STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KEHINDE O. ADEBOWALE (T/A SARAMIK DAY CARE), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated February 9, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-050 RESOLUTION OF DECISION

APPEARANCES

Kehinde Adebowale, petitioner pro se.

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

WITNESSES

Kehinde Adebowale and Adenike Gbadamosi, for petitioners.

Labor Standards Investigator Emily Nieves and Tamelia Bernard, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals on April 5, 2017, for review of two orders issued by respondent Commissioner of Labor against petitioner Kehinde O. Adebowale (T/A Saramik Day Care). Respondent Commissioner of Labor answered the petition on May 11, 2017. Upon notice to the parties a hearing was held on October 26, 2017, in New York, New York, before Vilda Vera Mayuga, Chairperson of the Board, and the 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 raised in the proceeding.

The order to comply with Article 19 (minimum wage order) directs petitioner to comply with Article 19 of the Labor Law and seeks payment to respondent for wages due and owing to Tamelia Bernard in the amount of $15,362.65 for the time period from September 5, 2010 through January 25, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $12,946.38, 100% liquidated damages in the amount of $15,362.65, and assesses a 100% civil penalty in the amount of $15,362.65, for a total amount due of $59,034.33.

The order under Article 19 of the Labor Law (penalty order) imposes a $500.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about August 26, 2008 through October 20, 2014; and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about September 5, 2010 through January 25, 2013.

Petitioner argues the orders are unreasonable because she employed claimant only from November 2010 through January 2013 and paid her all wages due and owing.

SUMMARY OF EVIDENCE

Claim form

On February 28, 2013, claimant Tamelia Bernard filed a minimum wage/overtime complaint against petitioner Kehinde Adebowale for unpaid wages. The claim period listed is for September 5, 2010 through February 25, 2013, and a weekly wage rate of $200.00 from September 5, 2010 through April 5, 2011 and $220.00 from April 5, 2011 through February 25, 2013, each week working Monday through Friday from 8:00 a.m. until 6:00 p.m. with lunch at 1:00 p.m. The claim form shows Bernard took one day off some time in 2011, and did not work on some holidays.

Testimony

Petitioner Kehinde Adebowale testified that she operates Saramik Day Care out of her home from 8:00 a.m. to 6:00 p.m. She is present every day until leaving to her other job that starts at 4:00 p.m. Petitioner hired claimant in November 2010 and agreed to pay her $300.00 a week to work Monday through Friday from 8:00 a.m. to 6:00 p.m., but claimant regularly arrived late to work. After the first two to three weeks of employment, petitioner lowered claimant's pay to somewhere between $180.00 to $240.00 per week. Petitioner always paid claimant in cash and kept no attendance or other payroll records.

Adenike Gbadamosi testified that she knew claimant from the community, provided her housing from approximately 2011 through 2013, and recommended her to petitioner for employment at the daycare. Claimant told Gbadamosi that petitioner had agreed to hire and pay her $300.00 per week, and claimant told Gbadamosi on Fridays she had been paid. Gbadamosi testified that claimant often woke up after 10:00 a.m. when claimant was supposed to be at work by 8:00 a.m.

Claimant Tamelia Bernard testified she worked for petitioner as a daycare assistant from May 2010 until January 25, 2013. She obtained the job through Gbadamosi who introduced her to petitioner. Claimant's duties involved caring for the children in the daycare and cleaning the daycare after it closed at 6:00 p.m. Her work hours were 8:00 a.m. to 6:00 p.m., but she sometimes started at 7:30 a.m. as the staff rotated to assist with one child who would regularly arrive at 7:30 a.m., or would stay after 6:00 p.m. if as child had not been picked up and nobody was at the home daycare to look after the child. Claimant never arrived after 8:00 a.m., and rarely saw petitioner who was either sleeping or not in the home during claimant's work hours. Claimant testified that petitioner had agreed to pay her $300.00 weekly, but never did. Instead, claimant's rate of pay was a minimum of $200.00 weekly regardless of the number of hours worked. Her pay was sometimes increased an additional $20.00 a week if a new child enrolled in the daycare, but it never went up to $300.00 weekly.

Respondent's investigator Emily Nieves testified that she investigated Bernard's claim against petitioner. During the investigation, Nieves requested payroll records from petitioner for the period August 26, 2008 through October 20, 2014, but petitioner indicated she did not have any such records. Since petitioner was unable to provide any payroll records, Nieves computed the wages owed claimant based on claimant's statements. Nieves' calculations considered holidays during which claimant indicated she did not work.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules (12 NYCRR) § 65.39.

Petitioner has the burden to show by a preponderance of evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Petitioner argues the orders are unreasonable because she paid claimant for all hours worked.

Article 19 of the Labor Law provides that "every employer shall pay to each of its employees for each hour worked" a minimum wage (Labor Law § 652). The minimum wage during the claim period was $7.25 per hour (12 NYCRR 142-2.1). Non-residential employees are also entitled to an overtime rate of one and a half times their regular rate of pay if they work more than 40 hours per week (12 NYCRR 142-2.2).

To assure that employees are properly paid their wages for the actual hours worked, the Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly regular and overtime hours worked, regular and overtime wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661, 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment (*Id.*). Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661, 12 NYCRR 142-2.7). The required recordkeeping

provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]). In the absence of legally required records, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same requirement is applicable to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Petitioner's only evidence was her own general testimony that she hired claimant and agreed to pay her $300.00 per week for a Monday through Friday, 8:00 a.m. to 6:00 p.m. workweek, but that claimant was frequently late to work. To support her position, petitioner offered Gbadamosi's testimony that repeated the $300.00 weekly agreement and claimant arriving late to work based on Gbadamosi's observation of claimant's wake up time. Petitioner testified that she does not maintain any payroll records and as such did not have a recording of claimant's entry and departure times for each day of work. The Board has repeatedly held that such general, conclusory and incomplete testimony concerning the work schedules of employees is insufficient to satisfy the high burden of precision required to meet an employer's burden of proof in the absence of required records (*Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]; *Matter of Bulganin Chandok, Sr.*, PR 15-205 at 10 [December 14, 2016]). Claimant provided credible, detailed and specific testimony of her hours worked, her assigned duties, and her sometimes fluctuating start and end times of work based on the needs of the children enrolled in the daycare. Investigator Nieves testified that her computations were based on claimant's statement and included days in which claimant did not work due to holidays. In the absence of legally required records, we find petitioner failed to meet her burden of proof to show the precise amount of work performed by claimant or to negate the reasonableness of respondent's determination of the hours worked and wages owed, which was based on the employee's claim.

Petitioner did not offer evidence challenging respondent's determination of interest, liquidated damages and civil penalty, and as such the minimum wage order is affirmed in its entirety.

Penalty Order

The penalty order assesses a $500.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about August 26, 2008 through October 20, 2014, and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about

September 5, 2010 through January 25, 2013. Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. Petitioner herself testified that she does not maintain payroll records, and she failed to present evidence challenging respondent's determination that she failed to provide wage statements. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Absent
Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on June 6, 2018.

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