STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MARK BARASCH AND BARASCH SOUND STUDIOS LLC (T/A SOUND IMAGE),	
Petitioners,	DOCKET NO. PR10-333
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, and an Order Under Article 19 of the Labor Law, all dated August 26, 2010,	RESOLUTION OF DECISION
-against-	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Mark Barasch, *pro se* petitioner, and for Barasch Sound Studios LLC.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Benjamin Garry of counsel) for respondent.

WITNESSES

Mark Barasch, John Starace, Christopher Sherwin, and P. Dennis Mitchell (claimants) and Carol McCoy, for petitioners.

Anju Arora, Labor Standards Investigator, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals ("Board") on October 25, 2010 and an answer was filed on February 1, 2011. A hearing was held on March 28, 2013 and May 21, 2013 in White Plains, New York before Administrative Law Judge Jeffrey M. Bernbach, the assigned hearing officer in this matter. 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 submit legal briefs.

The first order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) against the petitioners on August 24, 2010.

The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to John Starace, Anthony Dostillio, Dennis P. Mitchell Jr., and Christopher Sherwin in the amount of $35;867.59 for the time period from January 1, 2009 through August 18, 2009, together with interest continuing thereon at the rate of 16% calculated to the date of the wage order in the amount of $4,497.62, and assesses a 100% civil penalty in the amount of $35,867.69, for a total amount due of $76,233.00. The parties agreed at hearing that the wages due and owing should be reduced by $9,788.90 for claimant Mitchell, $197.11 for claimant Dostillio, and $2,242.00 for claimant Sherwin, for an amended total amount of wages due and owing of $23,639.58.

The second order to comply with Article 6 (supplements order) was issued against the petitioners on the same date and directs compliance with Article 6 and payment of supplemental wages (vacation) to Anthony Dostillio in the amount of $995.56 for the time period from January 1, 2009 through August 18, 2009, together with interest thereon at the rate of 16% calculated to the date of the supplements order in the amount of $167.58, and assesses a 100% civil penalty in the amount of $995.56, for a total amount due of $2,188.70.

The order under Article 19 of the Labor Law (penalty order) was issued against the petitioners on the same date. The penalty order imposes a $500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 24, 2009 through August 18, 2009.

The petition alleges in relevant part that the orders are invalid or unreasonable because the claimants worked with the knowledge that the business was failing and they might not be paid, no vacation pay was due to Anthony Dostillio, and the petitioners acted in good faith and had no prior Labor Law violations. Additionally, the petitioners asserted during the proceeding that the claimants are exempt employees not covered by Article 6 of the Labor Law because they were employed in a bona fide professional capacity and earned more than $900.00 a week.

I. SUMMARY OF EVIDENCE

Mark Barasch owned and operated Barasch Sound Studios LLC (collectively, petitioners) which traded as Sound Image. Sound Image was a video and sound editing facility located in New York, New York, that provided post-production services to advertising, entertainment, and other clients. Barasch explained at hearing that on or about May 27, 2009, the petitioners, who were facing severe financial difficulties, filed for bankruptcy. At that time, Barasch met with the petitioners' staff, including the claimants, to inform them of the financial condition of the company and advise them that he would not be able to pay them, but would make every effort to secure financing to pay them in the future. It is undisputed that several employees, including the claimants – video editors and sound engineers, continued to work for the petitioners for several months without being fully paid.

Claimant John Starace testified that he worked for the petitioners for approximately two years as a post-production video editor. His video editing work for the petitioners consisted of following a storyboard[1] developed by a client and editing the video footage provided by the

[1] Starace testified that a storyboard is a set of visual instructions showing how a commercial needs to look.

client according to the client's directions. Starace was able to develop his own versions of the videos he edited based on his own ideas after the client's cut was made, and sometimes, depending on the client, his version would be accepted, however, at other times, if he did not "cut the board, [he] was in trouble." Any alternative version developed by Starace was shown to the client only after the original version had been edited and presented to the client. Starace testified that ultimately, every commercial he worked on for the petitioners' clients had a storyboard and had to be presented as the client wanted, and his work was dictated by Barasch or the clients. With respect to whether making a commercial is an "artistic endeavor," Starace testified that "[t]he agency creates the commercial. At times it is an artistic endeavor requiring creativity. At times it isn't." Starace's work was the same type of editing work every day, although the clients were different so that the nature of the editing varied. The work could be intellectually challenging, although no specific education is required of a video editor. Starace has no post-secondary training and learned to edit on the job.

Claimant Christopher Sherwin testified that he worked for the petitioners from July 1, 2004 to August 7, 2009 as a sound engineer. He described his work as a sound engineer for the petitioners as follows: "people would bring audio elements. I would load them into a computer. I would adjust their levels, spit out audio files or put that set audio file on a videotape if it was attached to a piece of video." Sherwin recorded voices, adjusted sounds, and matched sounds to video on assignments given to him by the petitioners to complete in "a manner acceptable to the client." Sherwin testified that half of his work involved a sound or music track brought to the studio by the client, and the other half involved finding a sound that matched an image on the screen. He estimated that approximately 75% of his work for the petitioners consisted of recording a voice, saving it to a file, and sending it to a client. If the client needed changes, the client would send the file back for more work to be done. On other projects, Sherwin used a "scratch tape" provided by the client as a guide to find sounds for a soundtrack. Sherwin said that "[m]ost of the time what you're trying to do, if you're cutting in new sound like a car sound, it's because it wasn't recorded properly on set and you're trying to actually just replace what should have been recorded." Sherwin testified that the client, talent, or Barasch had the final say on his work for the petitioners. Sherwin did audio editing or mixing everyday for the petitioners but the clients varied. His job-related education consisted of on the job training and completing a program at the School of Audio Engineering.

P. Dennis Mitchell worked for the petitioners as a sound mixer. He testified that "the process of mixing is to simply take the elements that have been assembled . . . edit all that trying to clean out the noise that might have occurred on set and assemble the whole thing. It's like baking a cake. You're putting it together to create the finished whole that the customer wants to get . . . using electronic devices of all manner." Mitchell testified that clients directed the work, and that although he could offer creative input to projects, he did not have final creative say. The producer had final say as to whether tasks were done properly. Mitchell's job was to make "sure that everything the client would have expected of the company occurred for the client." Mitchell could make choices of music or sound effects, and sometimes his choices made it to the final product, but the client was the final arbiter.

Carol McCoy was a manager and vice president at Sound Image. She has 35 years experience in post-production facilities, although she does not know how to perform the technical work done by the claimants and described the engineers as having the intellectual ability to solve complicated technical issues. She described Sound Image as

> "a factory. You come in and you get the tools, you get what you have, you have your tools. Your tools happen to be a switcher or a mixing console. Your clients send in the raw material and you spit out a product. It's a factory. You follow the blueprint. In some cases it's a storyboard. In some it was a scratch clip. But it basically was just doing what the client wanted. You did not make a decision without client approval."

Barasch testified that he had a "use it or lose it" vacation policy, and that under the petitioners' vacation policy, Anthony Dostillio, who did not work for the entire year in 2009, was not entitled to the vacation pay he claimed. Dostillio did not testify. Barasch further testified that he had no prior history of Labor Law violations and acted in good faith as an employer and during the investigation.

Labor Standards Investigator Anju Arora testified that DOL investigated the petitioners based on the claims filed by Starace, Sherwin, Mitchell, and Dostillio. Arora did not investigate this case, had no personal knowledge of the investigation and did not know the basis for imposing a 100% civil penalty against the petitioners.

II. FINDINGS OF FACT 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 petitioners have the burden to show that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

Wage Order

There is no dispute that the petitioners failed to make wage payments in the amounts agreed to by the parties before hearing, and that such failure was due to financial problems at the company. To the extent that the petitioners allege that they should be relieved from liability to pay the wages because the claimants were aware that the petitioners' financial condition was such that if they continued to work they might not get paid, we find the respondent's determination that the petitioners are liable is reasonable. Article 6 of the Labor Law requires employers to pay the type of workers at issue not less frequently than semi-monthly (Labor Law § 191 [1] [d]), and further requires that "no employee shall be required as a condition of employment to accept wages at periods other than as provided in this section" (Labor Law § 191 [2]). Additionally, "it is settled law that an employee may not waive the protection of the Labor Laws" (*Padilla v Manlapaz*, 643 FSupp2d 302, 322 [EDNY 2004] [internal citations omitted]; *Asaro v Lilienfeld*, 36 NYS2d 802 [Civ Ct, New York City 1942] [employees may not agree to accept wage less than required by law]). Accordingly, we only need address the reasonableness of the respondent's determination that the claimants are not exempt as professionals from these requirements.

Labor Law § 190 (7) excludes individuals employed in a professional capacity whose earnings are in excess of $900.00 a week from the definition of "employee." The parties

stipulated that the claimants earned more than $900.00 a week. Employment in a professional capacity is defined in relevant part as work by an individual whose primary duty consists of the performance of work that is

> ". . . original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and whose work requires the consistent exercise of discretion and judgment in its performance; or whose work is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time" (12 NYCRR 142-2.14 [c] [4] [iii]).

Federal law contains an exemption for "creative professionals." The federal regulation provides in relevant part that:

> "(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.
> "(b) To qualify for exemption as a creative professional, the work performed must be 'in a recognized field of artistic or creative endeavor.' This includes such fields as music, writing, acting and the graphic arts.
> "(c) The requirement of 'invention, imagination, originality or talent' distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoons, or as a retoucher of photographs, since such

work is not properly described as creative in character . . . " (29 CFR § 541.302.)

The petitioners have the burden of proving that the claimants fit within the exemption (*Freeman v* NBC, 80 F3d 78, 82 [2d Cir 1996]), and the exemption is to be construed narrowly against the party asserting it (*Arnold v Ben Kanowsky, Inc.*, 361 US 388, 392 [1960]). Because the tests under New York and federal law "are identical," we may look to federal law for guidance (*Galasso v Eisman*, 310 F Supp2d 569, 575 [2004]). For the reasons set forth below, we find that on the record before us, the petitioners have not met their burden of proof to establish that the claimants' work comes within the creative professionals' exemption.

Claimant John Starace worked for the petitioners as a video editor. His work consisted primarily of editing video according to directions provided by either the petitioners or their clients. Starace credibly testified that although he could sometimes develop an alternative version of a project based on his own ideas, this could only be done after first editing the project according to the client's directions, and that his ideas were not always accepted. We find that although there is no doubt that Starace is a highly skilled and talented video editor, the work he did for the petitioners is not the type of work contemplated by the state and federal regulations. Starace's work did not require sufficient invention, imagination, originality, or talent, but was the type of manual or mechanical work that courts have found not to be exempt from wage and hour laws.

One federal court has found that a production editor in the book publishing industry was not exempt. Her work consisted of approving or disapproving edits made by copy editors and proofreaders, and editing manuscripts for clarity, readability, grammar, word choice, and spelling. She had to understand the overall purpose and message of the books she edited and know the editing guidelines for the series. Her responsibilities included looking for ways to make ideas understandable for the intended audience, including rewriting sentences so long as she did not change the technical content. Similar to Starace's work for the petitioners, she could help to shape a book by writing queries to the author with suggestions for substantive changes. The court found that although she used independent judgment and discretion in her work, and she performed some creative editing tasks, her principal duty was to "manage a book project through the editing and publishing process, work which required diligence, good time management, organization and assertiveness, but not invention, imagination or talent in an artistic field of endeavor" (*Shaw v. Prentice Hall, Inc.*, 977 F Supp 909 [S.D. Ind. 1997]). We find that Starace's work as a video editor, similar to that of the editor in *Shaw*, is of a technical nature and involves the use of independent judgment and creativity to complete an artistic project, but does not meet the requirements for the exemption, because the editor is following a plan for completing the project that is dictated by the person actually creating the work, and the editor does not have final say over the artistic and creative content. To the extent that Sarace's work required him to edit videos based on a storyboard he did not create and was subject to the client's or the petitioner's approval, he is not covered by the exemption.

The sound engineers (Sherwin, Mitchell and Dostillio[2]) also performed work that was not within the exemption. The sound engineers performed audio production work that was similar to the video work done by Starace. The audio work, according to the testimony of Sherwin and

[2] Dostillio did not testify, but the record shows that his work was similar to that of Sherwin and Mitchell.

Sherwin and Mitchell, consisted primarily of matching sounds to images based on a client's specifications, direction, and approval. As with the video work performed by Starace, the sound engineers performed highly skilled technical work and exercised some discretion and creativity, but did not have final artistic say on the projects they worked on. Because the client directed what the engineers needed to accomplish, we find that the sound engineers are also not exempted from the wage and hour law.

Civil Penalty

The respondent imposed a 100% civil penalty against the petitioners, which the petitioners alleged was unreasonable. Petitioner Barasch testified that he acted in good faith throughout the investigation and had no prior history of Labor Law violations. The investigator who testified at the hearing did not work on this case and only reviewed the file in order to testify and introduce documents from the respondent's file into the record. She did not recommend the civil penalty in this case and does not know why a 100% civil penalty was imposed. The petitioners' allegation that they acted in good faith and had no prior history of Labor Law violations, two of the factors to consider in imposing a civil penalty (*see* Labor Law § 218), was credible and unrebutted. Indeed, there is evidence in the record that the petitioners made payments to the claimants during the investigation when money became available, which shows good faith. Accordingly, we revoke the civil penalty.

Interest

Labor Law Section 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 Section 14A sets the "maximum rate of interest at sixteen percent per centum per annum."

Supplements Order

The respondent found that the petitioners failed to pay accrued vacation time to Anthony Dostillio in the amount of $995.56 for the time period from January 1, 2009 through August 18, 2009. Barasch testified that the petitioners' vacation policy was "use it or use it" and only accrued if the entire year was completed. Barasch credibly testified that Dostillio did not work the entire year of 2009 and was therefore not entitled to the vacation pay he claimed. Dostillio did not testify and no evidence in the record contradicted Barasch's position. Therefore, we revoke the supplements order.

Penalty Order

The respondent imposed a $500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 24, 2009 through August 18, 2009. Although the petitioners opposed the penalty order in their petition, they produced no evidence at hearing concerning maintaining and/or furnishing payroll records. Accordingly, the petitioners did not meet their burden of proof and the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified to reduce the wages due and owing to $23,639.58, with interest recalculated on the new principal, and the civil penalty is revoked ; and

2. The supplements order is revoked; and

3. The penalty order is affirmed; and

4. 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
November 20, 2013.