STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MICHAEL D. ANDRZEJEWSKI AND GREAT CITY FOOD, INC. (T/A MIKE A'S AT THE LAFAYETTE),	
Petitioners,	DOCKET NO. PR 16-051
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law dated February 29, 2016,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Kavinoky Cook LLP, Buffalo (*R. Scott DeLuca* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Michael D. Andrzejewski, for petitioners.

Senior Labor Standards Investigator James Donohue, for respondent.

WHEREAS:

On April 29, 2016, petitioners Michael D. Andrzejewski and Great City Food, Inc. (T/A Mike A's at the Lafayette) filed a petition for review of an order issued against them by respondent Commissioner of Labor on February 29, 2016. Respondent filed her answer on June 3, 2016.

Upon notice to the parties, a hearing was held on August 30 and December 7, 2016 in Buffalo, New York, before Board Member J. Christopher Meagher, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order under review is an order to comply with Article 19 of the New York State Labor Law that directs petitioners to pay a total of $46,374.61 in wages owed to four claimants, Scott Crombie, Keith Lesika, John Nicholson, and Dwight Robinson, who worked for petitioners at various times between June 2, 2012 and September 23, 2013, together with interest at 16% per annum calculated to the date of the order as $15,132.70, 25% liquidated damages in the amount of $11,593.66, and a 100% civil penalty of $46,374.61, for a total amount due of $119,475.58.

The petition alleged that: (1) claimants were not employees as defined by the Hospitality Wage Order (12 NYCRR 146) and were exempt from overtime requirements; (2) claimants were paid all wages due; and (3) in the alternative, the amounts found due and owing in the order are incorrect. The petition also contested the civil penalties, liquidated damages and interest assessed in the order. In their post-hearing brief, petitioners argue that claimants fell within the executive exemption as defined in 12 NYCRR 146-3.2 (c) (1) (i), and that Crombie, Lesika and Nicholson also fell within both the learned professional exemption and the creative professional exemption as defined in 12 NYCRR 146-3.2 (c) (1) (iii) (1) and (2). For the reasons set forth below we affirm the order as modified.

SUMMARY OF EVIDENCE

Petitioner Michael D. Andrzejewski's Testimony

Petitioner Michael D. Andrzejewski was the president and majority shareholder of Great City Food, Inc., which operated Mike A's at the Lafayette from May 2012 to April 2016. Mike A's was the first restaurant awarded ten stars by the Buffalo Evening News. Andrzejewski, who has been an executive chef for 25 years, is one of the few chefs to represent Buffalo at the James Beard House, which invited him five times. The restaurant served lunch Monday through Friday. Dinner was usually served Monday to Saturday, and featured an extensive menu that changed seasonally, a seven-, ten-, or twelve-course tasting menu that changed weekly, daily specials, and sometimes wine pairings.

Mike A's had about six kitchen employees (two or three cooks including claimant Robinson, two dishwashers and sometimes a porter) at lunch. While Andrzejewski's testimony about the number during the dinner service was not precise, it appears there were about six or seven cooks including claimants Crombie, Lesika and Nicholson; two or three dishwashers; a pantry person; and executive chef Ed Forster. Andrzejewski stated there could be "between seven and 10" cooks at dinner but also repeatedly testified that Crombie and Lesika supervised six to eight employees including dishwashers as well as cooks; identified an employee contact list compiled by petitioners that listed Lesika, Nicholson, Robinson and only three other employees as cooks; testified that "four to six people" created 12 daily courses along with the regular menu and occasional parties; and testified that the restaurant's entire kitchen staff comprised, "all told, 16" people or at times a few more.

Andrzejewski oversaw the whole restaurant. Executive chef Forster oversaw the kitchen, coordinating the style of service, the presentation of the tasting menus, the extent of the specials, and the wine pairings. Forster was the final person to oversee the food when it left the kitchen, synchronizing the courses with the dining room manager. Forster directed the work of Crombie and Lesika. Tasting menu courses were decided by Andrzejewski, Forster, Crombie and Lesika,

with Forster and Andrzejewski giving direction at the start of a week and turning implementation of the menu over to Crombie and Lesika.

Andrzejewski testified that "pretty much most" of Crombie's time was spent managing the kitchen, and that Crombie and Lesika:

> "were more the day-to-day hands-on guys that were on the cooking line every day with the ... other cooks, making sure that stuff was set up, making sure the product was good, was fresh, the recipes were followed, that the dishes were ready to go at 5:00 o'clock when service was there, and making sure the cooks that were working with them were ready to go at the same time."

Andrzejewski testified as follows concerning claimants' specific roles:

Crombie and Lesika – Sous chef Crombie worked from 12:00 p.m. until the restaurant closed at 10:00 p.m.; "oversaw basically everything" including supervising six to eight employees; "did an awful lot of the ordering" including going to markets and meeting with farmers together with executive chef Forster; hired and fired the cooks and dishwashers; interviewed job applicants; scheduled dishwashers and porters; and reprimanded, wrote up or fired employees. Crombie created new dishes for the tasting menu and specials under the direction of Andrzejewski and Forster, and re-created dishes, for example, refreshing a traditional Veal Oscar recipe by testing and selecting ingredients and preparation methods. Crombie used techniques such as molecular gastronomy to experiment with new ways to use ingredients; wrote out the "specs" of recipes and put recipes into the restaurant's prep and recipe book; made sure each station knew how to prepare the dishes on the menu; taught the chefs the timing of the dishes; made sure the preparation was complete; tasted the food; made any necessary corrections; explained the menu to the service staff and instructed them on the ingredients of each dish on the tasting menu. Crombie went from station to station, cooking alongside the line cooks and supervising them as they made the dishes throughout the night, making sure that recipes were followed without deviation. Crombie also planned the menus for special events and occasionally, weddings.

Andrzejewski stated at one point that at least 50% of Crombie's work time was spent developing dishes, including teaching others to execute them. Andrzejewski later testified that Crombie supervised other employees "[c]onstantly" and spent his whole day managing since "If you're a manager, . . . you might be cooking a steak or plating something, but you're still watching everything else going on. You still have to be responsible for the person next to you and be responsible for the operation of the kitchen."

Sous chef Lesika's hours began anywhere from 11:00 a.m. and 1:00 p.m., and he worked until 9:00 p.m. or closing. Lesika, along with Crombie, ran the day-to-day operations including supervising six to eight employees. He interviewed, trained, hired and fired employees, especially dishwashers; taught chefs and servers how to cook and present dishes; "had a lot of input" into specials; prepared food on a nightly basis; and did "quite a bit of the ordering." As with Crombie, Andrzejewski at one point testified that Lesika spent "more than half of his day" developing menu items including teaching others to prepare them, at another point testified that Lesika spent "[h]is whole day" managing. Andrzejewski testified that Crombie and Lesika "were a big part of the concept behind" Mike A's tasting menus as well as the day-to-day process of creating and making

them. They floated between stations and themselves prepared food. Crombie and Lesika had different days off and worked together when they were both working.

Nicholson – Lead line cook (or, as Andrzejewski identified him at another point, sous chef) Nicholson was responsible for a cooking station and "called the orders out to the other guys, made sure timing was proper;" "was involved in menu preparation," especially testing to make sure recipes were realistic; created a few of the dishes, especially the grilled meat dishes; and supervised three to four employees at dinner, and oversaw closing the restaurant. Nicholson could interview and hire a cook if a cook was needed, but not make the decision that one was needed. "A great deal" of his work time was spent butchering, portioning and constructing meat, which was his main task and special area of expertise.

Robinson – Lunch chef Robinson made sure workers showed up for the early shift, supervised two to five people, and oversaw the restaurant until noon or 1:00 p.m. He could hire and fire in extreme circumstances and made recommendations to others in this area. Robinson's creative responsibilities were to put together soup and salad specials and create most of the restaurant's soups.

Andrzejewski testified that each claimant was paid a weekly salary: Crombie, $750.00 and later $850.00; Lesika, $850.00 or $875.00; Nicholson, $800.00; and Robinson, $675.00. These salaries were for a five-day work week. If any of the claimants worked an extra day, they were paid for an extra day. If in a given week a claimant worked less than five full days and used up his vacation time or preferred not to charge time to vacation, their pay was prorated for partial days. Asked whether claimants' wage statements or pay stubs and petitioners' other payroll records referred to a "salary," Andrzejewski testified, "I believe it said rate," and stated he did not know whether this rate was stated on a weekly or a daily basis. Petitioners did not offer payroll records or wage statements into evidence.

Andrzejewski stated that Crombie, Lesika, and Nicholson each earned two-year degrees at, respectively: The Culinary Institute of America; an unnamed French Canadian culinary school; and Johnson & Wales. Andrzejewski testified that he was not familiar with any four-year culinary arts programs in the United States, and that he himself had attended a four-year management school, not a culinary school. Crombie, Lesika and Nicholson also had prior experience working at other restaurants.

Respondent's Investigation

Senior Labor Standards Investigator James Donohue testified about documents in respondent's investigative file. An anonymous complaint filed with respondent on August 12, 2013, alleged Labor Law violations at petitioners' restaurant. Labor Standards Investigator Ruth Gonzalez-Cruz visited the restaurant on October 9, 2013 and completed an investigation report including her notes from interviews with claimants Lesika and Nicholson. According to these notes, Lesika stated that he was hired as a cook and "pretty much" ran the kitchen, including scheduling staff, ordering and overseeing; earned $175.00 per day; and worked 10-11 hour shifts five or six days per week. Gonzalez-Cruz's notes from her interview with Nicholson said that he stated that he spent the majority of his time working as a cook; assisted Lesika with ordering and overseeing; was paid $160.00 per day; and worked five or sometimes six days a week for 10 or 11 hours.

Donahue testified that on November 7 and 13, 2013, Gonzalez-Cruz reviewed petitioners' payroll and time records at petitioners' attorney's office. She entered payroll information from petitioners' records into a spreadsheet on her computer, and on February 6, 2014, e-mailed the spreadsheet to petitioners' counsel together with a Recapitulation Sheet listing amounts respondent alleged were owed to each claimant and to seven other employees. For each work week and each of the 11 individuals, the spreadsheet showed a daily pay rate (for example, $150.00, later $170.00 per day for Crombie, and $175.00 per day for Lesika), and figures that varied week to week for hours worked (for example, up to 80.3 for Crombie and up to 68.27 for Lesika), number of days worked, wages paid, and an underpayment calculation. On March 28, 2014 petitioners' attorney DeLuca wrote to SLSI Donohue arguing that claimants (and a fifth individual whose claim is not now at issue) were not employees within the meaning of the Hospitality Wage Order and the restaurant was not liable for overtime wages or spread of hours pay. The letter argued that Crombie and Lesika met the requirements for the Hospitality Wage Order's executive, administrative, and professional exemptions. The letter also contended that Nicholson and Robinson were exempt under the executive and administrative exemptions. Attorney DeLuca's letter also reserved the right to contest potential calculation errors.

According to Donohue, DOL's unwritten policy is that only one executive chef or other back-of-the-house manager and one front-of-the-house manager at a restaurant can be deemed exempt as an executive, and respondent also deemed claimants not exempt, in part, because they took direction from executive chef Ed Forster as well as Andrzejewski. Furthermore, petitioners had a relatively small number of kitchen employees for whom they claimed that six people (Andrzejewski, Executive Chef Ed Forster, and the four claimants) were all executives and supervisors.

Donahue testified that DOL concluded claimants were not paid a "salary" within the meaning of the executive or administrative exemptions of the Hospitality Wage Order. Donohue testified concerning a chart he created, based on the spreadsheet compiled by Gonzalez-Cruz, showing that claimants were paid a daily rate: Lesika, whose daily rate was $175.00, was paid $175.00 in weeks when he worked one day, $350.00 when he worked two days, $700.00 when he worked four days, $787.50 when he worked four and a half days, $875.00 when he worked five days, and $1,050.00 when he worked six days; Crombie was initially paid a daily rate of $150.00 and earned $600.00 for four days and $750.00 for five days. When his daily rate was raised to $170.00, he earned $340.00 for two days, $765.00 for four and a half days, $850.00 for five days, and $1,020.00 for six days; Nicholson was paid a daily rate of $160.00 and earned $640.00 for four days, $720.00 for four and a half days; and $800.00 for five days; Robinson's daily rate was initially $130.00, and he was paid $520.00 for four days and $650.00 for five days. When his daily rate was raised to $135.00, he earned $675.00 for five days. Robinson's daily rate was increased again to $140.00, and he earned $560.00 for four days of work, $630.00 for four and a half days of work, and $700.00 for five days of work.

Donahue stated that the administrative exemption was unavailing because DOL considers the administrative exemption to be for office or other non-manual workers, not kitchen workers. As for the professional exemption, Donohue testified it applied to professionals such as lawyers, CPAs, teachers or computer programmers, not for cooks. With respect to the possibility that original and creative work in a field of artistic endeavor can also render someone an exempt professional, Donohue stated that he did a great deal of research without finding any indication that cooks were exempt as professionals under New York Labor Law.

Donohue testified that respondent did not believe petitioners intentionally violated the law, "it was just an error." Although respondent can impose up to a 200% civil penalty, when employers cooperate in an investigation, as petitioners did here, a 100% penalty is normally assessed. Similarly, while respondent can assess up to 100% liquidated damages, petitioners were assessed only 25%. On cross-examination, Donohue stated he did not know the specific basis for the penalty or liquidated damages assessed. He also stated that a DOL mistake, for which petitioners were not responsible, caused a 16-month delay before the order was issued.

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 [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 Rules (12 NYCRR) § 65.39.

Relevant Legal Requirements and Definitions

Article 19 of the Labor Law and the Minimum Wage Order for the Hospitality Industry (12 NYCRR Part 146) (The Hospitality Wage Order) require that employees be paid overtime at a wage rate of 1½ times their regular rate for hours worked in excess of 40 hours in one workweek (12 NYCRR 146-1.4), and receive an extra hour of pay at the minimum legal wage rate for any day in which their "spread of hours" (the number of hours between the beginning and end of the work day) is more than ten (12 NYCRR 146-1.6 [a]). Employees must be paid hourly rates and may not be paid "on a daily, weekly, salary, piece rate or other non-hourly rate basis" (12 NYCRR 146-2.5).

Article 19 excludes from its definition of "employee" those who work "in a bona fide executive, administrative, or professional capacity" (Labor Law § 651 [5] [c]), and the Hospitality Wage Order set forth the definitions of the executive, administrative, and professional exemptions in the hospitality industry (12 NYCRR 146-3.2). The main issue in this case is petitioners' contention that the four claimants fell within one or more of these three exemptions. The petition itself did not specify which exemption(s) applied. Petitioners' counsel's March 2014 letter invoked the administrative, executive, and professional exemptions for Crombie and Lesika, and the administrative and executive exemptions for Nicholson and Robinson. Petitioners' post-hearing

brief argued that all four petitioners fell within the executive exemption and Crombie, Lesika and Nicholson also fell within the learned professional and creative professional exemptions.

Each of the exemptions asserted by petitioners is discussed below; the following discussion applies to all of them. Article 19, pursuant to which the Hospitality Wage Order's overtime regulations have been promulgated, "constitutes remedial legislation.... As such it is to be liberally construed so as to permit as many individuals as possible to take advantage of the benefits it offers" (*Settlement Home Care v Industrial Board of Appeals,* 151 AD2d 580, 581-82 [2d Dept 1989]). "Exceptions to this remedial legislation are to be narrowly construed so as not to frustrate the legislative purpose" (*Id* at 581*).* The employer bears the burden of proving that its employee falls within an exemption, and the exemption applies only if employees plainly and unmistakably fit within its terms and spirit (*Matter of 238 Food Corp T/A Riverdale Diner,* PR 05-068 at 8 [April 25, 2008]).

The Fair Labor Standards Act (FLSA), 29 USC § 213 (a) (1), likewise contains executive, administrative and professional exemptions to federal minimum-wage and overtime requirements, explained in federal regulations promulgated by the United States Department of Labor (USDOL) at 29 CFR Part 541. Pursuant to 29 USC § 218 (a) of FLSA, no state law may reduce the protections provided under FLSA, and FLSA "explicitly permits states to set more stringent overtime provisions than the FLSA" (*Maliguez v Joseph,* 226 F Supp 2d 377, 389 [EDNY 2002]; 29 USC § 218 [a]; 29 CFR 531.26).

Petitioners Did Not Meet Their Burden of Proof to Show that Claimants Were Exempt Under Executive Exemption

The executive exemption (12 NYCRR 146-3.2 [c] [i] [a] – [e]) applies to work "in a *bona fide* executive capacity," defined as work by an individual (a) "whose primary duty consists of the management of the enterprise... or of a customarily recognized department or subdivision;" and (b) "who customarily and regularly directs the work of two or more other employees;" and (c) who has the authority to hire or fire or whose recommendations about hiring and firing are given particular weight; and (d) "who customarily and regularly exercises discretionary powers;" and (e) "who is paid for his services a salary of not less than "$543.75 per week inclusive of board, lodging, or other allowances or facilities." The criteria are in the conjunctive and all five of the criteria must be met for the exemption to apply *(Matter of Hand Held Films, Inc.,* PR 06-092 at 7 [May 20, 2009]).

Petitioners, citing no authority, argue that because 12 NYCRR 146-3.2 (c) (i) (e) does not define the term "salary," the regulation requires only payment of an amount exceeding $543.75 per week; not payment of the same amount each week. This argument is unavailing. As found in *Torres v Gristede's Operating Corp.*, 2006 US Dist LEXIS 74039, *42-43 (SDNY 2006) and *Scholtisek v Eldre Corporation,* 697 FSupp2d 445, 466-67 (WDNY 2010), under the implementing regulations, as in common speech, "salary" means receipt of fixed, regular compensation, *i.e.,* not subject to weekly variation by hours worked."

In *Torres v Gristede's Operating Corp.*, 2006 US Dist LEXIS 74039 at *41-43, the court noted that the federal and state executive and administration exemptions differ with respect to payment of a salary. While the federal regulations expressly define "salary basis," (*see* 29 CFR 541.602), the New York regulations do not use the term "salary basis" and do not expressly define

what a salary means. The New York executive and administrative exemptions state that employees will not be considered to work in an executive or administrative capacity unless they are paid for their services a salary of not less than $543.75 per week.

In determining the meaning of "salary," the *Torres* court looked to the New York Court of Appeals' decision in *Orens v Novello,* 99 NY2d 180, 185 (2002), which explains that such an analysis begins with the language of the statute. "If the terms are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. In cases where the term at issue does not have a controlling statutory definition, courts should construe the term using its usual and commonly understood meaning" (*Id.* at 185-86). The *Torres* court, noting that *Webster's Third New International Dictionary* defined "salary" as "fixed compensation paid regularly (as by the year, quarter, month or week) for services," and *Black's Law Dictionary* defined "salary" as "an agreed compensation for services ...usually paid at regular intervals on a yearly basis as distinguished from an hourly basis," and held that under New York regulations, "'salary' means receipt of fixed, regular compensation (i.e. not subject to weekly variation by hours worked). Further, [the petitioners] must satisfy both a 'duties' test and a 'salary' test in order to establish exemption" (*Torres v Gristedes*, 2006 US Dist LEXIS 74039 at *43).

In the instant case, the petitioners have failed to meet their burden to show that the claimants were paid a salary constituting a fixed, regular compensation that was not subject to variation by weekly hours worked. While Andrzejewski testified that the claimants' compensation was a weekly salary based on a five-day work week, he acknowledged that petitioners' own records referred to a "rate," not a "salary," and testified that he did not know whether this "rate" was even stated on a weekly as opposed to a daily basis. Petitioners failed to enter into the record any evidence such as payroll records or wage statements to corroborate that the claimants were paid a fixed weekly salary. We find that the DOL spreadsheet which was created from petitioners' payroll records provided to DOL by petitioners' attorney during the investigation, and whose validity was never contested by petitioners, is the best evidence of how the claimants were paid. The spreadsheet shows that the claimants were paid a daily rate,[1] not a weekly salary, and in any week in which a claimant worked less than five days, his wages were reduced, and were thus subject to weekly variation. Although each of the claimants' weekly compensation generally exceeded $543.75, their compensation did not constitute a "salary" because the claimants were not paid a fixed amount not subject to variation by weekly hours worked.

During the 12 weeks that Andrzejewski testified that Crombie's weekly "salary" was $750.00, the spreadsheet shows that Crombie was paid that amount during only 5 of those 12 weeks (weeks ending June 16 and 30, September 9, 16 and 30). In the other 7 weeks during this period, Crombie was paid the following amounts:

Week ending	Wages	Days worked
6/2/2012	$ 850.00	5
6/9/2012	$1,050.00	7
7/8/2012	$ 600.00	4
7/22/2012	$ 900.00	6
8/19/2012	$ 900.00	6

[1] 12 NYCRR 146-2.5 requires employers to pay employees only hourly rates, and "not on a daily, weekly, salary, piece rate or other non-hourly basis."

8/26/2012	$700.00	5
9/2/2012	$900.00	6

And in the 27 weeks that Andrzejewski testified that Crombie's weekly "salary" was $850.00, the spreadsheet indicates that Crombie was paid that amount during 20 weeks of the 27-week period from December 12, 2012 to June 30, 2013. But during the other 7 weeks of the 27-week period Crombie was paid the following amounts:

Week ending	Wages	Days worked
12/16/2012	$1,020.00	6
1/13/2013	$ 340.00	2
1/27/2013	$1,020.00	6
4/7/2013	$ 765.00	4.5
4/28/2013	$1,020.00	6
5/12/2013	$1,020.00	6
6/30/2013	$ 765.00	4.5

While Andrzejewski testified that Lesika was paid a weekly "salary" of $875.00 per week, the spreadsheet shows that Lesika was only paid that amount for 13 of the 24 weeks he worked for petitioners (weeks ending September 16 and December 9, 2012, January 6 and 20, March 3, 24, and 31, April 7 and 14, May 19 and 26, and June 9 and 16, 2013.). In the other 11 weeks, Lesika was paid the following amounts:

Week ending	Wages	Days worked
8/26/2012	$ 350.00	(21.64 hours)
9/2/2012	$ 175.00	1
9/9/2012	$ 767.50	4.5
12/23/2012	$1,050.00	6
12/30/2012	$ 700.00	4
1/13/2013	$1,050.00	6
3/10/2013	$ 700.00	4
4/28/2013	$1,050.00	6
5/5/2013	$ 787.50	4.5
5/19/2013	$1,050.00	6
6/30/2013	$ 787.50	4.5

Andrzejewski testified that Robinson earned a weekly "salary of $675.00 per week. The spreadsheet, however, indicates that Robinson worked for 13 weeks during the period from the week ending February 8, 2012 to May 23, 2013 and was paid $675.00 for only four of the 13 weeks that he was employed by the petitioners.

Week ending	Wages	Days worked
2/8/2012	$520.00	4
7/25/2012	$650.00	5
8/19/2012	$360.00	4
8/26/2012	$700.00	5
9/2/2012	$700.00	5

9/9/2012	$630.00	4.5
9/16/2012	$700.00	5
3/3/2013	$540.00	4
3/31/2013	$675.00	5
4/7/2013	$675.00	5
4/28/2013	$675.00	5
5/19/2013	$675.00	5
5/23/2013	$700.00	5

Andrzejewski testified that Nicholson was paid a weekly "salary" of $800.00. According to the spreadsheet, Nicholson was paid $800.00 for 18 of the 23 weeks that he was employed by the petitioners (weeks ending December 16 and 23, 2012, January 6, 13, 20, and 27, February 17 and 24, March 3, 10, 17, and 24, April 14, 21 and 28, May 12, June 16 and 23, 2013. However, Nicholson's wages were reduced to $720.00 during the five weeks when he worked 4.5 days per week:

Week ending	Wages	Days worked
3/31/2013	$720.00	4.5
4/7/13	$720.00	4.5
5/5/13	$720.00	4.5
5/26/13	$720.00	4.5
6/9/2013	$720.00	4.5

We find that petitioners did not meet their burden of proving that claimants were paid a weekly salary that was not subject to weekly variation by hours worked, and that claimants were not exempt employees under the executive exemption.

Petitioners also argued that because New York's regulation does not define the term "salary," interpreting the term to exclude compensation that varies week to week could only be based on the FLSA executive exemption (29 CFR 541.100), which requires that to be exempt, an executive employee must be compensated on a "salary basis" at a rate not less than $455.00 per week. The federal regulation defining "salary basis" limits the term to cases where "the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed" (29 CFR 541.602 [a]). As already discussed, under New York law, we have used ordinary usage and dictionary definitions, not the FLSA executive exemption, to understand the word "salary" (*Orens v Novello*, 99 NY2d at 185-86).

Similarly, petitioners argued that they did not reduce the salary for a week unless a claimant chose not to charge time off to vacation entitlement or had no vacation entitlement left. But even if it were applicable, the federal regulation allows docking a leave balance without changing an employee's exempt status only if the cash salary itself is *never* docked, which was not true here (*see Castro v Metro. Transp. Auth.*, 2006 US Dist LEXIS 32842, *13-14 [SDNY 2006]). In addition, New York law requires that an employer that has agreed to pay such "benefits or wage supplements" do so as part of wages (Labor Law §§ 190 [1] and 198-c [2]) and that the employer "notify his employees in writing or by publicly posting the employer's policy on... vacation,

personal leave, holidays and hours" (Labor Law § 195 [5]; *see generally Matter of Stephen S. Mills and the New York Hosp. Med. Ctr. of Queens*, PR 14-104 at 11 [July 22, 2015]). There is no evidence that petitioners notified employees in writing or by publicly posting a policy that vacation entitlement must be applied towards time missed from a five-day week or "salary" would be docked. As found above, "salary," the term used in defining New York's executive exemption, is itself clear and sufficient to find the claimants non-exempt. The result would be the same even if the FLSA "salary basis" approach was used.

Petitioners Did Not Meet Their Burden of Proof to Show that Claimants Were Exempt Under Administrative Exemption

The administrative exemption established by 12 NYCRR 146-3.2 (c) (ii) is for "[w]ork in a *bona fide administrative capacity*," defined as work by an individual (a) "whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations of such individual's employer; (b) who customarily and regularly exercises discretion and independent judgment; (c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge;" and (d) who is paid a salary of at least $543.75 per week inclusive of board, lodging, or other allowance. In their post-hearing brief, petitioners did not argue that any claimant fell within the administrative exemption. However, since it had been invoked in petitioners' counsel's March 2014 letter and the petition did not specify which exemptions it relied on, we discuss this exemption. For the same reasons given above concerning the executive exemption: that claimants were not paid a "salary" that was not subject to weekly variation as also required by 12 NYCRR 146-3.2 (c) (ii) (d), we find that the petitioners did not meet their burden of proof that the claimants were exempt under the administrative exemption which also has a salary requirement.

Petitioners Did Not Meet Their Burden of Proof to Show that Claimants Crombie, Lesika, and Nicholson Were Exempt Under Professional Exemption

Petitioners' post-hearing brief argues that Crombie, Lesika and Nicholson satisfied each of two types of professional exemptions established by 12 NYCRR 146-3.2 (c) (iii), referred to below as the "learned professional" and "creative professional" exemptions.[2]

The learned professional exemption (12 NYCRR 146-3.2 [c] [iii] [a] [1]) is for "work by an individual: (a) whose primary duty consists of the performance of work: (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes." No New York authority defines cooking as such a "field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study."

[2] Unlike the executive and administrative exemptions, 12 NYCRR 146-3.2 (c) (iii) does not establish any minimum "salary" or compensation level for a professional exemption to apply. In this respect, it also differs from the FLSA professional regulation, which requires that exempt professionals be compensated on a fee or salary basis at a rate of not less than $455 per week (29 CFR 541.300 [a] [1]).

In arguing that Crombie, Lesika and Nicholson fell within the learned professional exemption, petitioners primarily rely on FLSA's learned professional exemption (541.300 [a] [2] [i] and 541.301), which includes chefs (*see* 541.301 [e] [6]):

> "*Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirement for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work."

This subsection was promulgated in 2004 after the "National Restaurant Association confirm[ed] that a four-year college degree in culinary arts is the standard prerequisite in the industry for executive chefs" (*see* 69 FR 22122, * 22154 [Apr. 23, 2004]).

Petitioners did not establish that Crombie, Lesika, or Nicholson's "primary duty" required "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study," as required by 12 NYCRR 146-3.2 [c] [iii] [a] [1]), or that they had the requisite four-year specialized academic degree in a culinary arts program, as required by FLSA. While Andrzejewski, himself an executive chef, attended a four-year management school, Crombie, Lesika and Nicholson all graduated from two-year programs, not the four-year program required to meet the exemption. Andrzejewski described Crombie and Lesika as "more the day-to-day hands-on guys that were on the cooking line every day with the ... other cooks, making sure that stuff was set up, making sure the product was good, was fresh, the recipes were followed, that the dishes were ready to go." Crombie's involvement "in teaching the rest of the staff the creations," or Lesika's in preparing recipe books "to make sure that everybody did everything consistently," or Nicholson's butchering, portioning and constructing meat, were routine, mental, manual or physical processes rather than the result of specialized intellectual instruction and study. While Andrzejewski testified that Crombie used techniques such as molecular gastronomy to experiment with new ways to use ingredients, that was not Crombie's primary duty. He also performed many other tasks for which the necessary knowledge is clearly not customarily acquired by a prolonged course of specialized intellectual instruction: for example, ordering food; hiring, firing and supervising employees; planning menus; and going from station to station cooking alongside the line cooks. The same was true of Lesika and Nicholson. We find that the petitioners failed to meet their burden of proof to show that Crombie, Lesika, and Nicholson were exempt as learned professionals.

The creative professional exemption (12 NYCRR 146-3.2 [c] [iii] [a] [ii]) pertains to a person whose primary duty is work that is "[o]riginal and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability), and the result of which depends primarily on the invention, imagination or talent of the employee." As with the learned professional exemption, no New York authority defines cooking as such a "recognized field of artistic endeavor," and in arguing that Crombie, Lesika and Nicholson fell within the creative professional exemption, petitioners primarily rely on the comparable FLSA exemption established by 29 CFR 541.300 (a) (2) (ii) and 541.302, which states that "a recognized field of artistic or creative endeavor" (the federal regulation's counterpart for New York's "recognized field of artistic endeavor"), "includes such fields as music, writing, acting and the graphic arts" (29 CFR 541.302 [b]), and that the

"requirement of 'invention, imagination, originality or talent' distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy" (29 CFR 541.302 [c]).

As with the learned professional exemption, the USDOL when revising 29 CFR Part 541 in 2004 specifically discussed chefs, expressing agreement with a National Restaurant Association submission which had argued "that certain forms of culinary arts have risen to a recognized field of artistic or creative endeavor;" quoting commenters who pointed out that "[d]ue to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame" and some enjoy "national acclaim;" and concluding:

> "to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional.... The Department intends that the creative professional exemption extend only to truly 'original' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires 'invention, imagination, originality, or talent.'"

(69 FR at 22154 [April 23, 2004]).

After the 2004 revision, including this regulatory history, the court in *Karropoulos v Soup du Jour Ltd.*, 128 F Supp 3d 518, 536-7 (EDNY 2015), considering whether an executive chef was a "creative professional" under FLSA and New York law, found a triable factual issue about that chef's actual primary duties, and stated that "[f]ederal courts apply the same standards to interpreting the exemptions" under FLSA and under Labor Law Article 19 (*Id.* at 527; *see also Kim v 511 E. 5th St., LLC*, 133 F Supp 3d 654, 660-661 [SDNY 2015] [similarly finding a triable issue under both statutes]).

Neither *Karropoulos* nor *Kim* found a chef to be an exempt creative professional under either federal or New York law. As stated in *Eren v Gulluoglu LLC*, 2017 US Dist LEXIS 161802, *7 (EDNY 2017), there appears never to have been a reported decision that did so find, and simply being "experienced and talented" is clearly not enough to make a chef a creative professional (*see also Eren v Gulluoglu LLC*, 2017 US Dist LEXIS 72825, *8-10 [EDNY 2017] [courts have been "reluctant" to apply the exemption "to all but the most extraordinary chefs"]). We find that the petitioners failed to meet their burden to prove that Crombie, Lesika and Nicholson were exempt as creative professionals.

First, while Andrzejewski's testimony established that Crombie and Lesika were talented chefs who made significant contributions to a fine restaurant, that is quite different from establishing that they were among "the most extraordinary chefs" (*Eren v Gulluoglu,* 2017 US Dist LEXIS 72825 at *8). It was Andrzejewski, not Crombie, Lesika or Nicholson, who was invited to represent Buffalo at the James Beard House. Andrzejewski testified that he and executive chef Forster gave direction to sous-chefs Crombie and Lesika (who, in turn, were above lead line cook Nicholson); Andrzejewski ordered what he did not like fixed, and he or Forster would "jump in" as necessary to reshape the others' creations. Andrzejewski described Crombie and Lesika as "more the day-to-day hands-on guys that were on the cooking line every day with the ... other

cooks, making sure that stuff was set up, making sure the product was good, was fresh, the recipes were followed, that the dishes were ready to go." Crombie's involvement "in teaching the rest of the staff the creations," or Lesika's in preparing recipe books "to make sure that everybody did everything consistently," or Nicholson's butchering, portioning and constructing meat, were tasks that – in the terms used in 29 CFR 541.302 (c), "primarily depend[ed] on intelligence, diligence and accuracy," and thus, however important to a fine restaurant's menu development, did not fall within the creative professional exemption.

In addition, we find that Crombie, Lesika, and Nicholson's managerial and supervisory duties as described by Andrzejewski were significantly more central and time-consuming than their work on menu creation casting further doubt on whether any "creative" (in the sense of exempt) work they did was a "primary duty." According to Andrzejewski, Crombie supervised other employees "[c]onstantly." Lesika spent "his whole day" managing; and both spent "[p]retty much most of" their work time managing; and Nicholson was primarily butchering meat and was responsible for a cooking station. As stated in *Karropoulos*, 128 F Supp 3d at 531, where "a chef's management duties were more important to his employer than his cooking duties, courts have found that the chef's primary duty is management." Especially given the principle that employees must fit "plainly and unmistakably within the terms and spirit" of an exemption for it to be applicable, we find that petitioners did not meet their burden to prove that Crombie, Lesika and Nicholson were exempt as creative professionals.

The Petitioners Failed to Meet Their Burden of Proof and the Commissioner's Calculation of Minimum Wages is Affirmed

We find that petitioners did not establish the applicability of either the executive, learned professional, creative professional, or administrative exemption. Although petitioners reserved the right to dispute DOL's calculations, they did not do so at the hearing, nor did they offer in evidence payroll documents, wage statements, or other evidence to dispute DOL's calculations. We find that the petitioners failed to challenge or dispute respondent's minimum wage underpayment calculation, and we affirm the minimum wages assessed in the order.

The Civil Penalty is Revoked

The order imposed a 100% civil penalty of $46,374.61. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent shall give:

> "due consideration to 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 record-keeping or other non-wage requirements."

SLSI Donohue testified respondent did not believe petitioners intentionally violated the law, "it was just an error;" there is no claim by respondent that petitioners violated record-keeping or other legal requirements, in addition to their failure to pay the proper wage; and 100% is a standard penalty imposed by the Commissioner. DOL provided no reasonable explanation of how

the factors were considered to justify the 100% penalty since Donohue found that petitioners did not intentionally violate the law, there were no record-keeping violations, and petitioners had no prior violations. We have previously found that the imposition of a 100% standard penalty contradicts the statutory requirement to give due consideration to the factors enumerated in the statute (*see Matter of Melissa Dewey,* PR 14-099 [March 2, 2016]). We revoke the Commissioner's imposition of a 100% civil penalty in the order.

The Liquidated Damages Are Revoked

The orders include liquidated damages in the amount of 25% or the wages owed. Labor Law §§ 218(1) provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. We find that petitioners demonstrated that they had a good faith belief that the four claimants were exempt from coverage of the minimum wage laws. Indeed, SLSI Donahue testified that the respondent did not believe petitioners intended to violate the law in taking the position that these cooks were exempt employees. Accordingly, we revoke the Commissioner's imposition of 25% liquidated damages in the order.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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." Here, respondent correctly determined that claimants were not paid owed wages and petitioners did not offer any evidence to challenge the imposition of interest. We therefore affirm the imposition of interest in the amended minimum wage order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is modified to revoke the civil penalties and liquidated damages assessed in the order; and

2. As so modified, the order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order is modified to revoke the civil penalties and liquidated damages assessed in the order; and

2. As so modified, the order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York,
on August 8, 2018.