STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
JOSEPH BAGLIO AND THE CLUB AT WINDHAM, LTD.,	:	
Petitioners,	:	DOCKET NO. PR 11-394
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated November 17, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Trivella & Forte, LLP (Jonathan M. Bardavid and Christopher A. Smith of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Joseph Baglio, Jennifer Buckley, Jennifer Lippman, Krista Koehler Dolan, Susan Schlosser, and Donald Murray, for petitioners.

Marianne Biagioni, Colleen Deciel, and Kenneth Harnett, Senior Labor Standards Investigator, for respondent.

WHEREAS:

A petition in this matter was filed with the Industrial Board of Appeals (Board) on December 22, 2011 seeking review of two orders issued by the respondent Commissioner of Labor (Commissioner) against petitioners Joseph Baglio and The Club at Windham, Ltd. on November 17, 2011. An amended petition was filed on January 27, 2012. The Commissioner's

answer was filed on June 27, 2012. By stipulation of the parties, the orders were amended and reissued on June 29, 2012.[1]

Upon notice to the parties, a hearing was held on May 9, 2014 in Albany, New York before Wendell P. Russell, Jr., then Counsel to 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, and make statements relevant to the issues.

The first order (wage order) directs that petitioners comply with Article 19 of the Labor Law and pay the Commissioner minimum wages owed to 38 individually named employees in the amount of $39,977.70 for the period from September 20, 2008 to October 30, 2010, together with interest continuing thereon at the rate of 16% to the date of the amended order in the amount of $7,553.05, and a civil penalty of $39,977.70. The total amount due is $87,508.45.

The second order (penalty order) under Article 19 of the Labor Law directs that petitioners pay a civil penalty of $250.00 for failure to maintain and/or furnish true and accurate payroll records for each employee, and $250.00 for failure to provide each employee a complete wage statement with each payment of wages, during the period from September 20, 2008 to October 30, 2010. The total amount due is $500.00.

As clarified at hearing, the amended petition claims that the orders should be reversed because: (1) petitioners kept and furnished the Commissioner payroll records for the period from September 20, 2008 to October 30, 2010; (2) the underpayment estimated by the Commissioner is inaccurate and false because all servers understood their payments were based on working a five hour shift, marked their time cards to indicate how many shifts they worked each week, and were paid accordingly at proper hourly rates for such work; (3) the Commissioner's calculation utilizing an average number of hours worked drawn from employee questionnaires is unreliable, overly speculative, and unreasonable, and; (4) the civil penalties assessed are arbitrary, capricious, and inappropriate under the circumstances.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of petitioner Joseph Baglio

Petitioner Joseph Baglio testified that from 2009 to 2010 he owned and operated a restaurant at a country club in Windham, New York known as "The Club at Windham" (Club). The Club offered lunch and dinner service seven days a week and served as a venue for private parties and wedding receptions. Baglio operated another restaurant in the area and had been in the restaurant business for some 37 years.

Baglio testified that service staff at the Club worked on a shift basis and were paid at minimum wage for each shift worked. Lunch service started at 11:00 a.m. and dinner service at

[1] The orders were initially issued to "Joseph Bigalo and the Club at Windham, Ltd." By stipulation filed and approved by the Board on February 29, 2012, the orders were amended to replace the name Joseph "Bigalo" with Joseph "Baglio."

5:00 p.m. Servers working the lunch shift reported at around 10:30 a.m. and worked until 3:00 p.m. Those working the dinner shift came in around 4:00 p.m. and worked until 9:00 p.m. Most nights the restaurant would be empty by 8:00 p.m. and certainly by the end of the dinner shift at 9:00 p.m. Baglio paid his servers $25.00 per shift, $20.00 by check and $5.00 in cash. They were provided a free meal with each shift and kept any tips they received. If a server worked both the lunch and dinner shift, which was rare, they were paid double.

Baglio explained that for private parties and weddings (banquet shifts) the service staff came in several hours before the event to set up and then worked through the event and clean-up. Depending on the party, servers would often work 9, 10, or 11 hours: "They would come in approximately a couple hours before the party. Then the party would be between four and five hours as an average, and then we would need a couple hours to clean up. So they did work the hours." Baglio turned over the service charge paid by the customer for the event to the bartenders at the end of the night, or the next day, and it would be added to the servers' tips and split amongst the staff. The service charge was set in the contract with the customer and was based on the number of servers needed. The customers were advised and understood that they were paying the staff their compensation for working the event, not Baglio: "So, that's what I would do. I assess service for the staff. You [are] paying the staff. I'm not paying the staff . . . And that's where the money came from to pay them." In addition to their split of the service charge, servers were paid one shift fee of $25.00 "just because they were there" and were provided free meals.

On cross-examination, Baglio testified that he kept time records of the hours worked by the service staff but they were destroyed after the restaurant closed.

Testimony of Jennifer Buckley, Jennifer Lippman, and Krista Koehler Dolan

Petitioners submitted the testimony of three servers who worked shifts and banquets at the Club during the period that petitioner operated it, Jennifer Buckley (2009-10), Jennifer Lippman (2008-10), and Krista Koehler Dolan (2008-10). Buckley and Lippman also worked for Baglio at his second restaurant.

Buckley testified that she mostly worked the lunch shift that ran from 10:30 a.m. or 11:00 a.m. to 3:00 p.m., probably five or five and one-half hours each time. The dinner shift ran from 4:00 p.m. to 9:00 p.m. and she worked it once or twice for an average of five hours each time. She was paid the same for both shifts, $20.00 by check and $5.00 in cash, and received a free meal and tips. She once worked a double shift for Baglio and received $40.00 by check and $10.00 in cash. When she worked parties, she came in early to do the set up and worked through the event and clean-up. The longest shift she ever worked was 12 hours. She received $25.00 for each banquet shift, free meals when she wanted to take them, and a second payment based on the size of the party that was divided up by the service staff at the end of the night or the next day. If the event was a wedding of 40 people lasting four hours, her share might have been $40.00. If it was 150 people, then it could have been $200.00 to $300.00.

Lippman testified that she didn't work many lunches but when she did it was by herself or with one other server and it was for three to four hours. When she worked dinners it was for four to four and one-half hours. She received $25.00 for each shift, $20.00 by check and $5.00 in cash, plus her tips. She often worked parties and received one shift fee of $25.00 and an even share of what she described as the "gratuity" for the event that was split up by staff at the end of

the night and included in their tips. Every time she worked at the Club she punched in and out on a time clock and designated the time she worked, not simply that she worked a shift.

Dolan testified that she worked an occasional lunch shift and "a lot" of parties but never dinners or a double shift. She worked lunches from 11:00 a.m. to 3:00 p.m. and received $25.00 for the shift, $20.00 by check and $5.00 in cash, plus a free meal and tips. When she worked parties, she received a $25.00 shift fee and a split of the staff's tips and their "money" for working the event. Baglio told her the payment was from "the people who wanted us to cater for them." Dolan added that she clocked in and out for all the shifts she worked, including banquets.

Testimony of Susan Schlosser and Donald Murray

Petitioners also called two employees who worked as managers at the Club from 2008 to 2010, Susan Schlosser in 2008 and Donald Murray from 2009 to 2010.[2] Schlosser was employed by Baglio at his second restaurant at the time of the hearing. Both witnesses testified that as managers they worked on salary.

Schlosser testified that she was responsible for scheduling the staff and that she came in each day around 10:00 a.m. and stayed through the dinner shift. Service staff came in for the lunch shift at 11:00 a.m. and left by 3:00 p.m., working from two to four hours each shift and no more than five hours. They reported for the dinner shift "anywhere three to nine" and worked no more than five hours. Each server received $25.00 per shift and never worked a lunch and dinner shift on the same day. When they worked banquets, they received their $25.00 shift pay, their split of the service charge, and their tips. Schlosser confirmed that the wait staff clocked in and out at the beginning and end of each shift.

Murray testified that service staff worked a rolling schedule on the lunch shift, coming in and leaving at separate times in the morning and afternoon. The same rolling schedule applied on the dinner shift. Murray also confirmed that there was a time clock in the kitchen where the servers punched in and out each day.

DOL's Evidence

Testimony of Marianne Biagioni and Collen Deciel

Marianne Biagioni testified that she worked as a waitress at the Club from April 18, 2010 to October 31, 2010, working the lunch shift each week along with parties and weddings. On many occasions she worked a lunch and banquet shift on the same day, starting at 9:30 a.m. or 10:00 a.m. and working until 11:00 p.m. Biagioni testified that she was pretty much a full-time employee and worked an average of five or six days and 40 to 50 hours per week. She did not punch a time clock but signed in and out in a time book indicating the hours she worked each day. She received a payment of $25.00 per shift, plus a free meal and tips, but when she worked lunch and banquet shifts on the same day she received only one shift fee. When she worked banquets she also received a split of the "gratuity" of the event from Baglio or Murray, and kept any side tips she received.

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[2] Murray also worked as a banquet chef at the Club from 2008 to 2009.

Biagioni authenticated a written claim she filed with DOL on December 6, 2010 stating that she was employed as a waitress at the restaurant from April 18, 2010 to October 31, 2010 at the rate of $4.65 per hour and was not paid full wages for the hours she worked.[3] In support of her claim, she attached pay stubs for each of the pay periods during her employment and testified that they did not reflect the actual number of hours she worked: "Well, almost every one of my paychecks said ten to fifteen hours. Only one had twenty hours. And I always worked more than that."

Colleen Deciel testified that she worked at the Club as a waitress serving lunches, dinners, and banquets from 2008 to 2010. She estimated that she worked an average of 32 to 34 hours per week, including many times when she worked two shifts and 10 or 11 hours per day. She received $25.00 per shift, plus her tips, but received only one payment when she worked two shifts on the same day. When she worked banquets she received a shift payment of $25.00 and a share of the tips collected by the servers at the event. The tips included money distributed by Schlosser or Murray on behalf of management at the end of the event that they referred to as "tips." Deciel filed a letter with DOL on January 29, 2010 complaining that she signed a time book listing the hours she worked but her pay stubs from the Club did not accurately reflect those hours.

Testimony of Senior Labor Standards Investigator Kenneth Harnett

Senior Labor Standards Investigator Kenneth Harnett testified concerning the investigation that resulted in the orders under review.

In follow up to Biagioni's claims, Harnett made a field visit to Baglio at his second restaurant on February 14, 2011 and interviewed him and an employee named Roberta Cole who had previously worked at the Club at Windham. Baglio stated that the Club was open from 11:00 a.m. to 9:00 p.m. seven days a week and that he had employed one manager, one cook, two bartenders, and 12 wait staff during the period of its operation. Harnett left him a "Notice of Revisit" requesting that he produce by March 8, 2010 payroll records of all hours worked and wages paid his employees at the Club during the period from September 12, 2008 to October 31, 2010, including daily and weekly hours, schedules, tip sheets, and a list of the employees' names, addresses, and phone numbers.

Harnett testified that when he interviewed Cole he recorded her answers in an interview report that she signed in his presence. He entered the report in DOL's investigative file the same day. Cole stated that she worked as a waitress and bartender at the Club, typically working an average of 30 hours over four days each week, including double shifts on two of those days. Cole said she received $25.00 per shift, plus tips, and that the staff's tips were pooled at special events. Meals were also provided at no cost.

Harnett testified that Baglio did not provide records of daily hours in response to the records request and told him he had no time records. His accountant submitted wage statements and "general payroll" showing weekly hours worked by the employees from 2008 to 2010, along with a list of their names and addresses. The weekly hours were uniformly stated in bulk units of 5, 10, 15, etc. In the absence of daily time records, Harnett sent a questionnaire to the 39

[3] Supplementary claims were filed on January 20 and March 29, 2011.

employees for whom addresses had been provided requesting that they provide information concerning the hours they customarily worked and the wages they were paid for those hours. Nine questionnaires were returned completed and signed, including one from Biagioni. Harnett testified that he did not take further steps to determine whether any employee had in fact signed the questionnaire and did not contact any of the employees on the list provided by petitioner by telephone or otherwise during the course of the investigation.

In the absence of adequate payroll records, Harnett calculated underpayments based on the questionnaires, the wage statements and general payroll provided by the accountant, and the interview with Cole. Averaging the weekly hours stated by each person who returned a questionnaire, Harnett determined that employees worked an average of 8.8 hours per day. Since the employer paid the employees by flat shifts of five hours, DOL determined they were owed 3.5 hours per day rounded down from 3.8 hours. The number of days worked was calculated by taking the total hours worked from each employee's wage statements and dividing that figure by five. That number was then multiplied by 3.5 to determine an underpayment of wages owed each employee. Underpayments were calculated at minimum wage of $4.60 per hour for the period from September 20, 2008 to July 23, 2009 and $4.65 per hour from July 24, 2009 to October 30, 2010, with the tip allowance credited.

Harnett testified that DOL considered the banquet "service charge" to be a gratuity because the servers were employed by petitioners and not by the banquet customers who had no employment relationship with them.

FINDINGS

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).

Petitioners Violated Article 19 of the Labor Law by Failing to Pay Biagioni, Deciel, and Cole Their Wages Due

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

Labor Law Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due. During the time period covered by the wage order, the minimum wage for food service workers in the restaurant industry with tip allowance was $4.60 an hour until July 23, 2009 and $4.65 thereafter (Labor Law § 652; 12 NYCRR 137-1.5).[4]

The Labor Law requires employers to maintain accurate payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.1). Employers are required to keep such records open to inspection by the

[4] 12 NYCRR Part 137 was replaced by 12 NYCRR Part 146, effective January 1, 2011.

Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*Id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.2). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence (*Anderson v Mt. Clemens Pottery,* 328 U.S. 680, 688 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee,* PR 10-293 at 16 [April 10, 2014]).

Petitioner produced no time records establishing the precise hours worked by Marianne Biagioni and Colleen Deciel, who both testified at hearing, and Roberta Cole who signed an interview statement taken by the investigator that was contemporaneously recorded in DOL's investigative file. Instead, petitioner and his witnesses testified in general fashion that servers did not work more than five or five and one-half hours on the lunch and dinner shifts and were paid at the rate of $25.00 per shift for those shifts. However, petitioner conceded that servers routinely worked as much as 9, 10, or 11 hours at parties and banquets and received only one shift payment of $25.00 for that shift, which covered only five of those hours.

Biagioni testified that she worked five or six days and 40 to 50 hours each week, including days when she worked 12 hours a day doing lunch *and* banquet shifts but received only one shift payment. Likewise, Deciel testified that she worked an average of 32 to 34 hours per week doing lunches, dinners, *and* banquets, including many times when she worked 10 or 11 hours per day and received only one shift payment. Cole stated that she worked an average of 30 hours over 4 days each week doing shifts *and* special events, including double shifts on two of those days. We credit their statements and testimony as it was specific, credible, and not rebutted by petitioner. Since each of these employees performed work that included lengthy hours working banquets not fully compensated at minimum wage, we find the underpayments calculated by the Commissioner for them to be reasonable. In contrast to the remaining employees covered by the wage order, their average hours were substantiated without reference to the employee questionnaires. Even should the hours and wages approximated be inexact and somewhat generous, the Commissioner's order may not be faulted for its imprecision since it is only an estimate (*Mt. Clements* Pottery, 328 US at 687-88 ["The 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"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [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"]).

We therefore find that petitioners failed to meet their burden of proof as to the wages owed Biagioni, Deciel, and Cole and affirm the wage order as to them, with interest and civil penalties reduced proportionally. We reject petitioner's claim that the service charges distributed to his employees for banquets were regular wages that were paid by the contract customer, not by petitioners. Petitioner Baglio offered no proof to support this claim and his practice was to divide the monies evenly amongst the workers who worked the event, similar to a gratuity. The servers in this case were hired and employed by Baglio and not by the contracting party, who had no employment relationship with them. As such, the charges were "a charge purported to be a gratuity for an employee" under Labor Law § 196-d that must be distributed to those employees (*Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

As to the remaining employees covered by the order, while petitioners did not establish their precise hours and wages, they nonetheless met their burden of proof to establish that the order was otherwise unreasonable (*Mt. Clemens Pottery* at 687-88 [employer may meet his 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"]; *Matter of Ram Hotels, Inc.*, PR 08-078 at p. 24 [October 11, 2011] [employer must establish by a preponderance of evidence of the specific hours that employee worked and that he was paid for that work *or* other evidence that shows the Commissioner's findings to be invalid or unreasonable]).

DOL calculated wages owed these employees solely based on questionnaires sent to 39 employees whose addresses were provided by the employer, nine of which were returned as filled out and completed, including one from Biagioni. DOL credited the questionnaires because they were addressed to the employees and returned in envelopes provided by DOL. While section 306 of the State Administrative Procedure Act requires the admission of records kept in DOL's file, we find that we cannot rely on evidence which lacks foundation. There was no corroboration that the information contained in any of the questionnaires was correct or that the individuals were actually the persons who completed them, save for Biagioni who substantiated her hours by her testimony at hearing. DOL did not follow up with a phone call or an in person interview with any of these individuals and no one authenticated their signatures on the questionnaires. DOL did not contact any of the other employees covered by the order by telephone or otherwise, aside from Biagioni and Deciel, during the course of the investigation.

While questionnaires may be useful in appropriate cases where the employer has failed to submit adequate records, in the circumstances of this case we find DOL's reliance on unsubstantiated questionnaires returned in the mail to calculate an average number of hours worked by those employees to be unreasonable. We revoke the wage order for them accordingly (*Matter of Geiger*, PR 10-303 at pp.8-9 [January 16, 2014] [reliance on unsubstantiated questionnaire without foundation unreasonable]); *Matter of Kong Ming Lee*, PR 10-293 at pp. 17-19 [April 10, 2014] [overtime calculation based on allegations in unsubstantiated anonymous letter unreasonable]).

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is revoked as to the wages owed the remaining employees covered by the order except Biagioni, Deciel, and Cole, and the interest shall be reduced proportionally.

Civil Penalty Assessed in the Wage Order

Labor Law § 218 authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioners did not submit evidence challenging the civil penalties assessed in the wage order beyond the conclusory allegations of the petition and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is revoked as to the wages owed the remaining employees covered by the order except Biagioni, Deciel, and Cole, and the civil penalty assessed in the order shall be reduced proportionally.

Penalty Order

Petitioners did not submit evidence challenging the penalty order beyond the conclusory allegations of the petition and the issue is thereby waived pursuant to Labor Law § 101 (2).
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed with respect to the wages owed Marianne Biagioni, Colleen Deciel, and Roberta Cole, with interest and civil penalties reduced proportionally; and

2. The wage order is revoked as to the remaining employees listed in the order; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on.
December 9, 2015.