionally, Guaman testified that Linardic assigned employees to their work stations and that the stations changed.

Freddy Andrade testified that he worked for the petitioners from 2001 to 2006 as a busboy. He testified that Linardic interviewed and hired him, and also assigned him to his work station. Andrade explained that there was a break each day at 2:30 p.m. during which Linardic decided who stayed to work at dinner and who could go home.

Juan Pinos testified that he was a busboy at iTrulli from 2004 to 2007. He heard about the job from his brother who was already working at iTrulli. His brother introduced him to Linardic who eventually hired him. According to Pinos, Linardic did not speak to anybody before offering him the job. Pinos testified that Linardic gave him directions. He observed Linardic dealing with customers every once in a while.

2. Alec Steidl's work for the petitioners

Alec Steidl testified that he is currently employed as the senior "wine person" at another restaurant. He worked for the petitioners from 1997 or 98 to 2006. He started working at iTrulli in 1997 or 98 as the daytime bartender. Around 2000, he started doing computer work for the petitioners and began to assist with wine service. He programmed the POS system, printed out daily menus, schedules, and wine lists, and performed other necessary office work downstairs during hours when the restaurant was not open to customers. Steidl testified that when the

restaurant was open for lunch and dinner, he spent 100% of his time on the service floor answering questions about wine, serving wine, and helping the waiters by taking orders, clearing tables, and running food as necessary.

Steidl printed the work schedules, which were almost always the same unless somebody wanted a day off. Steidl testified that he adjusted the schedules after Marzovilla approved requests for days off. Steidl explained that he had no authority to approve such requests or make his own changes to the schedule. Steidl did interview people who came to the restaurant looking for work, but Marzovilla or Frankland did the actual hiring. Steidl was paid by salary and received a portion of the tip pool because he had only a supporting role in customer service, mostly selling wine.

Steidl admitted that he signed as the general manager on a reference letter for Alex Burgos. He explained that he did this with Marzovilla's permission and was never the general manager at iTrulli and never told the wait staff he was their "boss." Indeed, Steidl testified that when the petitioners hired a general manager in 2005, his duties did not change.

Marzovilla testified that Steidl became wine steward at iTrulli in 2000. Steidl was also responsible for office work related to the computer system, because he was conversant with computers. Marzovilla testified that Steidl made schedules, printed menus, and at the daily staff meetings went over the specials, new menu items, and the wine list. Steidl's duties also included regularly checking the wine cellar to see what was in stock, restocking the bar, and competing shift paperwork. During the dinner shift, Steidl answered questions from customers about wine, made suggestions, and decanted wine if necessary. He also went to the cellar to retrieve the wines. Marzovilla further testified that Steidl received a half share from the tip pool. In 2005, Steidl was promoted to assistant manager and no longer took part in the tip sharing.

Frankland testified that Steidl's job duties included discussing wine with customers and making recommendations and serving wine. Steidl did not set the work schedules, but did print them from the computer. Linardic also testified that Steidl was the restaurant's "wine guy," who suggested wine to customers, and retrieved and opened the bottles.

Burgos testified that Steidl was a "general manager" responsible for the computer, printing menus, and handling the wine cellar. Burgos explained that Steidl was usually in the downstairs office and had to be called upstairs to answer questions from customers about wine. According to Burgos, Steidl spent most of his time in the office Monday to Thursday, even during service hours, but worked on the floor on the weekends. However, he also testified that Steidl might make wine suggestions to customers, decant and serve the wine. Orellana's testimony was similar to that of Burgos, stating that Steidl spent most of his time in the office, although he did serve wine during the dinner hours. Espenoza testified that Steidl worked with the computers and was not in charge of the wine. According to Espenoza, Charles was in charge of wine at iTrulli.

Ortega testified that Steidl was promoted to manager in 2000 and was in charge, along with Linardic, of daily meetings. Ortega further testified that Steidl was in charge of the computers, ordered specials, and checked on the wait staff, and that Steidl received a share of the tips. Steidl was also responsible for wine, although Charles, who worked in Enoteca, was more knowledgeable and answered questions for waiters if necessary. Ortega also explained that

when new waiters asked him questions to which he did not know the answer, he referred them to Steidl or Linardic if the question related to money or work schedules. Finally, waiters called Steidl to request time off if Linardic was not present.

Guaman, Andrade, and Pinos each testified that Steidl was introduced to them as a manager, or they were told by other employees that he was a manager. They each agreed that he worked most of the time in the office, but also served wine, particularly the expensive wines.

Arias testified that when he was hired, Linardic introduced him to Steidl and referred to Steidl as a manager. Arias further testified that Steidl wore a suit, spent most of his time in the office, and was rarely in the dining room. During the six to eight months Arias worked at iTrulli, he only saw Steidl serve wine on two or three occasions. Arias answered customers' questions about wine himself, because he knows about wine. Even when Steidl recommended wine to customers, Arias opened the bottles.

3. DOL's investigation

Labor Standards Investigator Maria Zalewska testified that she was assigned to investigate the claims filed against iTrulli by a number of its former employees. The claims included tip appropriation questionnaires and indicated that the restaurant operated a tip pool and that the employees were required to share their tips with Linardic and Steidl.

Zalewska visited the restaurant on November 6, 2006, at which time she spoke with some employees and issued a Notice of Revisit to inspect payroll records for the period of November 2002 to November 2006. She met with iTruilli's accountant and reviewed payroll documents including tip records and W-2 forms for the employees. She determined that Linardic and Steidl were not entitled to participate in the tip pool based on the employee statements that the two men were managers, and because they were paid by salary and did not receive an hourly wage. Zalewska determined the misappropriation of tips based on the W-2 statements, which separated out tip income, for the years 2000 to 2006.

DOL met with petitioners and their representative but did not accept their information that Linardic and Steidl were not managers but were service personnel.

Supervising Labor Standards Investigator Suk Chan Leung testified that he supervised the investigators and the senior investigators assigned to this case. In reviewing the background sheet for civil penalties, Leung testified that DOL considers different factors in assessing a penalty against an employer. The factors include the size of the firm, how long they were in business, if they were cooperative and if they had a prior history of violations. The sheet indicates that there was a prior violation in November 1998 where it was found that $866 was due and it was paid. Penalties can range from zero to 200 per cent. A 25 per cent penalty was assessed in this case. If there is a past violation, the standard is not to go below 50 per cent so this was a low penalty.

GOVERNING LAW

STANDARD OF REVIEW

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30; *see also* State Administrative Procedure Act § 306 [1]).

NEW YORK LABOR LAW REGARDING GRATUITIES

Labor Law § 196-d provides:

> "No employer or his agent or an officer or agent of any corporation, or any other person shall 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 purporting to be a gratuity for an employee... Nothing in this subdivision shall be construed as affecting . . . the sharing of tips by a waiter with a busboy or similar employee."

The Board stayed its decision in this case when the United States Court of Appeals for the Second Circuit certified two questions to be answered by the New York State Court of Appeals concerning the proper interpretation of Labor Law § 196-d regarding who is eligible to participate in tip pools.[1]

> " '1. What factors determine whether an employee is an 'agent' of his employer for purposes of *N.Y. Labor Law §196-d* and, thus, ineligible to receive distributions from an employer-mandated tip pool? . . .
>
> " 'a. Is the degree of supervisory or managerial authority exercised by an employee relevant to determine whether the employee is a 'manager [or] supervisor' under *N.Y. Labor Law § 2 (8-a)* and, thus an employer's 'agent' under *N.Y. Labor Law § 196-d?*
>
> *" 'b.* If an employee with supervisory or managerial authority renders service that generates gratuities contributed to a common tip pool, does *§196-d* preclude that employee from sharing in the tip pool?
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> " 'c. To the extent that the meaning of 'employer or his agent' in *§196-d* is ambiguous, does the Department of Labor's New York State Hospitality Wage Order constitute a reasonable interpretation of the statute that should govern disposition of these cases?

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[1] The two appeals before the Second Circuit involved Starbucks Corporation which operates coffeehouses that employ four categories of employees: baristas, shift supervisors, assistant store managers and store managers. The issue before the Second Circuit in one of the appeals is whether shift supervisors may share in the tips left by customers in a tip jar at the cash register. The second case was brought by the assistant store managers and turned on the issue of whether the employer could properly deny a category of worker a share of the tips.

> " 'd. If so, does the Hospitality Wage Order apply retroactively?
>
> " '2. Does New York Labor law permit an employer to exclude an otherwise eligible tip-earning employee under *§ 196-d* from receiving distributions from an employer-mandated tip pool?' "

(Barenboim v Starbucks Corporation, 21 NY3d 460, 468-69 [Ct App 2013].)

The Court of Appeals reframed the question to focus on determining "what factors determine whether an employee is eligible or ineligible to receive distributions from an employer-mandated tip splitting arrangement" (21 NY3d at 470). The reformulated question addresses what the Court felt was the interest of the Second Circuit in "knowing both whether an employee's supervisory responsibilities are relevant in ascertaining tip-pool eligibility and, if so, the point at which an employee's authority becomes too great to remain eligible to participate in the tip pool" (Id at. 470 n 2). The Court then enunciated the following standard:

> "In sum, an employee whose personal service to patrons is a principal or regular part[2] of his or her duties may participate in an employer-mandated tip allocation arrangement under Labor Law § 196-d, even if that employee possesses limited supervisory responsibilities. But an employee granted meaningful authority or control over subordinates can no longer be considered similar to waiters and busboys within the meaning of section 196-d and, consequently, is not eligible to participate in a tip pool."

(Barenboim v Starbucks Corporation, 21 NY3d at 473.)

In discussing the point at which the "degree of managerial responsibility becomes so substantial that the individual can no longer be characterized as an employee similar to general wait staff within the meaning of Labor Law §196-d" (Id.), the Court gave the following examples:

> "[M]eaningful or significant authority or control over subordinates. . . might include the ability to discipline subordinates, assist in performance evaluations or participate in the process of hiring or terminating employees, as well as having input in the creation of employee work schedules, thereby directly influencing the number and timing of hours worked by staff as well as their compensation" *(Id.)*.

The Court also found that the Hospitality Industry Wage Order promulgated by DOL in 2011 was instructive and entitled to retroactive effect.

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[2] Although the court states that in order to participate in the tip pool an employee must render service as a "principal or regular part of his duties," the Wage Order defines an employee eligible to participate in a tip pool as one who renders service as a "principal and regular part of their duties." (12 NYCRR 146-2.14 [e]). The distinction is more than a nicety.

HOSPITALITY INDUSTRY WAGE ORDER

The Hospitality Industry Wage Order was promulgated in 2011 and is codified at 12 NYCRR part 146. It "clarified and unified" DOL tip-splitting policies and guidelines dating back to 1972. In relevant part, the Wage Order provides as follows:

> **"146-2.14 Tip Sharing and tip pooling.**
>
> ". . .
>
> "(e) Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental. Examples of eligible occupations include: . . . (8) captains who provide direct food service to customers; and (9) hosts who greet and seat guests.
>
> "(f) Employers may not require directly tipped employees to contribute a greater percentage of their tips to indirectly tipped employees through tip sharing or tip pooling than is customary and reasonable."
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> **"146-2.16. Tip Pooling.**
>
> ". . .
>
> "(b) An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distributions from the tip pool."
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> **"146-3.4. Food service worker.**
>
> "(a) A *food service worker* is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. . . . "

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).

Seventeen witnesses testified at the hearing in this case concerning events occurring six or more years earlier. In general, the witness testimony fell into two categories: statements emphasizing the service aspects of the work of Messrs. Linardic and Steidl and minimizing their

managerial work, which supported petitioners; and opposite statements in support of respondent. There were inconsistent statements on both sides. The Board makes the following findings based on the credibility of the witnesses, the standards enunciated above, and with an eye toward the admonition of the Wage Order, which the Court of Appeals held had retroactive effect (*Barenboim,* 21 NY3d at 472 n4), that tipped employees should not be required to relinquish more of their tips than is "customary and reasonable" (12 NYCRR 146-2.14).

GIANNI LINARDIC

1. **Mr. Linardic provided personal service to patrons as a principal and regular part of his duties.**

Mr. Linardic is experienced in the restaurant industry, having owned his own restaurant, and in fact, assisted Mr. Marzovilla in setting up iTrulli. He was at various times referred to as headwaiter, floating waiter and manager. Fairly consistent throughout the testimony, however, from both petitioner's and respondent's witnesses, was the fact that Mr. Linardic served customers, primarily the VIP or regular customers, and his primary duty was service or supporting the service of the other waiters. He greeted guests, seated them, explained specials, took orders, made menu suggestions, gave them complimentary treats and made sure that they were properly served. In addition, he acted as a floater, supporting the other wait staff and doing table service which required certain skills, such as filleting fish, when required. He did not usually have a regular station but, at times, when the restaurant was busy, he did have a station. His expertise in suggesting and taking orders increased sales and tips for everyone,[3] as indicated by the two customers who testified and who also stated that it was their expectation Mr. Linardic would receive some, if not all, of the tips that were left.

Mr. Linardic also tended to the restaurant garden and purchased supplies for the restaurant and was not required to do the preparatory work such as lowering chairs or fixing stations that was required of other waiters. It is telling that when a General Manager came into the restaurant in September of 2005, Mr. Linardic was made a waiter with a regular station. In addition, although there was testimony that Mr. Linardic would close out the computer accounts at many tables at the end of the night, due to the fact that some waiters left early as the restaurant was winding down, the amount of restaurant sales generated by Mr. Linardic during the period in question was sizable and further evidence of his work as a waiter.

We find that Mr. Linardic was a food service worker and performed "personal service to patrons at a level that is a principal and regular part" of this duties.

2. **Mr. Linardic had meaningful authority or control over subordinates.**

As stated above, an employee who possesses limited supervisory authority may nonetheless participate in a tip pool unless he has been granted meaningful authority or control over

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[3] Although petitioners allege in their brief that Mr. Linardic contributed his tips into the tip pool, there was no direct evidence of that fact. There was testimony, however, that Linardic did not contribute tips that he received into the tip pool. Since this was not an issue in the case, we will not address it except to state that it would not be permissible for an employee to participate in a tip pool, if in fact, the employer did not also require that employee to surrender his tips.

subordinates (*Barenboim v Starbucks*, 21 NY3d at 473). Examples of meaningful authority were the ability to hire, fire, set schedules, etc.

Four former employees testified at hearing that Mr. Linardic hired them. In addition, four claimants who did not testify at hearing, indicated on their claim forms that they were hired by Mr. Linardic. The employees credibly testified that when they arrived at the restaurant to request a job, usually referred by a friend, relative or current employee, they met with Mr. Linardic who interviewed them and hired them or told them to come back the next day for training and did so without conferring with anyone.

Mr. Linardic, Mr. Marzovilla and Ms. Frankland testified that Mr. Linardic did not have the authority to hire employees. Mr. Marzovilla stated that Mr. Linardic always checked with him or Ms. Frankland prior to interviewing or hiring anyone to make sure that there was a position open and to get authority to hire. Despite this testimony, given the specific and consistent testimony that Linardic hired people without consulting anyone, we find that Linardic had the authority to hire employees.

In addition, there was testimony that Mr. Linardic was authorized to grant days off and vacation. This, again, was contradicted by petitioners' witnesses who stated that only Mr. Marzovilla or Ms. Frankland had the authority to grant days off. Petitioners' witnesses testified that waiters, and especially busboys, only went to Mr. Linardic because he spoke their language and they were uncomfortable speaking with the owners. However, we credit the specific testimony of Luis Ortega that Linardic approved a 4 week vacation which upset Marzovilla who told him that only 3 weeks was allowed but who did not contest it after being told that Linardic had approved it and Ortega had already purchased his ticket.

The employees also testified that Mr. Linardic made the schedules and assigned the stations. However, it was also undisputed that the waiter's stations and schedules rarely changed and that waiters usually designated which busboys they wanted to work with, with the more senior waiters having first priority.

The concern behind omitting those employees with meaningful authority is that somehow they will use that authority to manipulate the tip pool to their advantage and would be able to do so because they can change schedules and fire, etc. Testimony that Linardic at times would demand and received a full share of tips, as opposed to the 50% share, even over employee complaints, supports the notion that his authority was meaningful and was used to unilaterally determine his share of the tip pool. The Hospitality Industry Wage Order provides that the "employer" may set the percentage distributions from the tip pool. In this instance, Linardic acted as an employer. In addition, we also find credible that Linardic received tips from regular customers which he did not add to the tip pool.

The Court listed a series of duties which would imply that an employee had meaningful authority. Linardic's duties did not encompass all of the duties listed by the court. However, there was no testimony that any waiter was disciplined or fired during the relevant period or who was responsible for those duties.

The Board finds that tips received by Linardic were misappropriated from the pool and should be reimbursed to the employees. However, Linardic's duties and authority changed in

September 2005 when a general manager was hired and he was relegated to his own station. Therefore, the calculation of his tips that should be disgorged should cease in September 2005.

ALEC STEIDL

1. **Steidl was not a food service worker and his personal service to patrons was not a principal and regular part of his duties.**

Mr. Steidl started working at iTrulli as a bartender and after two years, in 2000, his job changed. He became salaried and received a 50% share of the tip pool. Although petitioners argued that he was the restaurant's wine steward, not even Mr. Steidl referred to himself as such. In fact, upon starting at iTrulli, Mr. Steidl had no specialized knowledge about wine, but did gain that knowledge along the way. iTrulli was known for its Italian wine collection and Mr. Marzovilla along with "Charles," the "wine guru," were well versed in wine. Per Steidl: "Charles was basically a - he was a personality in the dining room. He was just, you know, his job was to talk wine and look good." In fact, there was also a wine bar connected to the restaurant, which was called Enoteca.

Based on the testimony, we find that Mr. Steidl's main occupation was with the restaurant's administrative tasks. He printed menus, the extensive wine list, schedules, maintained the wine cellar, and installed and maintained the restaurant's POS computer software program. There was conflicting testimony concerning his duties during the restaurant's service hours but we find that he was rarely on the floor during lunch service hours and, although he may have been on the floor during dinner service hours, his service duties were limited. Unlike Mr. Linardic, he was not dressed as a waiter, he was in a suit, and based on the credible testimony, his duties were limited to serving the expensive wine and answering waiters' questions about wine. At times, he would answer questions or recommend wines to customers but in general, those duties were handled by the waiters, who attended daily meetings where the menu specials and wine pairings were discussed and where the waiters themselves at times would sample the wines.

We find Mr. Steidl's testimony that when the general manager was hired, his duties did not change especially telling, since that was the point that his participation in the tip pool ceased and he was referred to as assistant general manager.

The Wage Order provides that only "food service workers" may participate in tip pools (12 NYCRR 146-2.14[f]). Therefore, although *Labor Law §196-d* has been interpreted to limit tip pool participants to those employees "whose personal service to patrons is a principal or regular part of his or her duties," the definition of "food service worker" requires that the employee be "primarily engaged in the serving of food or beverages." When asked why he did not receive a full share of the tips, Mr. Steidl replied: "Because I'm not a server. I'm only selling wine. Other than selling wine I was there in a support role." Although Mr. Steidl at times served wine, he was not primarily engaged in service.

Since we find that Mr. Steidl was not a food service worker and that his service duties were not primary and regular, we find that he was not a proper participant in the tip pool and the tip appropriations must be reimbursed to the employees.

CIVIL PENALTY

Labor Law §218 provides that DOL may impose a penalty up to 200% of the wage in the order to comply. It further states that "In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty." This last statement implies that a penalty shall be imposed in all orders. The section also provides that the commissioner shall take into consideration the size of the business, the employer's good faith, the gravity of the violation, and, if wages are involved, the failure to comply with recordkeeping and other non wage violations.

In the instant case, a 25% penalty was assessed taking into account the above considerations in addition to the fact that records show that there was a previous violation. Based on these considerations, we find that the penalty was reasonable and valid.

INTEREST

As previously noted, the Board suspended the accumulation of interest between December 18, 2008 and May 26, 2009 based on DOL's amendment of the original Order. In addition, we note that the case has had a long a tortured history. However, as stated in our interim decision in *The Matter of Dictor,* PR 09-003 (June 18, 2009):

> "The Commissioner is mandated by Labor Law § 219 (1) to include in her Order a requirement to pay "interest at the rate of interest 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 states that the "maximum rate of interest provided for in section 5-501 of the general obligation law shall be sixteen percent per annum." We further note that the Commissioner has no discretion to charge a lower rate of interest, as such discretion was taken away from her by the Legislature in 1987 (*see* L. 1987, ch. 417; *see also Matter of Long Island-Airport Limousine Service Corp.*, PR 31-89 [September 24, 1992]).

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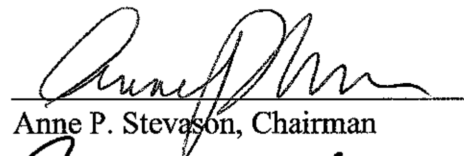
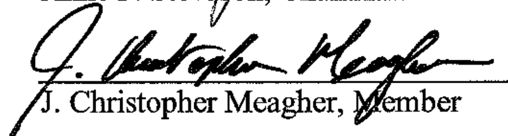
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified and remanded to DOL to reduce the amount due and owing to reflect that the improper tip distribution ceased on September 1, 2005, to reduce the amount of interest and civil penalty accordingly, and to suspend interest entirely between the period of December 18, 2009 and May 26, 2010;

2. The petition for review be, and the same hereby is, granted in part and denied in part.

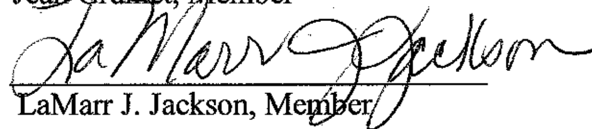


Anne P. Stevason, Chairman



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
January 16, 2014.