STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAUL HAYE AND SLOPE JAMAICAN PATTIES LLC (T/A CHRISTIE'S JAMAICAN PATTIES), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order under Articles 6, 7, and 19 of the Labor Law, issued November 10, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-354 RESOLUTION OF DECISION

APPEARANCES

Paul Haye, *pro se* petitioner, and for petitioner Slope Jamaican Patties.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Matthew Robinson-Loffler of counsel), for respondent.

WITNESSES

Paul Haye, for petitioners.

Senior Labor Standards Investigator Rashid Allen, Shane Minto, and Jason Allen, for respondents.

WHEREAS:

On November 15, 2010, petitioners Paul Haye and Slope Jamaican Patties LLC filed a petition to review two orders that the Commissioner of Labor (Commissioner) issued against them on November 1, 2010. The respondent filed its answer on January 10, 2011.

The first order under review is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs petitioners to pay $25,387.45 in unpaid wages owed to four employees, $7,972.11 in interest, and $50,774.90 in civil penalties for a total due of $84,134.46.

The second order was issued under Articles 6, 7, and 19 (Penalty Order) and directs petitioners to pay $32,000.00 in civil penalties based on: (1) the failure to provide wage statements to employees with every payment of wages for the period January 6, 2007 to January 30, 2010 ($1,000); (2) the failure to keep and/or furnish the requisite payroll records for the same period ($1,000); and (3) the violation of Section 215 of Article 7 of the Labor Law by discharging three employees: Shane Minto, Jason Allen and Kirk Lewis, after they lodged complaints with the Commissioner ($30,000).

The petition alleges that the employees were not retaliated against for filing complaints with DOL. Two of the employees quit without notice and the other one was fired for stealing. The employees were paid $7.00 per hour, which is less than the required $7.25 but they also received tips and meals.

In response, DOL answered that based on the complaints filed, the employees worked overtime hours and were only paid $7.00 for each hour worked; petitioners failed to maintain accurate time and payroll records; and fired three of its employees the same week that DOL conducted its inspection.

Upon notice to the parties, a hearing was held on August 1, 2013, in New York City before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

At hearing the penalty order under Labor Law Section 215 was amended and reduced from $30,000 to $6,000 due to the fact that the maximum penalty allowed under the statute at the time was $2,000 per violation.[1] The penalty order now totals $8,000.

I. SUMMARY OF EVIDENCE

A. Petitioner's Case

Testimony of Paul Haye

Haye is the owner of the Caribbean restaurant called Christie's Jamaican Patties and has been in business for approximately 17 years. Haye and his wife work in the restaurant. Haye works approximately 12 to 14 hours per day. The restaurant is open seven days per week. During the period in question, the restaurant employed three to four workers. There was no set schedule of working hours for the employees.

From 2007 to 2010, Haye employed Jason Allen, Shane Minto and Moises Genis. Moises Genis still works for petitioner and has worked there since 2010 without interruption. The restaurant only has about ten seats and most of the business is take-out. There is a tip jar at the cash register and at the end of the day the tips are divided among the staff. Neither Haye nor his wife receive any tips. The employees were paid $7.00 per hour. In addition to the tips, the

[1] As of April 1, 2011, Labor Law § 215 was amended to increase the penalty to $10,000 per violation.

employees were given food and drink free of charge. There was no agreement with the employees that tips or meals would be considered part of their compensation.

Mrs. Haye kept track of the hours worked by the employees and totaled them at the end of the week and then the employees were paid. The time records were not retained after the employees were paid and Haye has no time records for the period in question. The only employee to receive a wage statement during the period in question was Shane Minto.

Haye put in a new cash register system and installed remote video equipment in his store in November of 2009. The employees did not want to work as much after the system was put in.

Jason Allen was not fired. He failed to show up for work on February 11, 2010 and quit without notice. Shane Minto quit under the same circumstances. He failed to show up for work on February 17, 2010. Kirk Lewis was fired for taking money out of the cash drawer.

B. Respondent's Case

Testimony of Shane Minto

Minto testified that he worked for petitioners from 9:00 a.m. to 4:00 or 5:00 p.m. six to seven days per week at the wage rate of $7.00 per hour. There was a tip jar at the cash register and most of the time the tips were shared among the employees, though some times the employer or his wife took the tips. Minto received approximately $3.00 to $4.00 per day in tips during the winter and $7.00 or $8.00 per day in the summer, but there was never an agreement that tips or meals would be counted toward his wages.

DOL investigators visited the store and interviewed the workers there including Minto and Allen. Haye fired Minto over the phone on February 17, 2010 when Minto called to request the day off. Haye treated the employees differently after the DOL inspection.

Testimony of Jason Allen

Allen testified that he worked for petitioners for $7.00 per hour and that there was no agreement that tips or meals would be credited against his pay. Allen was fired due to a misunderstanding as to whether he should show up for work. He did not quit.

Testimony of Supervising Labor Standards Investigator Rashid Allen and DOL records

DOL visited petitioners' store and interviewed employees on February 3, 2010. Haye admitted that he did not keep daily records or supply his employees with wage statements. He produced payroll registers but they did not include the number of hours worked. Surveillance was conducted on February 19 and 20, 2010 where it was noted that none of the employees interviewed were currently working at the store. Another visit was made on February 24, 2010 where Haye denied that any employee ever worked any overtime.

Allen recommended a 100% civil penalty on the wage order based on the size of the business, the experience of the employer, and the nature and severity of the violations.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that 'any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it."); State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.,* 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

I. The Wage Order

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 137-2.1[2] provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) occupational classification and wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (5) the amount of gross wages;
> (6) deductions from gross wages;
> (7) allowances, if any, claimed as part of the minimum wage;
> (8) money paid in cash; and
> (9) student classification.
> " . . .

[2] As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR 146).

> "(e) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 137-2.2 further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews.

In *Anderson v Mt. Clemens Pottery Co.* (328 US 680, 687-88 [1949]), superseded on other grounds by statute, the U.S. Supreme Court opined that a court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (*Id.* at 688-89). Wages may be found due even if it is based on an estimate of hours (*Reich v Southern New England Telecommunications Corp., (*121 F.3d 58, 70 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

B. Petitioners have failed to keep adequate records.

In the instant case, petitioners have admitted that they failed to maintain any time records for its employees. Therefore, the petitioners' burden is to show that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for the those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078, October 11, 2011, *appeal pending*.)

C. Calculation of Wages under the Minimum Wage Order

Article 19 of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Restaurant Industries, 12 NYCRR 137-1.3 (2009), requires an employer to pay employees "at a wage rate of 1 ½ times the employee's regular rate" for all hours worked over 40 in a work week. The term "regular rate" is defined at 12 NYCRR 137-3.5:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece rate, salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

An allowance against minimum wage is authorized for tipped food service workers but the employer bears the burden of proving that tips were sufficient to constitute minimum wage; and must maintain records of the tips received by their employees and provide a wage statement which indicates which allowances are taken (12 NYCRR 137-2.2, 3.4 [c] [2007]; *See also Bakerman. Inc. v Roberts*, 98 AD2d 965 [4th Dept 1983]; *Padilla v Manlapaz*, 643 F Supp 2d 302, 310 [EDNY 2009]).

An allowance may also be made for meals but an employer must keep records of the meal allowances claimed and provide evidence that the food provided constituted meals as defined by 12 NYCRR 137-3.8 (2007) (defining a meal as including at least one of the types of food from each of fruits and vegetables; cereals, bread or potatoes; eggs, meat, fish or poultry; and milk, tea or coffee, except that for breakfast eggs, meat, fish or poultry may be omitted if both cereal and bread are offered) (*see Padilla*, 643 F Supp 2d at 310).

D. Calculation of Unpaid Wages Due

DOL has calculated the unpaid wages due based on the claims and employee interviews that it received. This is a reasonable basis for the calculation since petitioners have failed to keep or maintain time or payroll records. However, the hearing before the Board is *de novo* (Board Rule 66.1 [c]), and therefore, we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders.

We find, in general, that DOL's Wage Order was a reasonable approximation of the hours worked by the employees and it was reasonable for the Commissioner to rely on that approximation to calculate back wages, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioners' failure to keep records, would reward the employer for its unlawful conduct. Petitioners failed to proffer evidence of the specific hours worked by the employees and admitted that there was no set work schedule.

1. Wage Due the Three Identified Employees

We affirm the Wage Order with respect to the wages due to the three identified employees: Jason Allen, Moises Genis and Shane Minto. Petitioners were not entitled to an allowance for

tips and/or meals since there was no record of the amount of tips received other than general testimony concerning approximations.

2. Wages Due the Unidentified Employee

There is one unidentified employee listed in the audit. In the case of *The Matter of the Petition of Anthony Boumoussa and Bay Parkway Super Clean Car Wash, Inc.,* Docket No. PR 09-058 (Decided February 7, 2011), the Board affirmed, but modified, an order which included wages owed to unidentified workers. DOL included a number of unidentified employees on the audit to account for the total number of employees observed at the time of inspection and the complete time period. The Board based its finding on the case of *Reich v Petroleum Sales, Inc.,* 30 F3d 654 (6th Cir 1994), where the court held that it could award damages to unidentified employees under the Fair Labor Standards Act (FLSA) as long as the existence, work hours and wages of these employees is established by a preponderance of the evidence.

> "Such awards benefit the public interest by depriving the employer of any benefits accrued as a result of its illegal pay practices and by protecting those employers who comply with the FLSA from unfair competition with those employers who do not" (*Id.* at 657).

In the instant case, however, there is little evidence to support the calculation of wages due an unidentified worker. The only evidence was that the petitioners employed three to four workers during the period of time. Therefore, the Board finds that the amount found due to the unidentified employee is not supported by a preponderance of the evidence and we modify the Order to eliminate the wages due to the one unidentified employee.

E. The Civil Penalty is Modified.

The order imposes a 200% civil penalty against the petitioners. Supervising Labor Standards Investigator Allen testified that he recommended a 100% civil penalty based on his review of the relevant factors. Since there is no basis to uphold the 200% civil penalty, we reduce the penalty to 100% of the wages due as modified herein.

II. The Penalty Order is Modified.

Petitioners were cited $1,000 for failure to maintain and furnish payroll records; $1,000 for failure to provide wage statements with wages; and $6,000 for discharging three workers in retaliation for lodging a complaint with DOL.

Labor Law § 215 (1) provides:

> "No employer or his agent, or the officer or agent of any corporation shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer, or to the commissioner or his authorized representative, that the employer has violated any provision of this chapter. . . . If after investigation the commissioner finds that an employer has violated any provision of this section, the commissioner may, by an order which shall

> describe particularly the nature of the violation, assess the employer a civil penalty of not less than two hundred nor more than two thousand dollars."

The payroll and wage statement penalties are affirmed in full. The penalty under Labor Law § 215 is reduced to $4,000 based on the retaliatory discharges of Shane Minto and Jason Allen. Minto testified that he was fired soon after the DOL inspection and that Haye had a changed attitude after the inspection. Haye's testimony that Minto quit without notice, in contrast, was not credible, given the proximity of Minto's termination of employment to the DOL inspection and its similarity to his testimony concerning Jason Allen. Jason Allen testified that he was fired due to a misunderstanding concerning when he was to report to work. He also testified that his hours were reduced after the DOL inspection.

However, Haye's allegation that the other employee was fired for stealing was not contradicted by respondent and therefore, the penalty concerning Lewis is revoked.

The penalty order is reduced to $6,000.00: $1,000 for failure to maintain the required payroll records; $1,000 for failure to provide wage statements; and $4,000 for the violation of Labor Law § 215.

III. Interest is due

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Therefore, the interest imposed by the wage order is affirmed.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified and remanded to the Department of Labor for recalculation of wages, interest and penalty due by eliminating the wages due to the unidentified worker; and

2. The Penalty Order is modified to $6,000.00; and

3. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

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.