STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CHARLES ALLEN AND CHAROSA FOUNDATION CORPORATION, Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law dated January 9, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-063 RESOLUTION OF DECISION

APPEARANCES

Charles Allen, petitioner pro se, and for Charosa Foundation Corporation.

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

WITNESSES

Charles Allen, for petitioners.

Rose-Marie Nazon and Allen Kim, Labor Standards Investigator, for respondent.

WHEREAS:

On March 9, 2015, petitioners Charles Allen and ChaRosa Foundation Corporation filed a petition to review an order to comply with Article 6 of the Labor Law issued against petitioners by respondent Commissioner of Labor on January 9, 2015. The order directs payment of $4,875.00 in unpaid wages due and owing to claimant Rose Marie Nazon for the period from September 29, 2008 to January 16, 2009, together with $4,667.18 in interest at 16% per annum calculated to the date of the order, and a civil penalty of $4,875.00 for a total amount due of $14,417.18.

Petitioners allege that on May 2, 2014, Allen attended a compliance conference concerning the claims of three claimants including Nazon and wrote a check in the amount of $2,969.95 to the Commissioner in full settlement of all claims, and that the order is unreasonable because (1) petitioners relied on the settlement as a full settlement of Nazon's claim; (2) Nazon was an exempt

employee and paid all wages due; and (3) the penalties and interest assessed in the order are invalid and unreasonable. At hearing, petitioners' motion to amend the petition to contest Allen's individual liability was granted over respondent's objection. The Commissioner filed an answer on May 29, 2015.

Upon notice to the parties, a hearing was held on September 2 and October 8, 2015 in Hicksville, New York before Administrative Law Judge Jean Grumet, Esq., 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.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Petitioner Charles Allen

Allen is the Chairman of ChaRosa's Board. ChaRosa is a not-for-profit community organization founded by Allen 31 years ago. During the relevant period, ChaRosa had grants to run several programs, including an after school program at P.S. 36 in Queens, New York funded by the New York City Board of Education. Allen was signatory to the foundation's contract for the P.S. 36 after school program, and claimant worked with Allen under that contract. ChaRosa's Associate Executive Director Delores Amaker was responsible for interviewing and hiring employees, and Allen made the final hiring decisions. Amaker hired Nazon in the later part of 2008 or 2009 to be Assistant Director of the after school program at P.S. 36. While Allen "didn't object," his involvement in Nazon's hiring "wasn't a final say. . . . It was like rubber stamping."

Nazon generally worked five days per week, Monday through Friday from 8:30 a.m. to 6:30 p.m. with an hour off for lunch. During the day, she prepared for the after-school program. She was paid a salary of $750.00 per week, on a biweekly basis. Employees punched time cards and at the end of a bi-weekly period, submitted a bi-weekly time sheet. Amaker and Director of Operations Christopher Napolitano gave these records to Allen, who then provided payroll information to Paychex, the payroll service used by the foundation. Records for Nazon and all of ChaRosa's salaried employees, including Amaker, stated an hourly rate on the basis of a 30 hour week because, after discussion, the salaried employees decided that such an hourly rate would look better on their resumes. Allen told employees they were exempt when they were hired.

Nazon's duties were to oversee the afterschool program along with P.S. 36 After-School Program Director Marcus Miranda and to supervise the teaching staff and the children who attended the program. Nazon was an exempt employee because "she had all the authority and the power to do what an exempt employee could do. She could make decisions. She could hire and fire if she wanted to." Nazon submitted a proposal, approved by Amaker, for a teacher training program at P.S. 36. Although Allen met with staff, ChaRosa's 25 employees reported to Nazon, Amaker and others, not to him. Only the Executive Director, to whom Amaker reported, reported directly to Allen. Allen encountered Nazon frequently, "probably" once a day, and asked her if there were any problems because he was concerned that the foundation might lose funding.

After Nazon, Amaker and several other claimants filed various claims with the Department of Labor (DOL), a compliance conference took place on May 2, 2014, at DOL's New York City office. Allen, claimants Amaker and Sharon Lawson, and two DOL investigators attended the compliance conference, but Nazon was not present. Petitioners settled the claims and provided DOL a check in the amount of $2,969.95 as payment in full for the settlement of the claims. Allen believed that the settlement included Nazon's claim.

On rebuttal, Allen testified that when he hired Nazon, he told her that she was going to be paid $39,000.00 per year as a salaried employee, and that she would be paid bi-weekly based on a 30-hour week. He does not know if he ever told Nazon that she was going to earn $750.00 per week. Allen had "sign-off responsibility for everything for the corporation." Nazon reported to Miranda and to Amaker. Miranda was responsible for administration and timekeeping at the P.S. 36 After School Program, and Nazon was in charge of academics. Her duties were oversight of the teachers, making sure they had all the materials they needed and making sure the students were properly supervised. If a teacher was not performing the job properly, Nazon determined that the teacher should not be part of the program. Initially, Allen wanted to hire Nazon as ChaRosa's Senior Director but did not have the funding to do so.

Respondent's Evidence

Testimony of Labor Standards Investigator Allen Kim and Documents in the DOL Investigative File

Labor Standards Investigator Allen Kim investigated the claims in this matter and identified the documents in DOL's investigative file. An undated claim intake form in the file indicates that Nazon filed a claim for unpaid wages, minimum wages, and unlawful deductions stating that she was the Assistant Director of petitioners' after school program; her hourly wage was $25.00 per hour; she was not paid for all hours worked; she was not paid an overtime rate when she worked over 40 hours per week; and unauthorized deductions of $5.00 per week were taken from her pay for a coffee club. In an April 10, 2010 letter to DOL, Nazon stated that her schedule was 8:30 a.m. to 6:30 p.m. Monday to Thursday, 8:30 a.m. to 8:00 p.m. on Fridays, and 8:30 a.m. to 6:00 p.m. every other Saturday. Her letter also indicated that she was absent from work for doctor's appointments on December 2, 2008, January 5, 2009, and for half a day on January 9, 2009, and an additional day when she attended a religious service.

In a December 20, 2013 letter to petitioners, Kim indicated that Nazon was owed $40.00 for illegal coffee club deductions without mentioning her other claims. On May 2, 2014, Kim participated at a compliance conference with Allen, Amaker and Lawson. Nazon (who had moved to Miami, Florida) did not appear and a settlement was reached with petitioners without her input. On May 27, 2014, DOL received a check from petitioners in the amount of $2,969.95 for "full restitution" of the following claims: (1) Amaker $1,719.95; (2) Lawson $910.00; and (3) Nazon $40.00. The "full restitution amount" also included $300.00 in civil penalties. Treating Nazon as "exempted as an Assistant Director," DOL at the meeting discussed only her $40.00 claim for unlawful deductions for the coffee club. An August 12, 2013 Narrative Report prepared by Kim explained that her claim for overtime was not included in the settlement because she was an administrative employee exempt from overtime under Article 19 of the Labor Law, because she earned more than $543.75 per week.

After the May 2, 2014 compliance conference, Nazon contacted Supervising Labor Standards Investigator Andy Chan many times to express her dissatisfaction with the DOL's settlement of her claim. On June 24, 2014, several DOL investigators met to review the claim, and decided that Nazon was due unpaid wages for hours that she worked. Kim recomputed claimant's underpayment based on payroll records and bi-weekly time sheets provided by petitioners. The time sheets were signed by Nazon and supervisor Napolitano, and indicated that claimant worked from 8:30 a.m. to 6:30 p.m. Mondays through Thursdays, from 8:30 a.m. to 8:00 p.m. on Fridays, and some Saturdays from 8:00 a.m. to 6:00 p.m. or 11:30 a.m. to 4:30 p.m. In the case of the five weeks for which petitioners had no records, Kim computed Nazon's underpayment based on her report that she worked 40 hours per week but was only paid for 30 hours per week.

On June 25, 2014, Kim wrote to petitioners stating that DOL determined Nazon worked more than 30 hours per week from September 29, 2008 to January 16, 2009 and was not paid for the additional hours that she worked. This letter included a recapitulation sheet and a chart based on Kim's calculations, which indicated that Nazon was owed a total of $4,875.00 in unpaid wages. Thereafter, DOL issued the wage order.

Kim testified that the 100 percent civil penalty was imposed based on the size of the foundation, petitioners' lack of good faith, gravity of the monetary violation, and recordkeeping violation disclosed during the investigation. He identified an August 14, 2014 Background Information-Imposition of Civil Penalty form in the investigative file prepared by Senior Labor Standards Investigator Grace Tai. Under the factor "good faith of employer," on this form, Tai checked the box "not generally cooperative" and explained that the employer disagrees with DOL's findings and does not believe wages are owed. With regard to petitioners' record-keeping, the form listed four boxes (1) inadequate – impeded investigation, (2) inadequate – did not impede; (3) willfully false records; and (4) none. Tai checked the box stating "none."

Testimony of Claimant Rose-Marie Nazon

In September 2008, Allen and Amaker interviewed Nazon for the position of ChaRosa's Senior Director, which had been advertised for "41,000 a year or something like that," and Allen hired her for that job. But when Nazon started work on September 29, 2008 Allen told her that position was unavailable and instead offered her a position as Assistant Director of the After School Program paying $25.00 per hour, which she accepted. Allen told her that her job was to work with the teachers and "that I don't have specific hours, but they start [at] 8:30" when she was to clock in at the foundation's main office. In the afternoon she was to clock out, go to P.S. 36 and sign in there, and then sign out and return to the main office. Clocking in and out at the main office, and signing in and out at P.S. 36, were required. Nazon was also required to call the main office to let them know she had arrived at P.S. 36.

Nazon testified that she was paid for "30 hours a week, less when I was absent," but no more than 30 hours, no matter how many hours she worked, which was sometimes as many as 60 hours per week. Nazon identified a copy of ChaRosa's employee schedule, which was provided to employees and posted near the time clock. The schedule shows that Nazon worked from 8:30 a.m. to 6:30 p.m. Mondays through Thursdays, from 8:30 a.m. to 8:00 p.m. on Fridays and every other Saturday. At a staff meeting Nazon attended, Allen stated that all hours worked in excess of 30 hours "is volunteer work because we are serving the community." Although Nazon was not paid more than $750.00 (30 x $25.00 per hour) for working longer than 30 hours per week, her pay was

docked if she worked less. For example, once when she was five or ten minutes late for work because of a flat tire, her pay was reduced by 30 minutes, and when she asked Amaker was told "that is what you see, that is what it is." Nazon was also not paid for time taken off for doctor's appointments, a memorial service, or for holidays.

Nazon taught both younger children and older students. She also visited other classes and assisted other after school teachers, who were inexperienced and had no background in education. If a teacher was absent, Nazon would teach that teacher's class. Nazon identified an April 10, 2010 letter that she sent to DOL which she said accurately stated many of her duties as Assistant Director of the after school program. According to this letter, her job duties included observing classes and writing and presenting a report about her observations of each teacher's class in which she pointed out the urgency of training the teachers, all of whom were inexperienced. Nazon submitted a proposal for teacher training, and after receiving petitioners' approval, she conducted the training. Nazon supervised the academic aspect of the after school program, and Miranda was responsible for collecting employees' daily time sheets for hours worked at P.S. 36.

Nazon did not have the authority to discipline teachers, and she was never told she had authority to hire or fire teachers. She testified that Allen was generally in his office and the first one to arrive at the foundation. After Nazon began working for petitioners, supervisor Napolitano told her not to speak directly to Allen, but to only speak to him or to Amaker. Nazon is not claiming overtime, but is claiming her wages for additional hours over 30 that she worked each week of her employment with petitioners.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rule 66.1 [c], 12 NYCRR 66.1 [c]), and based on that hearing, if the Board finds that the order, or any part thereof, is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules of Procedure and Practice [Board Rule] 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

Petitioner Allen Was an Employer

"Employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law §

190 [3]). "'Employed' includes permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law, defines 'employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test used for analyzing employer status under the Fair Labor Standards Act. (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2nd Dept 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*). Under the broad New York and FLSA definitions, more than one entity or person can be found to be a worker's employer (*Id.*). Applying this test to the present case, we find that Allen was an employer.

With regard to the first *Herman* factor, it is undisputed that Allen had the authority to hire employees and exercised that authority. Nazon credibly testified that Allen interviewed and hired her for the job as ChaRosa's Senior Director, and when funding was unavailable, he offered her the job as Assistant Director of the P.S. 36 after school program. While Allen initially portrayed Amaker as the person who interviewed and hired Nazon, a decision which he merely "rubber stamp[ed,]" he acknowledged he was needed "[t]o say aye or nay or whatever," and later admitted that he hired Nazon and told her that she would be paid a salary of $39,000.00 per year.

The record demonstrates that Allen supervised and controlled the conditions of employment, the second *Herman* factor. We credit Nazon's testimony that when Allen hired her, he informed her of her duties, hours, and rate of pay, and that at a staff meeting, he announced that hours worked in excess of 30 hours per week were "volunteer work." Allen testified that although he met with staff, including regularly asking Nazon about any problems with her work, employees reported to Amaker, not to him. The Board has repeatedly held that an individual who has the power to control employees – even if that power is not continually exercised, and/or is shared with other individuals – can be liable as an employer. Under the economic reality test, employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'" (*Herman,* 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 (5th Cir 1982)]; see also *Carter v Dutchess Community College,* 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified"

is insufficient to place employment relationship outside statute]; *Moon v Kwon,* 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence]).

With regard to the third *Herman* factor, whether the individual determined the rates and methods of payment, Allen testified that he determined that Nazon would be paid a salary of $39,000.00 per year and that he notified exempt employees of their exempt status when they were hired. While he stated he told Nazon a yearly rate and Nazon stated he told her an hourly one, both agreed that he was the one who set the rate. With regard to the fourth *Herman* factor, maintaining records, Allen testified that Amaker and Napolitano provided him with bi-weekly employee time cards, and he reported payroll information to CharRosa's payroll service, Paychex, to process the payroll.

Allen satisfied all four of the *Herman* factors, and we find that respondent's determination that Allen is individually liable as an employer is reasonable and valid.

Nazon Was Not Exempt Under Article 6 of the Labor Law

Labor Law § 191 (d), part of Article 6 of the Labor Law, provides that a clerical and other worker "be paid the wages earned in accordance with the agreed terms of employment." Labor Law § 190 defines an "employee" for Article 6 purposes as "any person employed for hire by an employer in any employment," and § 190 (7) states that the term "clerical and other worker includes all employees . . . except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." Employees classified as bona fide executive, administrative or professional employees "are employees for purposes of Labor Law article 6, except where expressly excluded" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]).

It is undisputed that Nazon was paid $750.00 per week, less than the $900.00 necessary for her to be exempted from protection under Labor Law Article 6. The order at issue in this case was solely under Article 6. We therefore reject petitioners' contention that the order was unreasonable or invalid because Nazon was supposedly an "exempt" employee.

Respondent Reasonably Determined That Nazon Was Not Paid All Wages Due

The petition alleged that Nazon was paid all wages due. We find that petitioners failed to meet their burden to show that claimant was paid all wages due, and that the Commissioner's order was reasonable and valid. Nazon credibly testified that she was promised a $25.00 per hour wage rate, testimony confirmed by petitioners' payroll journals showing $25.00 as her hourly rate. Nazon also credibly testified, and Allen did not rebut, that Allen told employees that work in excess of 30 hours a week was "volunteer work because we are serving the community." Allen testified that when he hired Nazon he told her she would have a salary of $39,000.00 per year. He further testified that the hourly rate listed in petitioners' payroll records was, in effect, fictional and fabricated to exaggerate employees' wage and thereby help them when they ultimately sought other employment. We reject this attempt by petitioners to, in effect, discredit their own records. The idea that Nazon and others were promised a fixed weekly salary and not an hourly wage is further refuted by (1) the undisputed fact that she and other employees were required to punch a time clock and keep time records; (2) records confirming Nazon's testimony that when she missed

work time, her pay for a week was reduced below 30 hours; and (3) Nazon's credible testimony that her pay was docked for half an hour when she was 10 minutes late during the pay period October 20 through November 1, 2008, when she was paid for 59.50 hours instead of 60 hours.

Not only did Nazon credibly testify that she typically worked far more than the 30 hours per week for which she was paid, testimony confirmed by petitioners' posted work schedule and Nazon's time sheets, but Allen himself confirmed this fact in his own testimony. Petitioners' challenge to the Commissioner's finding that she was owed earned wages was premised not on a claim that she actually worked only 30 hours per week, which was clearly not the case, but on the claim, which we have rejected for reasons stated above, that she was an exempt employee. Petitioners raised no specific challenge to the Commissioner's underpayment calculations, and any possible such challenge has accordingly been waived pursuant to Labor Law § 101 (2).

The DOL Was Not Estopped from Issuing the Order

Petitioners argue that at the May 2, 2014 compliance conference they entered into a settlement with the DOL which covered Nazon, that they relied on the settlement as a full settlement of all claims, and that the DOL should be found to have settled all issues and/or be estopped from changing its position so as to find Nazon owed unpaid wages.

We do not agree. First, nothing demonstrates that respondent settled or purported to settle a claim that petitioners violated Article 6 by failing to pay Nazon for all hours worked. While Kim's testimony, his narrative report and petitioners' check stating it was "full restitution" all confirm that there was a settlement at the compliance conference with regard to issues discussed there, nothing contradicts Kim's testimony that the only such issue involving Nazon was deductions for the coffee club. In fact, Kim's December 20, 2013 letter to petitioners confirms that the only issue concerning Nazon raised with petitioners prior to the May 2, 2014 conference was the coffee club deductions. Petitioners presented no evidence that respondent agreed not to pursue issues not discussed and settled at the conference.

Rather, Kim's testimony and the narrative report show that at the time of the conference, DOL recognized that Nazon was exempt from Article 19's requirement of premium rates for overtime hours, and did not focus on her Article 6 claim for pay at the agreed-on rate for all hours until she subsequently brought it to their attention. When Nazon pointed out that the $40.00 obtained for her in restitution for coffee club deductions left her claim for earned wages for unpaid hours completely unaddressed, respondent realized she was correct. Not only was there no settlement agreement in which DOL agreed to waive issues not settled, petitioner presented no evidence that DOL voiced any such commitment. Nor is DOL's failure to focus earlier on Nazon's Article 6 claim for payment for all hours worked equivalent to a final administrative or judicial determination that Article 6 was not violated which, had such a determination been made, could have precluded "relitigating in a subsequent action or proceeding an issue clearly raised in [the] prior action or proceeding" (*Ryan v N.Y. Tel. Co.*, 62 NY2d 494, 500 [1984]). To the extent petitioners' argument is simply that it is unfair to hold them liable after Allen believed the matter concluded, we note that it would be far more unfair if Nazon could not collect earned wages simply because of Allen's belief.

While it is understandable that Allen was upset, there is no evidence that Nazon's claim to earned but unpaid wages had been settled as Allen stated he believed, and the law is clear that a

government agency is not estopped "from correcting errors, even where there are harsh results" (*Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied, appeal dismissed,* 488 US 801 [1988]). The Board has previously applied this principle. For example, in *Matter of Maddalone & Associates and Maddalone Construction, Inc.,* PR 08-157 (February 7, 2011), a petitioner challenging a DOL order argued that it had acted in reliance on an earlier DOL investigation, which found the claimant to be an exempt employee. The Board held: "The Commissioner is entitled, if not obligated, to correct errors made in previous audits, and under *Parkview* she cannot be estopped from doing so." In *Matter of Evgeny Freidman and Millennium Taximeter Corp.,* PR 14-050 (October 28, 2015), a petitioning employer claimed to have relied on a DOL unemployment insurance auditor's conclusion that its technicians were independent contractors, not employees. The Board held, citing *Ryan v N.Y. Tel. Co., supra,* that collateral estoppel does not apply in the absence of a litigated decision, and that *Parkview* precluded the application of equitable estoppel to government agencies and allowed DOL to correct errors.

Such a result is warranted in the instant matter, where any alleged harsh result or unfairness relied on by petitioners is minimal by comparison with those found insufficient for estoppel in judicial precedent like *Parkview*, and by the Board in *Maddalone* and *Freidman.* Thus in *Parkview*, 71 NY2d at 280, the Department of Buildings issued a stop work order "after substantial construction" had already been done in reliance on an erroneously issued permit. *Maddalone* and *Freidman* rejected petitioning employers' arguments that they would not have violated the Labor Law at all but for DOL inaction. By contrast, the compliance conference in the present case, which petitioners claim misled them, occurred long after they failed to pay Nazon for much of her work time. Even if Allen misunderstood the extent of what was being settled, that could not possibly have led to petitioners' violation of the law. At most, it might have encouraged them to tender $2,969.95 including a $300.00 penalty to settle claims concerning other employees and $40.00 to settle an unrelated issue concerning Nazon. Such an alleged consequence is far less than those found insufficient for estoppel in *Parkview*, *Maddalone* or *Freidman*, and does not provide a basis to set aside an order involving a claimant who was not paid for the work she performed.

The Civil Penalty in the Order Is Revoked

The petition alleged that the 100% civil penalty assessed in the order was invalid and unreasonable. We agree. Labor Law § 218 (1) lists as considerations when assessing a penalty "the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements." While LSI Kim recited the statutory factors in his testimony, he did not explain their application to this case. Respondent's Background Information – Imposition of Civil Penalty sheet, completed not by Kim but by Senior Labor Standards Investigator Grace Tai, stated with respect to the size of the firm that the foundation was in business more than three years; with respect to good faith that the employer was uncooperative because employer disagrees with DOL's findings and does not believe wages are owed;" and with respect to the gravity of the monetary violation, that DOL found a total of $4,875.00 including 25% liquidated damages due to all employees. With respect to non-wage violations, rather than checking either of the boxes stating that the records provided by petitioner were either inadequate because they impeded the investigation or were inadequate but did not impede the investigation, Tai checked the box indicating that no records were kept. Kim testified, however, that DOL's computations for 11 of the 16 weeks worked by Nazon were based on payroll records and time sheets that petitioners

provided to DOL during the investigation.

We do not believe the reasons cited by respondent are a reasonable and valid basis for a 100% penalty. In particular, we do not believe that simply stating the statutory factors with no explanation of their relevance is sufficient, nor, particularly under the circumstances here, do we consider an employer's statement that he disagrees with DOL's findings evidence of bad faith. While Allen's belief that petitioners' conduct complied with the law was objectively unreasonable in light of Article 6's definition of covered employees, DOL investigators initially shared petitioners' belief that Nazon was exempt, albeit from overtime pursuant to Article 19 rather than pursuant to the unpaid wage prohibitions of Article 6. While DOL's failure to raise the Article 6 issue at the compliance conference does not excuse the failure to pay Nazon properly, we find that on the record before us the penalty imposed did not have a reasonable and valid basis and we revoke it.

DOL's Imposition of Interest Is Affirmed

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." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is modified to revoke the civil penalty, and is otherwise affirmed;

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York
on September 14, 2016.

provided to DOL during the investigation.

We do not believe the reasons cited by respondent are a reasonable and valid basis for a 100% penalty. In particular, we do not believe that simply stating the statutory factors with no explanation of their relevance is sufficient, nor, particularly under the circumstances here, do we consider an employer's statement that he disagrees with DOL's findings evidence of bad faith. While Allen's belief that petitioners' conduct complied with the law was objectively unreasonable in light of Article 6's definition of covered employees, DOL investigators initially shared petitioners' belief that Nazon was exempt, albeit from overtime pursuant to Article 19 rather than pursuant to the unpaid wage prohibitions of Article 6. While DOL's failure to raise the Article 6 issue at the compliance conference does not excuse the failure to pay Nazon properly, we find that on the record before us the penalty imposed did not have a reasonable and valid basis and we revoke it.

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Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York
on September 14, 2016.