STATE OF NEW YORK
*IND*USTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
CHARLES L. ALBRIGHT AND ALBRIGHT INVESTIGATIVE ASSOCIATES INC.,	
Petitioners,	DOCKET NO. PR 11-175
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, dated April 15, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Coughling & Gerhart LLP, Binghamton (*Joseph J. Steflik, Jr.* of counsel), for petitioners.

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

WITNESSES

Charles Albright for petitioners;

Senior Labor Standards Investigator Susan Wood, Gary Hellmers, and William Carrigg for respondent.

WHEREAS:

The petition in the above-captioned case was filed with the Industrial Board of Appeals on June 13, 2011, was subsequently amended on August 22, 2011, and seeks review of an order issued against petitioners on April 15, 2011. Respondent filed an answer on November 2, 2011. Upon notice to the parties a hearing was held on May 21, June 24, June 25, and August 5, 2015, in Binghamton, New York, before Michael A. Arcuri, Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file legal briefs.

The order to comply with Article 19 of the Labor Law under review directs petitioners to comply with Article 19 and pay respondent for wages in the amount of $366,622.53 due and owing to 11 named employees for work performed during the period from September 1, 2003 through November 15, 2010, with interest continuing thereon at the rate of 16 % calculated to the date of the order in the amount of $66,083.87, liquidated damages in the amount of $91,655.66, and assesses a civil penalty in the amount of $733,245.06, for a total amount due of $1,257,607.12.

The amended petition alleges the order is unreasonable because the employees subject to the order are not subject to Article 19 of the Labor Law and in any event were paid at least minimum wage for all hours worked and overtime for all hours worked over 40 in a week, the orders are barred by the applicable statute of limitations and/or laches, liquidated damages and civil penalties are not appropriate because any underpayments were not willful, and the imposition of interest at a rate of 16 % is excessive. As discussed below, we find the order is unreasonable and revoke it.

SUMMARY OF EVIDENCE

Petitioners' evidence

Testimony of Charles Albright

Charles Albright owns and operates Albright Investigative Associates, Inc., a licensed private investigation agency, located in Binghamton, New York. The company was formed and started to do business in 1999, and was primarily engaged in investigating fraud and insurance claims. Albright testified that work was assigned by email to an investigator, who was required to return a report including a recommendation on how to proceed with the assignment. Albright explained that once a case was assigned to an investigator, the company did not supervise the investigator's hours of work or manage their caseloads. The investigators were free to use whatever investigative techniques were appropriate for the assigned case.

Albright explained that investigators were paid a "flat rate fee" for each investigation. The fees were based on eight hours of work. Investigations were assigned in blocks of times required to a complete the work, typically 8, 16, or 24 hours. A normal fee for 8 hours of work was $200.00, and investigators earned a minimum of $600.00 a week if they worked at least 40 hours. Albright kept employee time sheets that showed for each investigator, among other things, the date he or she worked on a case, the type of investigation, and the flat rate units worked on the case, which is the equivalent of hours worked. Mileage was also indicated on the time sheets because, according to Albright's testimony, mileage is a valid business expense not included in the investigators' taxable income.

Albright further explained that investigators worked from their homes and were not typically required to be present at the office. Investigators sometimes worked on more than one case in the same day.

Albright testified that during respondent's investigation of his business, Labor Standards Investigator Stephen Ambrozik requested that he submit certain records to the Department of

Labor (DOL). Albright submitted all the records that were requested and provided Ambrozik with a list of current and former employees and their contact information. Albright further testified that about seven or eight months after he provided Ambrozik with the records he had requested, Senior Labor Standards Investigator Susan Wood visited Albright at his office, informed him Ambrozik had retired, and advised that Albright would need to conduct a self-audit of his records going back to 2002. Albright testified that the audit required a great deal of labor and he was not able to complete it in the time required. Albright further testified that when he asked for additional time to complete the audit, Wood refused and said if the information was not submitted by the end of December, she would come up with her own figures and Albright would not like them.

Albright testified that Michael Stanton was an investigator from July 2000 to 2003, investigative supervisor from 2003 to 2008, and was also responsible for training employees during part of that period. Gary Hellmers worked as an investigator from July 2003 to October 2008, and was training supervisor from 2006 to 2008. Tim Neal was a part-time investigator from October 2000 to May 2004, supervisor from May 2004 to 2006, and administrative supervisor from 2006 to January 2014. William Carrigg was in investigator from August 2006 to April 2008. Daniel Freeman was a part-time investigator from January 2006 to April 2011. Thomas Gannon was an investigator from June 2003 to April 2013. Michael Kibler was an investigator from July 2003 to November 2011, and was deployed by the military overseas on two separate year-long occasions during that period. Nicholas Santiago was an investigator, working on and off for the company from June 2001 to 2012. Christopher Wallace was an investigator from February 2002 to February 2014. Patrick Welch was a "fill-in secondary" investigator from November 2007 to September 2014. Gary Wright worked on and off as an investigator from July 2002 to 2008 and then on an as needed basis. These investigators all had significant law enforcement experience and credentials, and in some cases a four-year degree in criminal justice.

Respondent's evidence

Senior Labor Standards Investigator Susan Wood

Senior Labor Standards Investigator Susan Wood testified she supervised Labor Standards Investigator Stephen Ambrozik's investigation of petitioners, and, upon Ambrozik's retirement, took over responsibility for completing the investigation. Wood identified numerous documents from the investigative file, including the original claim filed by Gary Hellmers on September 9, 2009, correspondence from DOL to petitioners requesting a list of current and former employees, questionnaires sent by Ambrozik to several current and former employees on March 8, 2010, and the returned questionnaires. Wood explained that after receiving the questionnaires she determined that petitioners were not properly compensating employees for overtime and travel time between assignments. Because of this determination, Wood sent a letter to petitioners on November 15, 2010 demanding that they conduct a self-audit of their records going back to 2002 to determine their liability for unpaid wages. Wood directed petitioners to complete the audit by December 17, 2010. By letter dated December 9, 2010, petitioners advised Wood that because of the time-consuming nature of the self-audit they would not be able to complete it by December 17, 2010, and estimated it could not be finished until March 2011. Wood wrote to petitioners on January 20, 2011 advising if the audit was not completed by January 31, 2011, the audit would be completed "with [petitioners'] figures or mine."

Wood testified that because petitioners failed to complete the self-audit she had *demanded*, she determined their liability based on claimant Hellmers' statements and the questionnaires. Estimates of travel time and hours worked for all employees were based on information and records provided by Hellmers and William Carrigg. Dates of employment came from the information provided by employees in the questionnaires returned to DOL. Wood did not speak to any of the employees who completed questionnaires. Wood testified she "estimated an average of ten hours per week travel time not paid based on the fact that some days would be more and some days would be less. So we found that ten hours was a good estimate for in between. So we based ten hours of travel." This estimate of travel time came from Wood's conversations with Hellmers and Carrigg during which she "had questioned how many hours a week they felt they averaged travel time that they weren't paid for." Carrigg, however, provided DOL with records showing his travel time and total hours worked, but Wood did not use these in her audit. Wood further testified that based on Hellmers' record of the hours he worked, she determined every employee had worked an average of 355.03 overtime hours per year. Wood explained that she did not review all the records in DOL's possession because:

> "The policy is that we do minimum wage investigations for all employees during the period of time of the audit. And that we find for all employees who not been paid overtime when the employer fails to provide the [self-] audit, we have no choice but to go on an estimate. We don't go and review every record."

Wood testified that Ambrozik had requested records from petitioners, which petitioners submitted. Wood did not use the records for her audit because "[t]hey were of absolutely no use to" her. Wood agreed petitioners provided the records Ambrozik requested; however, she did not request any additional records because "the employer was asked to provide the audit." When asked whether it was correct that instead of utilizing the records provided by petitioners to Ambrozik, Wood instead decided to base her audit on estimates made by Hellmers and Carrigg, Wood testified, "yes."

Wood testified that she did not recommend the civil penalty, but agrees with the 200 % civil penalty assessed by her supervisor "because the employer failed to cooperate for almost a year" and that the violations were "willful" due to petitioners' "lack of cooperation." One of the factors considered in reaching this determination was petitioners' failure to complete the self-audit, although Wood could not provide any statute, regulation or written policy requiring employers to audit themselves for wage violations, instead testifying that she was told to do it that way. Wood further testified that she believes the 200 % civil penalty is "automatic when the order's issued."

Gary Hellmers

Gary Hellmers testified petitioners employed him from 2003 to 2008 as an investigator. Hellmers, at the time petitioners hired him, had 27 years of law enforcement experience. Hellmers denied that he was ever a supervisor. According to Hellmers, Albright said he was going to create four investigative supervisor positions, "but basically, it never developed," although Hellmers did spend some of his time, which he estimated to be less than 10 % of his working time, supervising and training other employees. Hellmers indicated on his claim form

that he was an "investigative supervisor." Hellmers testified that Stanton was an investigative *supervisor* and did not recall Neal's title.

Hellmers testified he filed a claim against petitioners because he was not being paid overtime or drive time. He explained that he provided his time sheets to DOL during the investigation, which show the hours he worked but not the time he spent driving between assignments, although the number of miles driven is included. He also explained that the estimated ten hours he worked that he supplied to respondent included travel time from his home to his assignment, between assignments, and back to his home, and that he communicated this to Susan Wood. Hellmers provided DOL with calculations of the hours he believed he worked. The hours were based on his time sheets. At hearing, Hellmers could not recall how he determined the number of hours worked he had reported to DOL.

Hellmers testified petitioners paid him $28.50 an hour for investigative work and $19.00 an hour for supervisory work. Hellmers further testified that he did not understand the flat rate fees indicated on his pay records and when he asked Albright about them, he was never given "a solid answer . . . [Albright] said that he figured in his head that we had – it was worth X amount of money, and I didn't understand it."

William Carrigg

William Carrigg testified he worked for petitioners as a field investigator. Prior to his employment with petitioners, Carrigg was a police officer. Carrigg testified that he received a letter in the mail from a DOL investigator asking him to contact DOL. Carrigg called DOL and provided timesheets and paystubs related to his employment with petitioners. Carrigg testified, based on his timesheets, that petitioners paid him $25.00 per hour. Carrigg also testified that he spoke to Susan Wood about his employment with petitioners.

Carrigg testified that Gary Hellmers was originally his supervisor and later Michael Stanton supervised him, although Carrigg reported at various times to Hellmers, Stanton, Albright, and Neal. Carrigg often worked on more than one case in a day. He testified he was only paid for his surveillance time on cases, not for time travelling between assignments.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners have the burden to show by a preponderance of evidence that the order is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Petitioners allege the order is unreasonable because their employees are exempt from the overtime requirements of Article 19 of the Labor Law, and, in any event, the employees subject to the order were properly compensated for all hours worked. We disagree that the employees are exempt from Article 19, but find as discussed below, that the order is unreasonable.

Petitioners' private investigators are not exempt from Article 19

Petitioners allege that the employees covered by the orders are exempt from the Minimum Wage Act, Article 19 of the Labor Law. Article 19 does not include within the definition of "employee" any individual employed in an "executive, administrative or professional capacity" (12 NYCRR 142-3.12 [c] [2]). The executive and administrative exemptions require that several factors must all be met, including that the employee must be paid a salary that meets a prescribed minimum rate (*see* 12 NYCRR 142-3.12 [c] [2] [i] [e] and 12 NYCRR 142-3.12 [c] [2] [ii] [d]; *Scholtisek v Eldre Corp.*, 697 F Supp 2d 445, 464 [WDNY 2010]). We find the executive and administrative exemptions are not applicable to petitioners' employees because they were not paid a salary as required by the regulation. For purposes of the New York Labor Law "salary" means "receipt of fixed, regular compensation (i.e., not subject to weekly variation by hours worked)" (*Scholtisek*, 697 F Supp 2d at 467). The flat fees petitioners paid to their employees are not a salary for purposes of the Labor Law. The flat fees were based on eight hours of working time and employees' wages varied each pay period depending on the number of hours they worked during the pay period. Because petitioners' employees were not paid a salary but rather their wages fluctuated depending on the hours worked, they are not within the exemption for executive or administrative employees.

Petitioners also allege that William Carrigg, Thomas Gannon, Gary Hellmers, Michael Kibler, Timothy Neal, Michael Stanton, Christopher Wallace, Patrick Welch, and Gary Wright are not covered by Article 19 because they meet the professional exemption set forth at 12 NYCRR 142-2.14 (c) (4) (iii), which has no salary test, and provides that:

> "Work in a bona fide professional capacity means work by an individual:
>
> "(a) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or 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
> "(b) whose work requires the consistent exercise of discretion and judgment in its performance; or
> "(c) whose work is predominantly 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."

The regulation, therefore, exempts "learned professionals" and "creative professionals" *from* Article 19 (*see* 29 USC § 213 [a] [1] [similar test for professional exemption under federal law]; 29 CFR 541.301 and 302 [same]). 29 CFR 541.301 provides in relevant part that:

> "(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:
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> "(1) The employee must perform work requiring advanced knowledge;
>
> "(2) The advanced knowledge must be in a field of science or learning; and
>
> "(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
>
> "(b) The phrase 'work requiring advanced knowledge' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.
>
> "(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.
>
> "(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption

> is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction."

We find on the record before us that, although petitioners demonstrated that the investigators had extensive experience in law enforcement and in some cases, had earned degrees in criminal justice or certificates from police academies, that the investigators are not learned professionals for purposes of the exemption. The investigators, although they may have performed work requiring advanced knowledge to the extent they analyzed or made deductions based on facts gathered during their field investigations, nonetheless, do not work in a field of science or learning. Private investigators do not have a recognized professional status as distinguished from trades where the knowledge required to do the work is of an advanced type, but is not in a field of science or learning. Private investigators do not meet the exemption for creative professionals because they do not perform work in a recognized field of artistic or creative endeavor (*see generally* 29 CFR 541.302). Petitioners failed to prove the employees covered by the order meet the professional exemption.

Respondent's audit is unreasonable

Article 19 of the Labor Law requires employers to maintain payroll records for not less than six years that show for each employee, among other things, the wage rate, number of hours worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (12 NYCRR 142-2.6 [a]; *see also* Labor Law § 661). Article 19 also requires every employer to provide each employee a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 142-2.7). Payroll records must be produced to DOL for inspection when requested (Labor Law §§ 660, 661).

Article 19 also sets forth the minimum wage that an employer must pay to each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half of a non-residential employee's regular rate for each hour worked over 40 in a week (12 NYCRR 142-2.2). An employee's regular rate when paid by other than hourly rate is determined by dividing the total hours worked during the week into the employee's total earnings (12 NYCRR 142-2.16).

The minimum wage order finds based on a claim filed by 1 employee and 10 completed and returned questionnaires that petitioners failed to pay overtime wages to 11 employees in the amount of $366,622.53 between September 1, 2003 and November 15, 2010. In the absence of required records, petitioners bear the burden of proving that the disputed wages were paid (Labor

Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 1989]; *Heady v Garcia*, 46 *AD3d* 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam* Corp v Hartnett, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 21 NY3d 858 [2013]). Petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Ram Hotels, supra*). Where no wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

Petitioners may meet their burden of proof by establishing the precise hours worked by their employees *or* by negating "the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery*, 320 US 680, 688 [1949] [emphasis added] [*superseded on other grounds by statute*]). While the Commissioner is entitled to make just and reasonable inferences in awarding damages to employees, nevertheless "the approximation must at least have some rational basis" in the record (*Matter of John Shepanski Roofing & Gutters v Roberts,* 133 AD2d 757, 758 [2d Dept. 1987]); *Matter of Kong Ming Lee et al.*, PR 10-293 at 16 [April 10, 2014]).

Petitioners met their burden to negate the reasonableness of the inferences drawn from the evidence relied upon by the Commissioner and thereby established that there is not a rational basis in the record to support the underpayment amounts respondent found due. Wood's testimony establishes that her audit of petitioners' overtime liability was unreasonable and arbitrary. Petitioners provided records at respondent's request that while not strictly complying with the legal requirements for payroll records indicated the dates employees worked, the cases and hours worked each day, and miles travelled, as well as amounts paid. Despite testifying these records were "absolutely no use to" her, Wood did not request additional records from petitioners or attempt in any way to understand the records produced or reconcile them with the claim form and questionnaires nor did she contact any of the employees who filed questionnaires to ask them about their employment with petitioners to confirm whether her assumptions were correct. Instead, Wood demanded that petitioners audit eight years of their own records to determine their liability and when the self-audit she required was not completed within the time period she mandated irrespective of petitioners' requests for additional time to complete the task, she issued a letter threatening that if the self-audit was not sent to her within six days she would proceed with her own estimate based on information gathered from the claimant and questionnaires and threatened that respondent must have the case completed whether "with your figures or mine."

Because petitioners failed to complete the self-audit, Wood estimated the hours worked each week by all petitioners' employees based on the numbers and records provided to DOL by Hellmers and assumed each employee should have been compensated for ten hours of travel time between assignments each week based on an estimate made by one employee of his own travel

time, which he could not even recall at hearing the basis for. Wood's findings are unreasonable *and* arbitrary on their face and unsupported by the record. DOL had time sheets in its possession for at least one employee that showed the actual hours he worked, including travel time, but Wood did not use those records, which are the best evidence, instead relying on an estimate allegedly extrapolated from statements made by Hellmers or Carrigg or both. DOL also had other records, including timesheets, in its possession, that if reviewed and audited, would have provided the basis for respondent to make the "just and reasonable" inferences required by law in determining an employer's liability for unpaid wages. Indeed, that "DOL had evidence which may have provided a more accurate estimate of the hours petitioners' employees worked . . . but failed to consider them compels us on the record before us to find the audit unreasonable" because respondent did not rely on the best available evidence (*Matter of Mike Gordon et al.*, PR 14-048 at p20 [July 13, 2016]; *see also Matter of Moshe Maman*, PR 15-281 at p8 [October 26, 2016] [unreasonable not to consider records provided by employees]). Under the circumstances of this case, the audit is also unreasonable to the extent it relies on unverified questionnaires (*Matter of Joseph Baglio et al*, PR 11-394 at p8 [December 9, 2015]). The audit on which respondent determined the unpaid wages was arbitrary. The order is, therefore, unreasonable and must be revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is revoked; and

2. The petition be, and the same hereby is, granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on July 26, 2017.