

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 JULIANNE W. BECKERMAN, :  
 :  
 Petitioner, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order to Comply with Article 19, An Order To :  
 Comply with Article 6 of the Labor Law, and an Order :  
 Under Article 19 of the Labor Law, all dated March 4, :  
 2014, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
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DOCKET NO. PR 14-088  
RESOLUTION OF DECISION

**APPEARANCES**

Lamb & Barnosky, LLP (Richard K. Zuckerman, Esq. and Matthew J. Mehnert, Esq. of counsel), for petitioner.  
  
Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

**WITNESSES**

Julianne W. Beckerman, Phillip Calabro, Louis Nazario, Bertha Rodas, Adam Beckerman and Evelyn Kalenscher, for petitioner.  
  
Vera Baker and Marie-Elena Fazzio, Labor Standards Investigator, for respondent.

**WHEREAS:**

On May 2, 2014, Julianne W. Beckerman (petitioner or Beckerman) filed a petition to review an order to comply with Article 19 of the Labor Law, an order to comply with Article 6 of the Labor Law, and an order under Article 19 of the Labor Law that the Commissioner of Labor (respondent, Commissioner or DOL) issued against her on March 4, 2014. The first order to comply with Article 19 (minimum wage order) directs payment of \$42,875.08 in wages due and owing to Vera Baker (claimant or Baker) for the period December 15, 2006 to November 9, 2012, together with \$9,021.39 in interest at 16% per annum calculated to the date of the order,

25% liquidated damages in the amount of \$10,718.77 and a civil penalty in the amount of \$42,875.08 for a total amount due of \$105,490.32. The order to comply with Article 6 (supplemental wage order) directs payment of \$1,600.00 in vacation pay due and owing to claimant Baker for the same period, together with \$336.66 in interest at 16% per annum calculated to the date of the order, 25% liquidated damages in the amount of \$400.00, and a civil penalty of \$1,600.00 for a total amount due of \$3,936.66. The order under Article 19 (penalty order) directs payment of a total of \$1,000.00 in civil penalties for violations during the same period: \$500.00 for failing to keep and/or furnish true and accurate payroll records and \$500.00 for failing to provide a complete wage statement with each payment of wages.

The petition alleges that the claimant worked for petitioner for less than 30 hours per week and was compensated at a rate of \$400.00 per week, and that she was paid for ten vacation days in each year of employment and was not owed additional payment. The petition further alleges that in assessing civil penalties, due consideration was not given to petitioner's good faith compliance with the law and her lack of previous violations. Respondent DOL filed an answer on June 30, 2014.

Upon notice to the parties, a hearing was held on November 12, 2014, in Hicksville, New York before Administrative Law Judge Jean Grumet, the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. Briefs were filed by the respondent on January 28, 2015, and the petitioner on February 11, 2015.

### SUMMARY OF EVIDENCE

It is undisputed that Beckerman employed Baker in Beckerman's home during the relevant period beginning December 15, 2006 to help care for Beckerman's two sons, who in December 2006 were respectively twelve and eight years old and who left for boarding school, respectively, at the beginning of September 2009 and 2012. Baker earned \$400.00 per week and two weeks' annual paid vacation. She arrived at the Beckerman home at 7:00 a.m. on Tuesdays, left on Saturday evenings, and lived from Tuesday through Saturday in the Beckerman home, in a basement bedroom with a bathroom and small living area. Bertha Rodas also worked in the Beckerman home as a housekeeper.

#### *Baker's Claims*

On December 14, 2012, Baker filed a sworn minimum wage/overtime complaint with the DOL, stating that she worked for petitioner as a housekeeper from December 1, 2004 to November 9, 2012, worked Tuesdays through Saturdays from 9:00 a.m. to 7:00 p.m. with a half-hour meal break, earned \$400.00 per week paid in cash each week on Saturday, received two weeks' vacation each year, worked all holidays, and was provided with free lodging five days per week and two free meals per day. In response to the question, "Did your employer refuse to give you time off for meals?" Baker responded "No," and in response to the question, "If you were denied a meal period, when did you eat?" Baker answered "N/A."

Attached to her complaint form was a "Narrative Report" form also signed by Baker, listing a "Daily Schedule" that began at 9:00 a.m., when Baker made the beds and cleaned the

bedrooms. At 11:00 a.m., Baker did dishwashing and “Fed, babysit pets.” At 1:00 p.m. Baker did laundry and ironing, 3:00 p.m. household cleaning, and 5:00 p.m. cooking. “By 7 PM I finish cleaning the kitchen.”

Baker also filed a sworn claim for unpaid wage supplements on December 14, 2012, in which she stated that Beckerman “told me last month she would call me back when needed” and claimed to be owed \$800.00 in vacation pay for the period of 1/1/11-12/31/11, with the date payment was due and payable listed as 12/9/12. This claim stated that there was no written vacation policy but Beckerman “said I earned a vacation (2 weeks) each year” and there was a “precedent of paying 2 week vacation each year.” According to the claim, Baker never made a request for the claimed unpaid vacation pay, and Baker answered “N/A” to the question “Did employer refuse to pay these benefits?”

Labor Standards Investigator (LSI) Marie-Elena Fazzio testified that she spoke to Baker by telephone on February 26, 2013 to get clarification of her claims. Fazzio’s notes of the conversation indicate that Baker “states person wrote wrong hours” in the December 12, 2012 claim, and that Baker stated that she was not provided with a half hour lunch break, but did eat two meals from the Beckerman’s food. Fazzio’s notes indicate that Baker stated she normally worked Saturdays from 9:00 a.m. to 11:00 p.m. and on Tuesdays through Fridays, she started work at 7:00 a.m., preparing the boys for school. At 8:00 a.m., she cleaned up breakfast, and then made beds, did laundry, threw out the garbage, and ironed. At 3:00 p.m. the boys arrived home. Baker would cook dinner between 5:00 p.m. and 7:00 p.m., depending on the boys’ after school schedules, and would finish between 7:00 p.m. and 9:00 p.m., when she would eat with the Beckermans and then clean up the kitchen.

On March 6, 2013, Baker sent Fazzio a detailed day-by-day and hour-by-hour weekly schedule of her duties with a cover letter stating: “Per your request, enclosed is the information you requested.” According to this schedule, Baker’s “Start time” each weekday was 7:00 a.m., (9:00 a.m. on Saturday) and her detailed schedule varied day to day. On Tuesdays, for example, Baker’s first specific task was at 8:00 a.m. when she “cleaned up weekend dishes” and “cleaned stove and countertops;” she “Fed dog,” “Made up beds” and “collected and sorted laundry” at 10:00 a.m., “Cleaned kitchen and mopped the floor” at 12:00 noon, “Cleaned bathrooms” at 1:00 p.m., “Folded laundry and ironed clothes” at 3:00 p.m., and had “End time” at 8:00 p.m. On Wednesdays, she “Prepared breakfast” at 7:30 a.m. and “Unloaded dishwasher” and “Put away dishes” at 8:00 a.m., after which she “Cleaned breakfast dishes,” “Cleaned countertops,” “Cleaned stovetops” and “Tidied kitchen” at 8:30 a.m., “Collected garbage and took outside” at 12:00 noon, “Folded laundry” at 3:00 p.m. and had “End time” at 8:30 p.m. For Saturdays, the schedule listed hour-by-hour cleaning and laundry household tasks from 9:00 a.m. to 7:00 p.m., and stated that Baker “Babysat the boys” from 7:30 p.m. to 11:00 p.m. when “I left for my 2 days off.” Baker listed taking at least half an hour for lunch on each weekday, but listed no lunch period on Saturdays.

#### Petitioner’s Evidence

##### *Testimony of Julianne W. Beckerman*

Beckerman testified that she hired Baker “to help with the children, be there after school so that there was an adult presence,” take care of the boys’ laundry and “make sure that there

was dinner when we got back home from their activities.” Beckerman also expected Baker to make the boys’ beds and change their linens once a week. All laundry work other than for the boys, all housekeeping and all cleaning were performed not by Baker but by Bertha Rodas, Beckerman’s long-time housekeeper, who worked on Mondays and Thursdays from 9:00 a.m. to 4:00 p.m. and some Saturdays. The Beckermans’ only pet during the relevant period, a dog acquired in March 2009, was fed only at night, was not walked during the day, and accompanied the Beckermans on family vacations. Beckerman told Baker that she was free to leave the house or do whatever she wanted during non-work hours.

Baker’s work schedule was 3:15 p.m. to 8:00 p.m. Tuesday through Friday, though in practice the boys often did not return home until long after 3:15 p.m. because they were involved with after school activities, including many sports, religious school, and other commitments. Because of the boys’ schedules, “there were several nights during the week that we would pick up dinner or eat it between commitments on the road” and Beckerman estimated that the boys ate dinner at home three times per week. On these occasions, Baker would eat dinner with the family or prepare it and leave it for them.

On Saturdays, Baker “had no responsibility for the children during the day,” but was responsible to watch them in the evening until as late as 11:00 p.m. if Beckerman and her husband went out, which Beckerman testified happened about once a month. Baker “typically” did the children’s laundry on Saturday as well. If a holiday did not fall on Monday, when she was off in any case, Baker did not work, went home and was paid for that holiday. Baker also did not work, stay at the Beckermans’ house or accompany the family during family vacations of about ten days at Christmas, about ten days during winter and spring school recesses and “occasionally” a week or more in August. Beckerman still paid Baker her \$400.00 weekly salary for these periods when the family was away and Baker did not work. When Beckerman and her husband vacationed without the boys in late January, Baker continued working but Beckerman’s mother Evelyn Kalenscher also came to live with the boys. During the summers, the boys attended camp from 8:30 a.m. and returned home at 5:00 p.m. The younger son attended a three-week sleep away camp in the summers of 2007 and 2008. During the summer of 2010, the older son was at the waterfront from 8:30 a.m. or was away from home for several weeks.

In October 2012, Beckerman asked Baker to work on a Monday when both boys would be home from school. Baker said she could not. When Baker left on Saturday, the day after the boys returned for the long weekend, “I told her that thank you for your work, and if I need you again, I will call you.” In her February 2013 letter to Fazzio, Beckerman stated that on Friday, November 2, Baker “appeared at my home . . . . I explained to Ms. Baker, that there was no work at my home for her. I gave her a week’s salary severance and took her to the train station again telling her that I would call her if I was in need of her assistance.”

#### *Testimony of Dr. Adam Beckerman*

Petitioner’s husband, Dr. Adam Beckerman, testified that Baker was hired to be “there for my children which helped my wife relax that they had an adult in the house.” On Fridays, Dr. Beckerman took the children to school, returning home until he left to pick them up at 12:30 p.m., Friday dismissal time. Petitioner was also at home on Friday mornings until 11:30 or 11:45. Dr. Beckerman usually saw Baker for the first time on Fridays around 11:30 a.m. or later, when she came out of the basement. “Most of the time she walked back downstairs before I

would leave. Sometimes I would leave and she hadn't gone back down." Baker occasionally took out the garbage, although Dr. Beckerman insisted that his sons do it. Dr. Beckerman never saw Baker feed the dog, vacuum, mop or do any other cleaning other than wiping down the counter after cooking. Dr. Beckerman, who drove the boys to school on Mondays, Wednesdays and Fridays, and to their Saturday morning activities, never once saw Baker make the boys breakfast, and testified, "My boys are very good at making those frozen sandwiches or pop tarts." When both boys were home, Baker made dinner three times per week. After the older son went to boarding school and only the younger one was home, Baker made dinner two times per week. Dr. Beckerman stated that there were "a handful" of Saturdays when Baker made lunch.

#### *Testimony of Bertha Rodas*

Bertha Rodas testified that as Beckerman's housekeeper, working every Monday and Thursday from 9:00 a.m. to 4:00 p.m., and sometimes two Saturdays per month, she cleaned every room in the Beckerman house, including both boys' bedrooms and bathroom, but was not responsible for cleaning Baker's basement rooms. Rodas did Beckerman's and Dr. Beckerman's laundry, dusted, mopped, vacuumed and cleaned the entire house including the kitchen. When Baker arrived on Tuesdays, Rodas had already cleaned any weekend dishes, including putting them away. Rodas, not Baker, cleaned the stove and countertops. Rodas never saw Baker mop, vacuum except possibly in her own room, dust, or feed the dog. Baker did only the boys' laundry.

#### *Testimony of Evelyn Kalenscher*

Evelyn Kalenscher, Beckerman's mother, testified that during the relevant period she stayed with the boys – in later years, just the younger son – when her daughter and son-in-law went on vacation at the end of January. Although Baker was in the house as well, she "wasn't even up when I took the kids to school" and the boys made their own breakfast; Kalenscher never saw Baker make breakfast. Kalenscher would first see Baker at 9:30 or 10:00 a.m.; later, Kalenscher would see her watch television in the den and she also "spent a lot of time in her room." Kalenscher also saw Baker do the boys' laundry but never saw her clean the house or do other chores other than occasionally preparing dinner or, if Kalenscher did so, "putting the dishes in the dishwasher after we were all done eating after she ate with us." Rodas, not Baker, did all cleaning and household chores, including cleaning the boys' bedrooms and bathrooms.

#### *Testimony of Phillip Calabro*

Phillip Calabro, Dr. Beckerman's personal trainer and friend, testified that during the relevant period he visited the Beckermans' house at least twice weekly to train Dr. Beckerman: on Monday and Wednesday and sometimes also Thursday, always in the late afternoon or early evening. Calabro often saw Baker in the Beckermans' house on Wednesdays and Thursdays: occasionally folding laundry or preparing dinner, sometimes watching television in the basement. He never saw Baker do vacuuming, mopping or any type of cleaning other than wiping down the sink area after she cooked something.

### Respondent's Evidence

#### *Testimony of Claimant, Vera Baker*

Baker testified she was hired in 2004 to take care of the boys, do their laundry and make dinner, five days a week from Tuesday to Saturday. She stopped working in October 2012. On November 9, 2012, after Hurricane Sandy, Baker returned to the Beckerman house, and Beckerman said that "she was going to call me but they never called me back."

Baker testified that on Tuesdays, she arrived at the Beckerman house at 7:00 a.m. and began working at 7:30 a.m.: "I make breakfast for the boys, pour the cereal whatever. I make toast until she [is] ready to come and take them to school." After making breakfast, she sometimes emptied the dishwasher. She then made the boys' beds. Because "Bertha don't usually work on Monday," Baker also "vacuum clean on Tuesday morning." Beckerman "told me that I had to do all the towels on Tuesday, her towels and the kids' towels," which took four hours, and Baker spent an additional two hours ironing the boy's pants, long sleeved shirts, and Beckerman's blouse, put away the laundry, made dinner and loaded the dishwasher, finishing her work day at 7:30 or 8:00 p.m. Other days were similar, with minor variations: for example, "I change the linens on Wednesday, the two boys' linen," and on Thursdays, "help Bertha [Rodas] fold her laundry." On Friday mornings, Baker made the Beckerman's bed as well as the boys' beds, and unloaded groceries. On Saturdays, Baker started work at 8:00 a.m. She took the garbage out, made the beds, gathered and started the laundry, cleaned her own room and bathroom, cleaned the fireplace in winter, vacuumed and ironed until at least 5:00 p.m. Then Baker made dinner, either for the whole family if Beckerman and her husband were home or for the boys, for whom she then babysat until their parents returned and took her to the train at 11:00 p.m.

Baker was paid \$400.00 per week. As to paid vacation, Beckerman "owed me a week . . . and then in 2012, I didn't get nothing." Baker went to the DOL "to get my vacation pay and minimum wage overtime for my time because Mrs. Beckerman never told me that her job was finished . . . I was calling her to find out what about the job . . . she just kicked me to the curb."

When petitioner's counsel pointed out during cross-examination that Baker's sworn claim stated that she began work at 9:00 a.m., rather than 7:30 a.m. as she testified, Baker responded that the investigator who filled out the claim "probably wrote down the wrong thing," although she admitted that she, nevertheless, signed the claim form.

#### *Testimony of LSI Marie-Elena Fazio*

LSI Fazio testified concerning the investigation of Baker's claim, during which Beckerman supplied family calendars and financial records to show when her family was away, but no payroll records to "show start times or end times," show "what was actually done during the day by Ms. Baker" or show when she was paid for vacations. In a September 20, 2013 letter to Beckerman, Fazio stated that in the absence of such payroll records, the DOL calculated the underpayment based on Baker's statements that "she worked Tuesdays – Saturdays for a total of 64 hours per week and received \$400.00 per week in wages." Fazio's calculations included credits to Beckerman for providing ten meals and five days' lodging per week. Concerning vacation pay, the letter stated that Baker contended that she received five days paid leave at her

\$400.00 salary every March and December for the years of 2007-2010, but did not receive paid time off in 2011 and 2012 as in previous years. In the absence of time and payroll records, DOL could not determine whether Baker received paid leave, and therefore assessed a wage supplement underpayment of \$1,600.00.

Fazio testified that she did not believe that Baker's representations about her claims were truthful, because of "many changes in her statements of hours" in the original claim form, Fazio's February 26, 2013 phone interview, and the March 6, 2013 submission that Fazio requested "because I could not get a straight answer on start times and end times." Without the time and payroll records, however, Fazio testified that DOL had no choice but to use Ms. Baker's statements as the basis for the order.

### **STANDARD OF REVIEW AND BURDEN OF PROOF**

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

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). The petitioner has the burden at the hearing of proving that the Commissioner's order under review is invalid or unreasonable (Board Rules of Procedure and Practice [Board Rule] 65.30 [12 NYCRR 65.30] ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore petitioner's burden to prove by a preponderance of the evidence that claimant's minimum wage, overtime, and vacation pay awarded in the orders under review are not due and owing. It is also petitioner's burden to prove by a preponderance of the evidence that the civil penalties ordered were invalid or unreasonable.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

#### **The Penalty Order is Affirmed**

An employer's obligation to keep records is found in Labor Law §§ 195 and 661, and the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142). 12 NYCRR 142-2.6 provides that an employer must maintain and preserve for a period of six years, weekly payroll records showing, among other things, the employee's wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. 12 NYCRR 142-2.7 further provides that an employer shall furnish each employee with a statement with every payment of wages, listing

hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Beckerman did not dispute that she failed to maintain weekly payroll records or furnish wage statements. Accordingly the Commissioner's penalty order in the amount of \$1,000.00 is affirmed.

### Burden of Proof in the Absence of Adequate Employer Records

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

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

Where employee complaints demonstrate a violation of the Labor Law, DOL may credit the complainant's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]). If the petitioner meets her burden and establishes by credible evidence that the order is invalid or unreasonable, the burden then shifts to the commissioner to rebut the petitioner's testimony and establish that the orders under review are reasonable and valid (*Matter of Richard Delledone*, PR 08-145 [July 22, 2009]; *Matter of Marvin Milich*, PR 10-145 [June 12, 2013]; *Matter of Pamela Blum*, PR 08-111 [December 14, 2009]).

### The Minimum Wage Order is Revoked

#### Governing Law

Article 19 of the Labor Law, known as the Minimum Wage Act, requires an employer to pay each of its covered employees the minimum wage in effect at the time payment is due (*See* Labor Law § 652). The applicable minimum wage in effect in New York during the time period covered by the minimum wage order was \$6.75 an hour for December 15-31, 2006; \$7.15 an hour from January 1, 2007 through July 23, 2009; and \$7.25 an hour from July 24, 2009 through November 9, 2012, the last date covered by the minimum wage order (12 NYCRR 142-2.1).

The Claimant was a “domestic worker” as defined, effective November 29, 2010, by Labor Law § 2 [16] as “a person employed in a home or residence for the purpose of caring for a child . . ., housekeeping, or for any other domestic service purpose.” Since November 29, 2010, Labor Law § 170 has required that domestic workers who reside in the employer's home be paid

compensation for work over 44 weekly hours at a rate at least one and one half times the worker's normal wage rate. Previously, the Minimum Wage Order for Miscellaneous Industries and Occupations, at 12 NYCRR 142-2.2 required an employer to pay all residential employees an overtime rate for work over 44 weekly hours, but at a rate one and one half times the basic minimum hourly rate. (See, *Matter of Marvin Milich*, PR 10-145 [June 12, 2013]; *Matter of Diana Allaham*, PR 10-059 [February 7, 2011]; *Samirah & Enug v Sabhnani*, 772 F Supp 437 [EDNY 2011]). A residential employee shall not be deemed to be working at any time when she is free to leave the place of employment (12 NYCRR 142-1[b]). Under the Minimum Wage Order for Miscellaneous Industries, an employer is entitled to a credit for each day of lodging (12 NYCRR 142-2.5[a][ii]) and a credit for each meal provided as payment towards the minimum wage (12 NYCRR 142-2.5[a][i]).

### The Petitioner Met Her Burden of Proof

Petitioner's failure to provide required payroll records placed on her the burden of showing the Commissioner's minimum wage order to be invalid or unreasonable through proof of the specific hours that the claimant worked and that she was properly paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 [October 11, 2011]; *Matter of Kong Ming Lee, Fee Yin Lee and Blue Butterfly Fashion, Inc.*, PR 10-293, p 15-16 [April 10, 2014]). The respondent argues that having failed to provide adequate payroll records, Beckerman did not meet her burden of proving the number of hours worked by Baker during the duration of her employment, and therefore, the only information that could be used to determine the number of hours per week was the information provided by Baker. We do not agree. We find that although Beckerman did not maintain legally required records, she met her burden --to show that Baker worked less than 44 hours per week and was paid at least the minimum wage for her work-- through other evidence, including the credible and consistent testimony of Beckerman, Dr. Beckerman, Rodas and Kalenscher regarding Baker's duties, hours of work, and wages, which we find to be the best available evidence in this case. Baker's contradictory accounts of her hours and duties in her complaint form and Narrative Report, her statements during her February 26, 2013 telephone conversation with LSI Fazzio, and in her March 6, 2013 detailed day by day and hour by hour listing of the times she did her chores, were contradicted by her testimony at the hearing, and were not credible. There was no other evidence to corroborate Baker's claims, and even the investigator who investigated her claims, and whose testimony we also credit, did not find her truthful.

Baker referred to herself as a "housekeeper" in her unpaid wage complaint, and although the accompanying Narrative Report she signed mentioned that she "babysat pets," it made no mention of the fact that, as she testified, her actual job was to "look out for the boys, . . . do their laundry and make dinner." A different employee, Rodas, did Beckerman's housekeeping work on Mondays, Thursdays and many Saturdays. The credible evidence shows that specific tasks Baker claimed to have performed such as cleaning up the weekend dishes, cleaning the boys' bedrooms and bathroom, vacuuming, and doing petitioner's and Dr. Beckerman's laundry and ironing, were done by Rodas.

It would be unreasonable to believe, for example, that Baker, as stated in her March 6, 2013 letter to Fazzio, "cleaned up weekend dishes" on Tuesdays because Rodas was available for any such work on Mondays. We give no credence to Baker's testimony that "I do vacuum

clean on Tuesday morning. Bertha don't usually work on Monday," which was unexplained and contrary to all other evidence. Neither vacuuming nor cleaning the fireplace, as Baker testified she did on Saturdays, was previously mentioned in any of the three extremely detailed lists of chores Baker gave to the DOL. Nor do we find credible Baker's testimony that she spent four hours on Tuesdays laundering petitioner's and Dr. Beckerman's towels in addition to laundering the boys' towels, and two hours on Tuesday ironing the boys' pants, shirts and Beckerman's blouse. Beckerman and Rodas credibly testified that Rodas did petitioner's and Dr. Beckerman's laundry and ironing and Baker was responsible only for the boys' laundry.

We do not credit Baker's testimony that her workday began at 7:00 a.m. as she told LSI Fazio in a telephone call and by letter (after stating in her claim and Narrative Report that she began work at 9:00 a.m.). Nor do we credit her testimony that "I make breakfast for the boys, pour the cereal, whatever, I make toast" at 7:30 a.m. Beckerman testified that the boys left the house between 7:15 and 7:30 a.m. to be in school by 8:00 a.m. Dr. Beckerman, who drove the boys to school on Mondays, Wednesdays and Fridays, testified that Baker never made breakfast for the boys. Dr. Beckerman, who did not work on Fridays and returned home after dropping the boys off, did not see Baker until 11:30 a.m. on Fridays.

Baker's claim states that she was provided with a half hour lunch break, yet on February 26, 2013, she told LSI Fazio that Beckerman did not provide her with time off for lunch. During the investigation and at hearing, Baker implied she spent significant time caring for "pets" throughout the relevant period, yet it was undisputed there was just one dog acquired in 2009, and the dog was not walked during the day.

Because the boys were occupied with sports, religious school, and other extracurricular activities, it was rare that they were home before 4:00 or 5:00 p.m., and Beckerman testified that "there were several nights during the week that we would pick up dinner or eat it between commitments on the road." Especially in the last three years of Baker's employment, when the older son was away and the younger son (who was by then 11 years old or older) was often not home until long after school ended, it is obvious that Baker's main job (as Beckerman described it, "just being in the house with them as a responsible adult") would not preclude also doing laundry, preparing dinner or doing related similar tasks during the hours from 3:15 to 8:00 p.m. when Beckerman stated that Baker was deemed at work.

LSI Fazio testified that she did not believe that Baker was truthful because during the investigation, Baker kept changing the number of hours she worked, and Fazio "could not get a straight answer on start and end times." The chart below lists Baker's varying accounts of her hours:

	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>	<b>Saturday</b>	<b>Total Weekly Hours</b>
12/14/12 Narrative	9 am - 7 pm 9.5 hours	47.5				
2/26/13 Interview with Fazio	7 am - 7 pm 11.5 hours	9 am - 11 pm 13.5 hours	59.5			

3/6/13	7 am - 8 pm	7 am - 8:30 pm	7 am - 8 pm	7 am - 8 pm	9 am - 11 pm	
Letter to Fazio	12.5 hours	13 hours	12.5 hours	12.5 hours	13.5 hours	64
11/12/14	7:30 am - 8 pm	7:30 am - 8 pm	7:30 am - 7:30 pm	7:30 am - 8 pm	8 am - 11 pm	
Testimony	12 hours	12 hours	11.5 hours	12 hours	14.5 hours	62

We find that the many discrepancies in the hours reported by Baker, as well as her conflicting accounts of the chores she did and the time she did them, undermine rather than support her claim to have worked long hours at child care and housekeeping. Even if Baker sometimes actually performed such tasks before 3:15 p.m., nothing suggests that that was at petitioner’s direction, nor did respondent dispute petitioner’s testimony that Baker was free, indeed encouraged, to leave the house during non-work hours. We do not believe it was reasonable and valid for the DOL to take at face value Baker’s claim to have worked 64 hours per week.

We find that the credible testimony demonstrates that from Tuesday to Friday, Baker worked from 3:15 p.m. to 8:00 p.m., a total of 19 hours. Baker herself testified that she was hired to look after the boys, do their laundry, and cook dinner. We credit Beckerman and Dr. Beckerman’s testimony that Baker was expected to be available to the children as well as complete her assigned tasks of doing the boy’s laundry and cooking dinner between 3:15 p.m. and 8:00 p.m. on Tuesdays through Fridays.

Beckerman testified that Baker often did the boys’ laundry on Saturday, and worked only in the late afternoon or evening, including until 11:00 p.m. on those Saturday nights when Beckerman and her husband went out. We find that the credible evidence demonstrates that Baker worked from 3:15 p.m. to 11:00 p.m. on Saturdays. She did not work on Sundays or Mondays. We find that Baker worked a total of 26.75 hours per week.

For 26.75 weekly hours, claimant’s \$400.00 per week salary corresponds to a \$14.95 per hour wage rate, not including lodging and meal credits. During the relevant period, the highest minimum required wage was \$7.25 per hour, with an overtime premium for residential employees required only for weekly hours beyond 44. Based on the above, there was no reasonable and valid basis to find claimant owed either minimum wages or overtime. Accordingly, the minimum wage order is revoked.

**The Supplemental Wage Order Is Affirmed as Modified**

New York does not require employers to provide vacation pay to employees. However, when an employer does have a paid vacation leave policy, Labor Law § 198-c requires that the employer provide this benefit in accordance with the established terms (*Gennes v. Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2d Dept 2005]; *Matter of Glenville Gage Co. v. State Indus. Bd. Of Appeals*, 52 NY2d 777 [1980], *aff’g* 70 AD2d 283 [3d Dept 1979]; *Matter of Jay Baranker and USI Services Group, Inc.*, PR 11-115 p. 5 [October 2, 2013]); *Matter of Center for Financial Planning, Inc.*, PR 06-059 [January 28, 2009]).

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 must be specified in the employer’s vacation policy or in an agreement with the

employee (*Matter of Marc E. Hochlerin and Ace Audio Video, Inc. [T/A Ace Audio Visual Co. and Ace Communication]*, PR 08-055 [March 25, 2009]). Forfeiture provisions must be explicit (*Matter of Center for Financial Planning, Inc.*, PR 06-059 [January 28, 2009] *supra*; see also *Paroli v. Dutchess County*, 292 AD2d 513 [2d Dept 2002] [worker was entitled to vacation pay upon termination as the employer's benefit plan contained no language limiting the benefit only to employees in "good standing"]).

Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of wages (Labor Law §§ 190 [1] and 198-c [2]). With respect to paid vacations, as with respect to other forms of wages, an employer's failure to keep required records entitles the DOL to make just and reasonable inferences and use other evidence to establish" an employee's entitlement (See, e.g., *Matter of Marchionda v. IBA*, 119 AD3d 1342, 1343 [4<sup>th</sup> Dept 2014]).

As she did with regard to the minimum wage order, Baker also gave varying accounts of what she claimed she was owed in vacation pay. Baker's December 14, 2012 Claim for Unpaid Wage Supplements form is for \$800.00 for the "period covering 1/1/11-12/31/11." The date payment is due is listed as 12/9/12. In response to the question "were you ever previously paid this kind of benefit by the employer?" Baker checked "yes" and listed the period of "December 2011 in the amount of \$400.00." According to the claim, Baker did not request these benefits, and in response to the question, "did the employer refuse to pay" she responded "N/A."

The supplemental wage order, based on information Baker provided during the investigation, found that Baker was owed \$1,600.00, that is, four weeks' vacation pay. As explained in LSI Fazio's September 20, 2013 letter to petitioner, this was based on the fact that Baker "received 5 days paid leave every March and December for the years of 2007-2010," but "did not receive paid time off like the previous years in 2011 and 2012" – in other words, petitioner's vacation policy was to provide two weeks' paid vacation each year, in March and December, but such vacation was not paid in 2011 and 2012.

At the hearing, Baker gave yet another account of what she was owed in vacation pay. When asked by respondent's counsel whether she was to receive paid vacation, Baker responded, "she owed me a week, and she told me she wasn't going nowhere . . . and then in 2012 I didn't get nothing."

Beckerman did not dispute that the vacation policy was, as Fazio's letter stated, that Baker earned one week's paid leave in March and another in December every year. Petitioner's counsel asserted only that Baker "was in fact paid for that time and that any claim to the contrary is untrue." Beckerman testified that Baker was always paid her regular weekly \$400.00 salary, even when the Beckerman family was on vacation and Baker was not working, and that the family took up to two-week vacations at Christmas, during winter and spring school recesses, and sometimes in August. During the investigation, Beckerman provided the DOL with a calendar that she kept contemporaneously during the relevant period to support this, and on May 30, 2013, she provided a list of family vacations during which Baker did not work and was paid in full, indicating that during the relevant period the family took the following vacations:

2006	2007	2008	2009	2010	2011	2012
12/15 - 12/26	3/19 - 3/27 8/12 - 8/16	8/13 - 8/21 12/17 - 12/25	3/13 - 3/24 8/12 - 8/21 12/16 - 12/26	3/7 - 3/27 8/19 - 8/28 12/15 - 12/26	3/9 - 3/18 8/19 - 8/27 12/16 - 12/26	3/8 - 3/22

We do not find Baker's shifting explanations of what she was owed credible, and we credit Beckerman's testimony and find it met petitioner's burden to show that it was unreasonable to conclude that Baker did not receive five days' paid leave in each of March and December 2011 and March 2012. The same is not true with respect to December 2012, when it is undisputed Baker, who by then had been terminated, did not receive a week's pay. With respect to \$400.00 in vacation pay due as of December 2012, we find that petitioner did not meet her burden to show that the supplemental wage order requiring payment was invalid or unreasonable.

It is undisputed, and we find that petitioner's vacation policy was that Baker was paid one week's vacation pay in March and a second week of vacation pay in December. Petitioner's post-hearing brief argues that Baker "could not have been paid for vacation taken after her employment came to an end." That assertion, however, is contradicted by principles discussed above. For example, in *Matter of Jay Baranker*, PR 11-115 [October 2, 2013] and *Matter of Marc E. Hochlerin and Ace Audio Video, Inc.*, PR 08-055 [March 25, 2009], *supra*, the Board stated that absent a specific and explicit policy providing for forfeiture, accrued vacation pay must be paid notwithstanding termination of employment. (*See also Paroli v Dutchess County*, 292 AD2d 513 [2d Dept 2002] [absent language so providing, "plaintiff was not required to show that he left in good standing in order to receive his accrued vacation pay"]). Likewise, we found in *Knight Marketing Corporation*, PR 09-200 p.6 [September 9, 2011] that:

"just as an employee must be paid for accrued vacation unless the employer has, through a written policy or agreement, specified that accrued vacation pay is forfeited, a terminated employee is entitled to all promised vacation unless the employer has, through a written policy or agreement, specified that such vacation pay must be accrued *pro rata* over a specified period of time."

Such a finding is also warranted here. In the absence of a written vacation policy and of payroll records, Beckerman failed to prove that Baker's vacation pay for December 2012 was subject to forfeiture because Baker's termination occurred before it became payable. Since no such proof was provided, the supplemental wage order is affirmed insofar as it found \$400.00 owed as of December 2012.

Beckerman's testimony implies Baker was paid for some weeks when she did not work beyond those to which she was entitled under petitioner's vacation policy, and Beckerman testified she also paid Baker \$400.00 in severance pay on November 2, 2012. Thus in total, Baker in 2012 was paid as much, possibly more, than the established vacation policy required be paid, but this does not make such extra payments vacation-policy obligations, nor do extraneous payments satisfy such obligations (*See, Matter of Nancy Solomon and John Eilertsen and Dorothy Jacobs and Long Island Traditions, Inc.*, PR 09-197 p. 7 [March 29, 2012]).

The Civil Penalties in the Supplemental Wage Order Are Affirmed

The Supplemental Wage Order additionally assessed a civil penalty in the amount of 100% of the wages due. LSI Fazzio testified that she considered that Beckerman failed to provide DOL with the petitioner's vacation policy. We find that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty are reasonable in all respects.

The Liquidated Damages in the Supplemental Wage Order Are Affirmed

Petitioner did not challenge the Commissioner's determination to assess liquidated damages. The issue is thereby waived pursuant to Labor Law § 101 [2] and we affirm the determination as valid and reasonable in all respects.

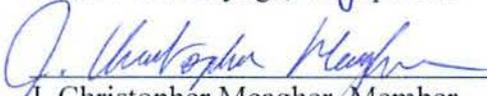
**NOW THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The minimum wage order is revoked; and
2. The supplemental wage order is modified by limiting the vacation pay awarded to \$400.00; the DOL is directed to recalculate interest, the civil penalty, and liquidated damages; and as so modified, the order is affirmed; and
3. The penalty order is affirmed; and
4. The petition for review is granted to the extent set forth above, and is otherwise denied.




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Vilda Vera Mayuga, Chairperson




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J. Christopher Meagher, Member

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LaMarr J. Jackson, Member

Absent

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Michael A. Arcuri, Member




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Frances P. Abriola, Member

Dated and signed in the Office of the Industrial Board of Appeals at New York, New York, on June 10, 2015.

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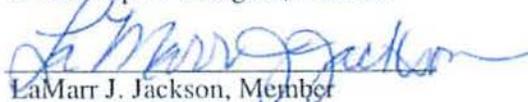
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Vilda Vera Mayuga, Chairperson

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J. Christopher Meagher, Member

  
LaMarr J. Jackson, Member

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Michael A. Arcuri, Member

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Frances P. Abriola, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Rochester, New York, on  
June 10, 2015.