STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: SPIRIDON VARLAS A/K/A SPIRO VARLAS AND AAA FOOD DELIGHTS INC. (T/A EURO DELIGHTS), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Articles 5, 6 and 19 of the Labor Law, both dated January 14, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-073 RESOLUTION OF DECISION

APPEARANCES

Sacco & Fillas, LLP (Mathew W. Beckwith of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jake Ebers of counsel), for respondent.

WITNESSES

Petitioner Spiridon Varlas, for petitioners.

Claimant Justino Rodriguez Cruz and Labor Standards Investigator Cecilia Maloney, for respondent.

WHEREAS:

On March 13, 2015, petitioners Spiridon Varlas A/K/A Spiro Varlas and AAA Food Delights Inc. (T/A Euro Delights) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by respondent Commissioner of Labor (Commissioner or DOL) on January 14, 2015. Respondent filed an answer to the petition on April 17, 2015.

Upon notice to the parties, a hearing was held on August 13, 2015 in New York, New York before Wendell P. Russell, Jr., then counsel to the Board and the designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Justino Rodriguez Cruz in the amount of $32,501.03 for the period from June 15, 2009 to April 9, 2011, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $15,073.35, 25% liquidated damages in the amount of $8,125.26, and a 100% civil penalty in the amount of $32,501.03. The total amount due is $88,200.67.

The order under Articles 5, 6, and 19 of the Labor Law (penalty order) assesses a civil penalty for each of the following counts: (1) $250.00 for violation of Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and / or furnish true and accurate payroll records for each employee for the period from June 15, 2009 through December 31, 2010; (2) $250.00 for violation of Labor Law § 661 and 12 NYCRR 146.-2.1 by failing to keep and / or furnish true and accurate payroll records for each employee for the period from January 1, 2011 through April 9, 2011; (3) $500.00 for violating Labor Law § 661 and 12 NYCRR 146.-2.3 by failing to furnish to each employee a statement with every payment of wages listing the hour worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages during the period from January 1, 2011 through April 9, 2011; (4) $500.00 for violation of Labor Law § 196-d by collecting and distributing tips and / or withholding part of the tips collected for employees during the period from June 15, 2009 through April 9, 2011; (5) $500.00 for violation of Labor Law § 162 by failing to provide employees a thirty minute meal period during the period from June 15, 2009 through April 9, 2011; and (6) $500.00 for violation of Labor Law § 161 by failing to provide at least twenty-four consecutive hours of rest in any calendar week during the period from June 15, 2009 through April 9, 2011. The total amount due is $2,500.00.

The petition alleges that the orders are unreasonable because Varlas never employed Justino Rodriguez Cruz, Varlas was Euro Delights' sole employee, and the only other individuals who assisted in petitioners' business were Varlas' family members.

SUMMARY OF EVIDENCE

The Claims

Justino Rodriguez Cruz submitted claims for unpaid minimum wages and unpaid wages, both dated April 13, 2011, with the DOL. The claims state that Rodriguez Cruz was employed at Euro Delights as a dishwasher and porter, and that he made deliveries. Both claims name "Spiros" Varlas as Rodriguez Cruz's supervisor and as the person responsible for the company.

Testimony of Petitioner Spiridon Varlas

Spiridon Varlas testified that from 2003 to 2014 he was the owner and operator of Euro Delights, a restaurant located at 32-02 Broadway in Astoria, New York, which served crepes and other food items. From 2009 to 2011, Euro Delights was open from 10:00 a.m. to 12:00 a.m.

seven days per week. The restaurant was approximately 600 square feet in size and had ten tables. Varlas' office was located in the basement along with other equipment.

Varlas testified that he was Euro Delight's sole employee. As such, Varlas did not maintain employment records because he was under the impression that he was under no obligation to keep employment records with respect to himself. Given the small amount of income Euro Delights generated, Varlas could not afford to pay anyone other than himself. There were times where the restaurant "had no business at all." He further testified that he had never met Rodriguez Cruz before they participated in a "preliminary" conference related to DOL's investigation of Rodriguez Cruz's claim against petitioners. Daily, various members of Varlas' family, including his mother, father, sister, and brother in law would assist him on a full-time basis at the restaurant without compensation. Varlas' family members assisted with cooking and other tasks while Varlas made all food deliveries.

Varlas offered tax records to show that the business was not good. The tax records were prepared by Varlas' accountant based on information given to the accountant by Varlas. Varlas did not produce any of this underlying information at hearing.

Testimony of Claimant Justino Rodriguez Cruz

Justino Rodriguez Cruz testified that he worked at Euro Delights, located at 32-02 Broadway in Astoria, New York, from 2009 until April 2011. His boss was "Spiros" Varlas, who was at the restaurant daily. Varlas hired Rodriguez Cruz in 2009 after a friend who had worked at Euro Delights introduced him to one of the restaurant's cooks named Juan. Juan called Varlas on the telephone to ask whether Rodriguez Cruz could stay and work. Varlas said, "yes." Rodriguez Cruz's duties included "cleaning, washing, delivery, everything."

Rodriquez Cruz earned $275.00 per week. He was paid in cash by Varlas, and if Varlas was not at the restaurant, Varlas' father, who was at the restaurant "everyday," would pay him. Rodriguez Cruz also earned cash tips which he kept, but Varlas would deduct 20% off tips on orders placed over the Internet. He would work the night shift, from 5:00 p.m. to 2:00 a.m., on Friday, Saturday, and Sunday; the next weekend he would work the morning shift from 8:00 a.m. to 5:00 p.m. The remainder of the week he worked from 8:00 a.m. to 5:00 p.m. There were times when an employee would not report to work as scheduled, and Varlas would require Rodriguez Cruz to work after having worked until 2:00 a.m. the night before.

Varlas employed several people to help him run his restaurant. He employed two cooks, Efraim and El Chino, and three waitresses, Elena, Patricia, and Martha, in addition to two other employees named Jose and Bryce. Varlas' mother and sister would visit the restaurant and when Rodriguez Cruz was busy, Varlas' mother would assist with cleaning dishes. Rodriguez Cruz made food deliveries on an electric bicycle he purchased after he returned the one Varlas sold him because it failed to work properly.

Rodriguez Cruz described various physical aspects of Euro Delights, including the basement, where there was an office.

After a workplace dispute, Varlas fired Rodriguez Cruz and refused to pay him for his last week of work. Rodriguez Cruz submitted a claim for unpaid minimum wages and overtime and a claim for unpaid wages with DOL.

Testimony of Labor Standards Investigator Cecilia Maloney

Cecilia Maloney testified that she is a labor standards investigator with DOL and was assigned to investigate Rodriguez Cruz's claims against petitioners. Pursuant to her investigation, she visited the restaurant located at 32-02 Broadway three times in the beginning of 2014. Each time there was no activity at the site of the restaurant. On Maloney's second visit, she spoke with a man named Mohammed who owned a stationery store across the street from the restaurant. She asked him if he knew "Justino, the guy that works at the cafe," to which he replied "yes, the little one, I know him."

Maloney testified that a compliance conference took place on November 4, 2014, where Varlas "continued [his] denial that he knows the claimant either by name or by sight."

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the orders on review are claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*id.* § 101 [2]).

The Labor Law provides that an order of the Commissioner is presumed valid (*id.* § 103 [1]). Should the Board find the order or any part thereof invalid or unreasonable, the Board shall revoke, amend, or modify the order (*id.* § 101 [3]).

The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR 65.39). The petition asserts that the wage and penalty orders should be revoked because petitioners never employed claimant or anyone by the name of Justino Rodriguez Cruz. At issue is whether claimant was "permitted or suffered to work" and was therefore an "employee" under the Labor Law.

For the following reasons, we find that petitioners failed to meet their burden and the Commissioner presented sufficient evidence to reasonably support her determination that claimant was an employee. We therefore affirm the minimum wage and penalty orders as reasonable and consistent with the Labor Law.

We Affirm the Minimum Wage Order

With certain exceptions not relevant here, Article 19 of the Labor Law defines "employee" as "any individual employed or permitted to work in any occupation" (Labor Law § 651 [5]). Labor Law § 2 (7) defines "employed" to mean "permitted or suffered to work."

It is undisputed that petitioner Varlas owned and operated Euro Delights. Petitioner Varlas testified that Euro Delights was a small, low-volume business. His family helped him run the restaurant daily throughout the time it was doing business, including during the claim period. Because it was not a profitable enterprise—petitioner Varlas explained that there were times where the restaurant "had no business at all"—he was unable to pay anyone other than himself with the little money the restaurant made. Furthermore, petitioner Varlas testified that he had never met claimant before the compliance conference held at DOL offices pursuant to DOL's investigation of the instant claim against petitioners. Investigator Maloney confirmed that the report for such conference reflects that petitioner Varlas persisted in denying that he knew the claimant "either by name or by sight." Petitioners met their threshold burden to establish that claimant was not "permitted or suffered to work" at Euro Delights and was therefore not "employed" under the Labor Law (*see* Labor Law § 2 [7]).

The burden going forward thereby shifted to the Commissioner to submit credible and reliable evidence sufficient to establish that petitioners employed claimant. The Commissioner met her burden. In the first instance, petitioners maintained no employment records. At hearing, claimant affirmatively identified "Spiro" Varlas as his "boss" while pointing to petitioner Varlas. Claimant testified that in 2009 Varlas hired him to work at Euro Delights after claimant was introduced to a cook named Juan. Consistent with his claim form, claimant testified that he worked for petitioners as a dishwasher and porter, and that he made deliveries. Claimant also testified about the office located in the basement of Euro Delights, confirming petitioner Varlas' testimony. Petitioner Varlas maintained that he was Euro Delights sole employee, though it operated with the assistance of his family, yet claimant testified that, in addition to members of Varlas' family, several employees helped run the restaurant, including two cooks and three waitresses in addition to claimant, all of whom claimant identified by name. Claimant further testified that he made food deliveries on an electric bicycle claimant purchased himself after he returned the one petitioner Varlas sold him because it failed to work properly. Claimant was paid in cash by petitioner Varlas or Varlas' father, who was present daily at the restaurant. Claimant also explained that he earned cash tips, 100% of which he kept, but petitioner Varlas would deduct 20% off tips on orders placed over the Internet. Petitioners failed to rebut claimant's testimony.

Finally, claimant testified that he worked the night shift, from 5:00 p.m. to 2:00 a.m. one Friday, Saturday, and Sunday, and the next weekend he would work the morning shift from 8:00 a.m. to 5:00 p.m., while working from 8:00 a.m. to 5:00 p.m. the remaining days of the week. In the event an employee would not report to work as scheduled during the weekend, however, petitioner Varlas would require claimant to report to work after having worked until 2:00 a.m. the night previous. While claimant's testimony with respect to his work schedule departs from the stated hours worked in the minimum wage claim form, in the absence of reliable employment records, petitioners cannot complain that the hours worked are approximate (*see Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688 [1946] ["The employer cannot be heard to complain that

the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the Labor Law]."]).

We find claimant's detailed and credible testimony, which was not rebutted by petitioners, concerning his employment sufficient to meet respondent's burden when contrasted with Varlas' general and uncorroborated denial that claimant worked for petitioners. The only evidence produced by petitioners other than Varlas' testimony was tax records. Tax records absent the underlying documents upon which they were completed are not dispositive. The statements contained in the tax records are unreliable hearsay and not persuasive on the issue of whether claimant was employed by petitioners. The Commissioner, through claimant's un-rebutted, detailed, and credible testimony, has shown by a preponderance of the evidence that claimant was "permitted or suffered to work" and was therefore "employed" (*see* Labor Law § 2 [7]). Because petitioners did not challenge the wages, interest, liquidated damages and civil penalties respondent determined are due to claimant, the minimum wage order is affirmed in its entirety.

We Affirm the Penalty Order

The penalty order finds that petitioners violated articles 5, 6, and 19 of the Labor Law by failing to keep and / or furnish true and accurate payroll records for each employee (article 19); failing to furnish to each employee a statement with every payment of wages listing the hours worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages (article 19); collecting and distributing tips and / or withholding part of the tips collected for employees (article 6); failing to provide employees a thirty minute meal period (article 5); and failing to provide at least twenty-four consecutive hours of rest in any calendar week (article 5).

Article 19 requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 661; 12 NYCRR 137–2.1; 12 NYCRR 146-2.1).[1] The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances claimed, if any, and money paid in cash (Labor Law § 661; 12 NYCRR 137-2.1; 12 NYCRR 146-2.1).[2] Employers are further required to provide each employee a statement with every payment of wages listing the hour worked, rates paid, gross wages earned, any allowances claimed, deductions and net wages (Labor Law § 661; 12 NYCRR 137-2.2; 12 NYCRR 146-2.3).

As discussed above, we find that petitioners employed claimant. Moreover, petitioner Varlas admitted that he maintained no employment records during the claim period, even though he testified to having his relatives assist who would have been considered employees under the Labor Law (*see* Labor Law § 2 [7]; *Matter of Hussein*, PR 15-147 at 5 [Sept. 14, 2016]; *Matter of Abdullah*, PR 12-124 at 10 [March 2, 2016]). We affirm the penalties for failure to maintain payroll records and provide each employee with a statement of wages.

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[1] Effective January 1, 2011, 12 NYCRR 146 replaced 12 NYCRR 137. As such, 12 NYCRR 137 governed the claim period from June 15, 2009 through December 31, 2010, and 12 NYCRR 147 governed the remainder of the claim period from January 1, 2011 through April 9, 2011.

[2] *See supra* note 1.

Article 6 provides that no employer shall demand or accept, directly or indirectly, any part of the gratuities received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee (Labor Law § 196-d). As discussed above, petitioners failed to rebut claimant's testimony that petitioner Varlas deducted 20% of claimant's tips on orders placed over the Internet. We affirm the tip appropriation penalty.

For its part, Article 5 requires employers to provide covered employees at least one thirty-minute break from work for a meal (Labor Law § 162 [2]). Article 5 further requires that an employer operating a restaurant allow every employee at least 24 consecutive hours of rest in any calendar week (Labor Law § 161). Petitioners failed to offer evidence challenging the Commissioner's determination to assess civil penalties under Article 5. The issue is thereby waived (*see* Labor Law § 101 [2]). We affirm the penalties for failure to provide a thirty minute meal period and failure to provide at least 24 consecutive hours of rest in any calendar week.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review is 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
December 14, 2016.