

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

RAHMAN ARSHAD,

Petitioner,

To Review Under Section 101 of the Labor Law: An
Order to Comply with Article 6 and an Order under
Article 19 of the Labor Law, issued January 27,
2011,

DOCKET NO. PR 11-094

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Eaton & Van Winkle LLP, (Robert N. Swetnick of counsel), for petitioner.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Melanie L. Scotto of counsel), for respondent.

WITNESSES

Rahman Arshad, for petitioner.

Labor Standards Investigator Teri Stewart, for respondent.

WHEREAS:

On March 28, 2011, petitioner Rahman Arshad filed a petition to review two orders that the Commissioner of Labor (Commissioner) issued against Rahman Arshad, Foyaz Ahmed and 31st Indian Restaurant Inc. (T/A Very Famous Curry & Kabob) on January 27, 2011. No petition was filed by either Foyaz Ahmed or 31st Indian Restaurant Inc. An answer was filed by the Commissioner on May 10, 2011.

The first order is an Order to Comply with Article 6 of the New York Labor Law (Wage Order) and directs petitioner to pay \$3,000 in unpaid wages owed to Syed Ahmed, \$975.78 in interest, and \$3,000 in civil penalties for a total due of \$6,975.78 as of the date of the order.

The second order was issued under Article 19 (Penalty Order) and directs petitioners to pay \$500.00 in civil penalties based on the failure to keep and/or furnish the requisite payroll records for the period of September 6, 2008 to January 10, 2009.

The petition alleges that petitioner did not employ Syed Ahmed, has no affiliation with Foyaz Ahmed or 31st Indian Restaurant, Inc. and did not open his restaurant at the same location until February 2009, after the claimed period of employment.

In his answer, the Commissioner alleges that a claim was filed for unpaid wages which named petitioner as one of his employers. Petitioner was given notice of the claim and an opportunity to respond and produce payroll records and petitioner failed to respond in any way to the claim.

Upon notice to the parties, a hearing was held on July 18, 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.

I. SUMMARY OF EVIDENCE

Petitioner's Evidence

Rahman Arshad testified that he was never associated with 31st Indian Restaurant, Inc. or Very Famous Curry & Kabob. He had no ownership interest in that restaurant nor did he ever work there. In October of 2008, Arshad signed a lease for the premises where the restaurant was located so that he could open his own restaurant. The tenant listed in the lease is Food Choice Cuisine Corp. There was no electricity in the premises in October and a meter was not put in until November 20, 2008. Arshad obtained a certificate to collect sales taxes under the name "Food Choice Cuisine Corp." on November 4, 2008 and opened a bank account under that name on November 6, 2008.

Petitioner was involved in renovating the premises up until the end of January 2009 and did not open his restaurant until after he received his Permit to Operate a Food Service Establishment issued on February 3, 2008.

Claimant is the brother-in-law of petitioner's brother. Although claimant did ask petitioner for a job at his restaurant, he was never hired and at no time did petitioner work with claimant.

Respondent's Evidence

Labor Standards Investigator Teri Stewart testified concerning the contents of the Department of Labor (DOL) investigative file in this matter. On January 29, 2009, Syed Ahmed filed a claim for unpaid wages against Very Famous Curry & Kabab, naming Rahmen Arshad and Foyed Ahmed as responsible persons and partners. He claimed that he was employed as a chef at the wage rate of \$600.00 per week and that he was not paid for five weeks of work between the dates of September 6, 2008 and January 10, 2009.

Notices of the claim were sent to Very Famous Curry & Kabab on February 12, 2009, and November 17, 2010 and two letters were sent to the restaurant care of Rahman Arshad on November 17 and December 10, 2010. No documents were received in response to any of the letters. The DOL contact log indicates that a conversation was had with claimant who asked to withdraw his claim but stated that he had not yet received his wages and “described an employer/employee relationship” with Arshad.

II. 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).

The Petitioner has 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).

A. The Wage Order is revoked.

Petitioner testified that he did not own or even work at the restaurant at the time that claimant worked there and never hired or worked with claimant. The lease agreement, and other official documents entered into evidence support his testimony that he did not open his restaurant until February 2009, which was after the period of the claim. The listing of petitioner on the claim form as a responsible party, as well as the general notes of a conversation with claimant on the DOL contact log was insufficient to counter petitioner’s evidence.

For these reasons, we find that the orders are unreasonable with respect to the petitioner and must be revoked as to him as on the record before us there is insufficient evidence to support DOL’s determination that the petitioner was an employer responsible for the unpaid wages.

B. The Penalty Order is revoked.

Petitioner was cited \$500.00 for failure to maintain and furnish payroll records for the period from on or about September 6, 2008 through January 10, 2009. Since we find that petitioner was not operating the restaurant until February 2009, we revoke the penalty order as to petitioner.

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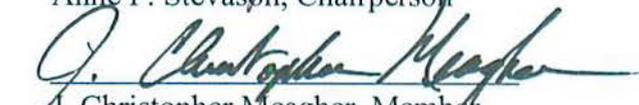
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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

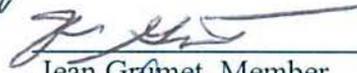
1. The Wage Order is revoked with respect to Rahman Rashad; and
2. The Penalty Order is revoked with respect to Rahman Rashad; and
3. The Petition for review filed by Rahman Rashad be, and the same hereby is, granted.



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
February 27, 2014.