STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
KYRA HARING AND FOR PET'S SAKE VETERINARY CENTER, P.C.,	:	
Petitioners,	:	DOCKET NO. PR 12-062
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, an Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, each dated December 29, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Girvin & Ferlazzo, P.C. (Scott P. Quesnel of counsel), for petitioners.

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

WITNESSES

Dr. Kyra Haring, Irene Peranto, Shannon DuPont, Donna Frawley, J. C. Dacier, Senior Labor Standards Investigator and Domini Vasquez, Labor Standards Investigator, for petitioners.

WHEREAS:

On February 27, 2012, petitioners Dr. Kyra Haring and For Pet's Sake Veterinary Center, P.C. filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued against them by respondent Commissioner of Labor on December 29, 2011. Respondent filed his answer on June 18, 2012.

Upon notice to the parties, a hearing was held on May 27, 2014, and continued on October 15, 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.

Respondent had not called any witnesses to testify by the conclusion of the second day of hearing. By notice of continuation of hearing, dated November 12, 2014, the hearing was scheduled to resume on December 2, 2014; however, on December 1, 2014, respondent's counsel advised the hearing officer and petitioners' counsel that claimant Kristina Goodspeed would not be available to testify. Because Goodspeed was unavailable, and respondent had no other witnesses, the hearing scheduled for December 2 was cancelled and the parties were permitted to submit closing arguments in writing. Petitioners' closing brief was received on February 9, 2015, and respondent's closing summation was received on February 10, 2015.

The first order (minimum wage order) under review demands that petitioners comply with Article 19 of the Labor Law and pay $7,524.34 in minimum wages due and owing to employees Matina Baker, Donna C. Frawley, Kristina Goodspeed, Kelli Harper, Amanda Monger, JoAnn Prior, and Brina Truax, for the period from November 10, 2006 to July 31, 2009, interest at the rate of 16% calculated to the date of the order in the amount of $3,663.92, and a civil penalty in the amount of $7,524.34, for a total amount due of $18,712.60.

The second order (supplemental wage order) demands compliance with Article 6 of the Labor Law and payment of unpaid wage supplements (vacation/sick days) for Goodspeed for the period May 2, 2008 to July 31, 2009, in the amount of $288.00, interest at the rate of 16% calculated to the date of the order in the amount of $111.22, and a civil penalty in the amount of $288.00, for a total amount due of $687.22.

The third order (penalty order) is for violation of Article 19 and 12 NYCRR 142-2.6 and assesses a civil penalty of $250.00 for failure to maintain and/or furnish true and accurate payroll records for each employee for the period from January 1, 2006 through December 31, 2009.

The petition alleges that: (1) Baker is exempt from the overtime requirements of state and federal labor laws; or, in the alternative, the method used to calculate Baker's unpaid wages failed to consider the actual number of hours worked, Baker failed to record her time and attendance accurately, and Baker should not be awarded back wages because, on information and belief, she was convicted of grand larceny in connection with taking money from petitioners; (2) Goodspeed and Prior should not be awarded back wages because they altered time and attendance records to reflect hours of work not performed; (3) Goodspeed was not entitled to vacation time and/or was paid in full for all vacation time claimed to be due; (4) no wages are due to Frawley, Harper, Monger, Prior and Truax because petitioners' "rounding practices" comply with 29 CFR § 785.48 (b); (5) the conclusions reached by respondent lack support in the record or are contradicted by the record; (6) petitioners have not engaged in conduct that warrants imposition of a civil penalty; (7) the civil penalties against petitioners are "grossly inequitable" in view of the conduct of certain of their employees and the amount is not based on any factors but respondent's practice of applying the same amount to all orders; and (8) no interest should be assessed against petitioners for any periods of inactivity or delay attributable to respondent. Based on the record, as discussed below, we grant the petition in part, and deny it in part.

SUMMARY OF EVIDENCE

Testimony of Dr. Kyra Haring

Petitioner, Dr. Kyra Haring, testified that she started a small-animal veterinary clinic in 2006, and hired Matina Baker to be a salaried office manager. Haring had previously worked with Baker at another organization that provided similar services, knew that Baker had handled multiple responsibilities and felt would be able to help Haring get her business started. She testified that she relied on Baker to run the business aspects of the practice so Haring could focus on providing veterinary services.

Haring stated that Baker had altered and destroyed hundreds of client records and that for two and one-half years she had been embezzling money, which she had been unaware of until Kristina Goodspeed brought the matter to her attention. At that point, Haring contracted with Irene Peranto for forensic accounting services to "verify that [Baker] had stolen thousands—fifty-four thousand, plus" from petitioners. Haring testified that Baker was convicted of a felony charge for alteration of records and theft, and that her former accountant was grossly negligent for failing to discover this. Because of the negligence of her former accountant, Haring hired Peranto to provide accounting services to petitioners. Haring testified that as a result of Baker's conviction, she was required as part of her sentence to pay $1,000.00 in restitution.

Haring testified that Baker, as the office manager, was in charge of "recordkeeping, payroll, hiring, firing, policies . . . any task [involving] the managerial, the daily running of For Pet's Sake." Baker was petitioners' only salaried employee. It was Haring's testimony that Baker worked anywhere from 25 to 60 hours a week and consistently "she and I put in a good forty-five hours a week." Haring stated that Baker did not use the time clock to track her hours, and that none of her employees has ever come to her to complain about not being paid properly. Haring testified that before hiring Baker, she had a specific conversation with her that she would be a salaried employee, and not entitled to overtime pay.

During the period covered by the orders, the office was open Monday through Friday generally from 8:00 a.m. to 6:00 p.m. Haring testified that the office was not open on weekends, and generally the employees did not work on weekends except on an intermittent basis for things like doing a "deep cleaning" of the facility, which would not have involved any of the employees listed in the order. Haring testified that employees had keys to the building and could come and go as they pleased; and that many employees came in on the weekends to groom their own pets. Goodspeed did that frequently and often brought her daughter with her to play with the animals.

Petitioners had an employee handbook, which Haring testified was distributed to each new employee upon hiring to be reviewed and signed. The handbook was also available in the office for employees to consult. The handbook was admitted into evidence at hearing and has a section regarding wages and salaries, including information for both hourly and salaried employees, time record keeping requirements and approval requirements for overtime for hourly employees. As to weekend pay, the handbook states: "We currently have no weekend hours therefore no pay hours exist." Hourly employees' hours were recorded with a computer system and were, for a time, called in by Baker to a payroll company. Haring testified that she did not

review the time put in by employees, because that was one of Baker's responsibilities and she relied on her review.

Haring testified that only full-time employees, defined as anyone working 40 hours a week, were entitled to vacation. The policy as described in the employee handbook was to accrue five days of vacation after one year, which had to be used during the year it was accrued. If an employee resigned or was terminated without cause, that employee would be compensated for any unused vacation time that had accrued, with a maximum of five days that could be compensated.

Haring testified about and produced at hearing "Employee Acknowledgement" forms for the employee handbook signed by Goodspeed that indicate she started work on or about July 30, 2007. According to Haring, Goodspeed started work on a part-time basis, became full-time in 2008, and ended her employment with petitioners on or about July 31, 2009. Haring testified that the paystub from Goodspeed's final paycheck showed payment for 24 hours of vacation at a pay rate of $12.00 per hour, with a total of 80 hours of vacation paid to her in 2009. Goodspeed's initial hourly rate of pay was around $9.00, with periodic increases until reaching $12.00.

Haring testified that she retained Irene Peranto to conduct forensic accounting, bookkeeping and payroll administration. Peranto discovered that JoAnn Prior had used Haring's computer password to falsify her time card. Haring stated that this led to Prior's termination on June 15, 2010, with Prior signing a document confirming her unauthorized use of Haring's password to alter her time records. Haring testified that the timekeeping computer system had administrative passwords, which some of her employees knew and had used to falsify their time cards, including Prior and Goodspeed.

Testimony of Irene Peranto

Irene Peranto testified that she has been in business for about 30 years providing tax preparation, bookkeeping and payroll services through her business, Tax Pro Inc., and that she began to do the payroll for petitioners in 2010; prior to that, she had done some examination of payroll records and some bookkeeping for petitioners.

Peranto testified that when respondent first visited petitioners' place of business, time and attendance records for Goodspeed could not be printed. Peranto stated that she later discovered that Goodspeed had been marked as an inactive employee and, in the computer system, if an employee is marked inactive, her records cannot be printed. Peranto testified Goodspeed was the only inactive employee at the time respondent asked for records. Once Peranto made Goodspeed an active employee, her records were available, printed and supplied to respondent. Peranto also testified about a document admitted into evidence that she obtained from petitioners' former payroll service, which shows that petitioners had paid Goodspeed $1,138.00 in vacation pay during her period of employment.

Peranto testified that she had provided investigator Vasquez "all payroll records [petitioners] had" for the business except for a missing folder for the third quarter of 2008 and Goodspeed's time-and-attendance records, which were later provided to respondent.

Peranto also identified an audit trail report of time clock records that were removed or changed, and that she had printed the report using petitioners' electronic payroll system. The report shows, among other entries, the initials for the employee making or changing an entry in the payroll system (for example, for clocking in or out, changes in an employee's time record, employee work station and employee password). The report shows that someone changed time reports for Goodspeed using Haring's password to reflect Goodspeed working when she was not. Peranto also identified an audit trail report created for Prior showing improper record changes for the period February 17, 2010 through June 10, 2010. Peranto raised these improprieties with Haring, who then terminated Prior. The reasons for Prior's termination were memorialized in a termination letter prepared by petitioners.

During cross-examination, Peranto testified about how she moved from doing some bookkeeping for the practice to replacing the former payroll service. She testified that the former company's practice of rounding hours for certain employees did not "seem right," so she submitted a proposal to Haring to do petitioners' payroll, starting in early 2010. Peranto testified that she used Quick Books to generate paychecks for employees, but had to go back to the former payroll service to get information for respondent's investigation. Finally, Peranto testified that she met with Vasquez at least three times to provide her with business records, including the retrieved records on Goodspeed.

Testimony of Shannon DuPont

Shannon DuPont testified that she is currently employed by petitioners full time as a head licensed veterinary technician and office manager. DuPont previously worked for petitioners on a part-time basis as a technician for about a year or a year and a half between 2008 and 2010. Between 2008 and 2010, petitioners paid her an hourly rate, and she worked Mondays and Tuesdays between eight and ten hours each day. She never worked overtime or on weekends, but testified that petitioners' practice of weekend work has always been done on a rotation schedule that only demands a few hours of work for the employees working on the weekend. DuPont was not aware of any employee working every weekend for an entire year.

DuPont testified that she was familiar with, and routinely used petitioners' time keeping system. DuPont has never had Haring's password, but recalled Donna Frawley, Goodspeed and Baker had it so they could serve as administrators in the system when Haring was unavailable. She testified that petitioners' regular office hours were Monday through Friday 8:00 a.m. to 6:00 p.m. and due to her new office manager role, she is aware of the need for an employee to be marked active in the computer time keeping system for a time card to print for that employee. DuPont stated that between 2008 and 2010, she worked with Goodspeed, Baker, Prior, and Frawley. Baker was the office manager during that time and Goodspeed was a receptionist.

Testimony of Donna Frawley

Donna Frawley testified that she has worked as an assistant and receptionist for petitioners since 2007, both part-time and full-time. She worked primarily part time as an assistant until mid-2008, when Baker left and Frawley became full time and her duties became more those of a receptionist. She testified that when she worked more than 40 hours a week, she

would receive time and one-half her regular rate for the hours she worked over 40 per week. She also testified that although she is listed in the order, she "is not aware of any money owed [her]."

Frawley stated that she worked with Baker who was the office manager and "basically ran the office" including "client appointments, everything, records, deposits." Frawley inputted her time using the computer-based time keeping system mentioned by other witnesses and testified that she had at times had Haring's password because Haring was unavailable and someone had to be able to act as the administrator in the system. Frawley believes Baker and Goodspeed also had access to Haring's password as generally staff in the reception area handled administrative matters.

Frawley testified that weekend work at the practice did "not happen that often," and that to her knowledge, no one had ever worked 5 to 20 hours on a weekend. Finally, she testified that she had never been paid in cash and had only been paid with a company payroll check.

Testimony of Senior Labor Standards Investigator J.C. Dacier

Senior Labor Standards Ingestigator J.C. Dacier testified that he customarily works on wage claims and wage-supplement claims, but did not conduct the field investigation of, or take the initial complaint related to, petitioners. Rather, he reviewed the file and prepared the documents that led to the issuance of the orders under review. He testified that Domini Vasquez was the field investigator for the matter, but could not recall speaking to her about the investigation. He also testified that he did not believe that he had spoken with any of petitioners' employees because there was no record of such in the file's "conversation log" and he would have noted a conversation with petitioners' staff. Dacier testified that penalties can be anywhere from "[z]ero to one hundred percent[1]" of the amount of wages found to be due, but he applied the maximum penalty to petitioners because "[w]e always do" and "[i]t wouldn't have been approved if I didn't write a hundred there."

Testimony of Domini Vasquez, Labor Standards Investigator

Labor Standards Investigator Domini Vasquez testified that she has been a labor standards investigator for four and one-half years and investigated the claim against petitioners. Referring to petitioners' employee handbook, Vasquez admitted that Goodspeed was only entitled to a maximum of six vacation days during her final year of employment. Vasquez acknowledged that Goodspeed, on her claim form, wrote that her last day worked was July 20, 2009. Upon review of Goodspeed's July 31, 2009 paystub, Vasquez admitted that it appeared that Goodspeed was not owed money for any vacation time as the paystub reflected Goodspeed having either taken or been paid for all vacation time she was entitled to at the time of her resignation.

Vazquez also testified that Goodspeed was the only employee listed in the orders under review for which petitioners did not provide records of daily hours while Vazquez was conducting the investigation and preparing computations for wages owed. As such, Vazquez

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[1] The maximum penalty is actually 200% if DOL determines that a violation is willful or egregious or the employer has a prior history of violations (Labor Law § 218).

computed underpayments based on Goodspeed's statement of working an average of 45 hours per week. Vazquez, when she made her calculations, only had records of the amount petitioners paid to Goodspeed, not the hours she worked. For the hours worked by Goodspeed, Vazquez used petitioners' payroll records only when those hours were more than 40 per week and reflected a payment of overtime or were less than 40 per week and reflected payment at straight time for the hours noted. If payroll records showed claimant working exactly 40 hours per week, Vazquez used the average of 45 hours per week provided by Goodspeed and computed an underpayment of 5 hours. Vazquez reviewed petitioners' time and attendance records produced at hearing, which had been provided prior to issuance of the orders but after the computations were done, and testified that they are legally sufficient records and she could have relied on them for computations if they had been produced when requested.

Vasquez testified an employer's record must show if an exemption is claimed. Vasquez agreed that petitioners' payroll records show Baker receiving the same amount of money regardless of the number of hours worked. In reviewing petitioners' payroll records at hearing, Vazquez testified that Baker was paid $510.00 for the payroll dated May 9, 2008 through June 6, 2008; $660.00 for the payroll dated June 13, 2008; and $400.00 for the payroll dated June 20, 2008. Vazquez's computations reflect weekly wages as follows:

Weeks ending	**Weekly rate paid to Baker**
November 24, 2006 – February 2, 2007	$420.00
April 22, 2007 – August 31, 2007	$440.00
September 21, 2007 – April 11, 2008	$500.00
April 18, 2008 – June 6, 2008	$510.00
June 13, 2008 – June 20, 2008	$660.00

Vazquez consulted her supervisor in reaching conclusion that Baker was not exempt from Article 19 of the Labor Law and believes that even if Baker was salaried she did not supervise two or more people to meet the exemption requirements and her functions did not involve those required to qualify an employee as exempt.

GOVERNING LAW

Standard of Review and Burden of Proof

The petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by respondent are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). Respondent issued three orders against petitioners – a minimum wage order, a supplemental wage order, and a penalty order. As discussed below, the minimum wage order is revoked with respect to Goodspeed, modified with respect to Baker, and affirmed with respect to Prior, Frawley, Harper, Monger, and Truax, and the civil penalty is revoked. The supplemental wage and penalty orders are revoked.

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.

Minimum Wage Order

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay not less than the applicable minimum wage to each covered employee (Labor Law § 652). During the time period relevant to this proceeding, the minimum wage was $6.75 an hour in 2006, $7.15 an hour from January 1, 2007 to July 24, 2009, and $7.25 an hour from July 25, 2009 through the end of the claim period (Labor Law § 652 [1]; 12 NYCRR 142-2.1). Article 19, in addition to requiring employers to pay the applicable minimum hourly wage rate to covered employees, requires payment of an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in a week (12 NYCRR 142-2.2). Employees may be exempt from certain provisions of Article 19 if they meet the requirements set forth at 12 NYCRR 142-2.14.

Wages owed to Kristina Goodspeed

The minimum wage order finds petitioners owe $2,962.86 in overtime wages to Goodspeed, the only employee who made a claim to DOL against petitioners. Respondent's investigator testified that a combination of petitioners' records and Goodspeed's statement were used in determining the wages due, because respondent did not have records of the hours Goodspeed worked at the time the calculations of wages owed was made.

The Labor Law requires employers to maintain contemporaneous payroll records that include, among other things, their 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 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative (*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 and 12 NYCRR 142-2.7). The required recordkeeping provides proof to an employer, an employee, and respondent that the employee has been properly paid.

In the absence of the accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the best evidence available, 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. 2013]).

Labor Law § 196-a provides that where an employer fails "to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." In a proceeding challenging respondent's determination, an employer must come forward with evidence of the "precise" amount of work performed, or with evidence to negate the reasonableness of the inferences drawn from the employees' evidence (*Anderson v Mt. Clemens Pottery*, 328 U.S. 680, 688 [1946]; *Mid-Hudson*

Pam Corp., 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages, and requires an employer to prove the "precise wages" paid 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 Gattegno*, PR 09-032 [December 15, 2010]).

The Court in *Mt. Clemens Pottery* further described the nature of evidence the employer must provide to meet its burden to establish the "precise" amount of work performed: "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*id.* at 693; *Matter of Mohammed Aldeen* PR 07-093 [May 20, 2009] [employer burden to provide "accurate estimate" of hours worked to overcome approximation drawn by Commissioner], *aff'd. sub nom. Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept. 2011]).

In this case, petitioners produced substantial payroll and time records, and offered credible testimony regarding such records. There was only one employee, Goodspeed, for whom payroll records were not initially provided, and as a result, respondent relied on an estimate of the average hours worked provided by Goodspeed herself to calculate unpaid overtime wages. At hearing, however, credible testimony was given as to why Goodspeed's payroll records had not been initially available. DuPont and Peranto testified that the computerized time and attendance system operated in such a way that were an employee designated inactive, his or her records would not print, and, because Goodspeed had been classified as inactive, her records—and only her records—were not available to be provided to respondent. Once it was discovered that if Goodspeed was reclassified as an active employee, her records would become available in the system. At the time, Goodspeed was the only inactive employee for whom records had been requested. Because petitioners provided Goodspeed's records to respondent prior to issuance of the order, respondent should have considered them. Petitioners met their burden of proof, because their records show Goodspeed was paid overtime when she worked over 40 hours a week. Goodspeed claimed she worked overtime for which she was not paid, and estimated she worked an average of five overtime hours per week, but absent Goodspeed's testimony or other evidence to cast doubt on petitioners' records, respondent failed to rebut petitioners' proof. The minimum wage order is revoked with respect to Goodspeed.

Wages owed to Matina Baker

Respondent assessed an underpayment of $3,898.51 for Baker on the theory that she was improperly classified as an exempt salaried administrative employee and, thus, not exempt from overtime. Petitioners contend that even if the Board finds that the administrative exemption does not apply, Baker's correct hours worked are not reflected in respondent's computations or Baker is not entitled to any wages because she stole from petitioners. There was significant, credible evidence produced at hearing about Baker's role in the practice and the termination of her employment upon petitioners' discovery that she had altered and destroyed client records and taken a substantial amount of money from petitioners' business over the course of several years. Haring testified that Baker had stolen more than $54,000.00 from the business and had a felony conviction for which she received five years of probation. Haring further testified that Baker had paid restitution of approximately $1,000.00.

Individuals who work in a bona fide administrative capacity are not employees under Article 19 of the Labor Law. 12 NYCRR 142-2.14(c) (4) (ii) provides that an individual:

> "(a) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer; (b) who customarily and regularly exercises discretion and independent judgment; (c) who regularly and directly assists an employer . . . and (d) who is paid for his services a salary of not less than . . . $506.25 on and after January 1, 2006 . . . and $536.10 per week on and after January 1, 2007"

Is not an employee.

Haring provided credible testimony that when she started her practice she decided to hire Baker to run office operations while she concentrated on providing veterinary services. She testified that she had worked with Baker previously and felt she was capable, hiring her as a salaried office manager in charge of recordkeeping, payroll, hiring, firing, policies, and practically everything related to the day-to-day operations of petitioners' business except the care and treatment of animals. Baker was petitioners' only salaried employee, and the employee handbook noted the distinction between salaried and hourly employees. Haring admitted during her testimony that she relied on Baker to handle the accounting and business aspects of the practice.

Vasquez's testimony reflects an unreasonable position with respect to the nature of the position Baker held in the practice, and Haring's testimony was credible in establishing that her intent was that Baker serve as a salaried employee, that Baker understood and accepted that her position was as an exempt salaried employee, and that all the employees at the practice understood that Baker ran day-to-day operations. The testimony of Peranto, DuPont and Frawley in this regard was credible and consistent with Haring's. The record shows that Baker enjoyed the complete confidence of Haring and ran petitioners' business until she was terminated upon discovery that she had falsified client records and stolen money from petitioners. Baker's primary duty consisted of the performance of office work directly related to management and general operations of petitioners' practice, customarily and regularly exercised discretion and independent judgment, and regularly and directly assisted petitioners (*see* 12 NYCRR 142-2.14 [c] [4] [ii] [a-c]). However, Baker was a covered employee for most of the time petitioners employed her, because her salary was less than the salary requirement (*see* 12 NYCRR 142-2.14 [c] [4] [ii] [d]), and she could only be excluded from coverage when all the factors were met. Vasquez testified that petitioners paid Baker the required salary only during the last two weeks covered by the minimum wage order, for a total of $787.79. We find during that period, Baker was not an employee.

The overtime pay requirement of the Miscellaneous Wage Order is found at 12 NYCRR 142-2.2 and provides that an employee shall be paid at the overtime rate of one and one-half times the regular rate of pay "subject to the exemptions of sections 7 and 13 of 29 USC § 201 *et seq.*, the Fair Labor Standards Act of 1938 [FLSA]," incorporating federal overtime law by reference (*Scott Wetzel Servs., Inc. v IBA*, 252 AD2d 212, 214 and n1 [3d Dept 1998]). Baker,

therefore, could still be exempt from overtime under FLSA's administrative exemption provision. 29 USC § 213 [a] [1] provides that an employer does not have to pay overtime to any salaried employee earning a weekly rate of not less than $455.00, and who is employed in a bona fide administrative capacity (29 CFR 541.200 [a]). As discussed above, there is no dispute that Baker's job duties met the test. The only issue is whether she earned a salary of at least $455.00 a week. We find, based on the record, that she was exempt for overtime for the period from the week ending September 21, 2007 through the week ending June 20, 2008 because her salary exceeded $455.00 a week.

Petitioners' other arguments are without merit. Vazquez credibly testified that she relied on petitioners' records to calculate all hours worked by Baker and we do not find the calculations to be unreasonable for the periods of time when she was not paid the required salary to be considered exempt from the overtime pay requirements of the Labor Law. We also do not agree with petitioners that Baker should not receive any money given Baker's related felony conviction for falsifying records and stealing funds from petitioners. Baker's conviction has no bearing in petitioners' responsibilities as an employer under the Labor Law. We therefore modify the wage order with respect to Baker to reflect an underpayment of $632.49 which covers the period from weeks ending November 24, 2006 through August 31, 2007 when she was not exempt from the overtime regulations.

Wages owed to JoAnn Prior

Respondent calculated $180.33 due Prior for the period of January 30, 2009 through July 12, 2009. Petitioners argue that Prior should not be paid any wages found due because she had falsified her time records and was terminated for such on June 15, 2010. Petitioners presented evidence that Prior changed her time records, but they are all for a time period outside of that covered by the minimum wage order for Prior. Having presented no other evidence, we find petitioners did not meet their burden of proof and respondent's calculation of wages owed Prior are valid and reasonable.

Donna C. Frawley, Kelli Harper, Amanda Monger and Brina Truax

The total underpayment calculated by respondent for Frawley, Harper, Monger and Truax is $482.64. Although we find that petitioners' payroll records were legally sufficient and respondent's investigator acknowledged such, petitioners did not meet their burden of proof that the *de minimis* amounts respondent found petitioners owed Frawley, Harper, Monger, and Truax were unreasonable. Petitioners' only evidence was that the violations were due to a rounding error made by their previous payroll company, and Frawley's testimony that she did not believe petitioners owed her any money. This evidence did not meet the burden of proof.

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."

We find that respondent's interest amounts must be recalculated in light of our findings with respect to the wage claims discussed above.

Civil Penalty

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, he must issue an order directing payment of any wages found to be due and an appropriate civil penalty.

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty shall be no more than double the amount of wages found to be due (*Id.*). For all other types of violations, the penalty amount is discretionary. In applying his discretion, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith basis of the employer . . . , the gravity of the violation, the history of previous violations and, . . . the failure to comply with record-keeping or other non-wage requirements" (*Id.*).

Dacier testified that he imposed the 100% civil penalty in the minimum wage order because he knew it would not otherwise be approved by his superiors, and that he had no discretion in the matter. This position is not consistent with the statute. In light of the record before us, and given respondent's failure to consider any of the statutory factors in arriving at the civil penalty in the wage order, the 100% civil penalty is unreasonable and must be revoked.

Supplemental Wage Order

The supplemental wage order finds that petitioners owe Goodspeed $288.00 in unpaid accrued vacation pay. New York does not require employers to provide vacation pay to employees. However, when an employer establishes a paid vacation leave policy, Labor Law § 198-c requires the employer provide this benefit in accordance with the established terms (*Matter of Robert H. Weiss*, PR 11-104 at p. 7 [June 10, 2015]). Where a policy exists, Labor Law § 195 (5) requires an employer to "notify his employees in writing or by publicly posting the employer's policy on . . . vacation." Forfeiture of vacation pay upon termination of employment must be specified in the vacation policy or in an agreement with the employee (*Matter of Stephen S. Mills et al.*, PR 14-104 [July 22, 2015]). Forfeiture provisions must be explicit (*Matter of Weiss*, Supra.).

Petitioners established that there was a written employee handbook that set out a policy with respect to vacation days, and that it was given to Goodspeed, who acknowledged its receipt on August 7, 2007, and again on December 26, 2007. The policy provides that full-time employees "accrue vacation time based on the amount of time of employment with For Pet's Sake." After one year, there was an entitlement of five days and after two years, it was six days. The policy also stated that "[v]acation time must be used during the year in which it is accrued. Any vacation days that are not used at the end of that calendar year will be lost." Goodspeed's employment with petitioners started on July 30, 2007. Based on petitioners' policy, she was entitled to five vacation days on July 30, 2008, and six vacation days on July 30, 2009.

Petitioners' credible and uncontradicted records show that Goodspeed took or was paid for all accrued vacation days in 2008 and 2009. Respondent's investigator testified that reviewing the records at hearing, Goodspeed was not owed for any vacation days earned and might have even been compensated beyond what she was entitled to under petitioners' existing written policy. Accordingly, the supplemental wage order is revoked in its entirety.

Penalty Order

The penalty order assesses a civil penalty of $250.00 against petitioners for failure to maintain and/or furnish true and accurate payroll records for each employee for the period from January 1, 2006 through December 31, 2009. There is no dispute that petitioners provided all such records to respondent when requested with the exception of time and attendance records for Goodspeed, which were provided to respondent prior to issuance of the orders. The record reflects that petitioners did not fail to maintain legally required records and their failure to produce time and attendance records for Goodspeed was due to an oversight related to petitioners' computer system. Once the oversight was discovered, petitioners promptly produced the requested records for Goodspeed, which although not considered by Vasquez because they were provided after she had completed her investigation, were legally sufficient according to her testimony. Based on the facts before us, we find the penalty order is unreasonable and revoke it.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed in part, modified in part and revoked in part as follows:

    a. The minimum wage order is affirmed with respect to Donna C. Frawley, Kelli Harper, Amanda Monger, JoAnn Prior, and Brina Truax; and

    b. The minimum wage order is revoked with respect to Kristina Goodspeed; and

    c. The minimum wage order is modified with respect to Matina Baker in that the amount of wages owed Baker is reduced to $632.49; and

    d. The 100% civil penalty is revoked; and

    e. Interest must be recalculated on the new principal.

2. The supplemental wage order is revoked in its entirety; and

3. The penalty order is revoked; and

4. The petition for review be, and the same hereby is, granted in part and denied in part.

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 Albany, New York on
April 13, 2016.