STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
EDWARD D. VUGMAYSTER, JR. AKA EDWARD VUGMAYSTER AND BEST BUY LIQUORS, INC. FKA CRAZY EDDIE LIQUORS INC. T/A BEST BUY LIQUORS,	:	DOCKET NO. PR 18-033
Petitioners,	:	RESOLUTION OF DECISION
To Review Under Section 101 of the Labor Law: Order to Comply with Articles 6 and 19, dated June 13, 2018,	:	
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Edward Vugmayster, for petitioners pro se.

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

WITNESSES

Edward Vugmayster and Victoria Vugmayster, for petitioners.

Senior Labor Standards Investigator Shawn Abrilz, for respondent.

WHEREAS:

Petitioners Edward D. Vugmayster, Jr. AKA Edward Vugmayster and Best Buy Liquors, Inc. FKA Crazy Eddie Liquors Inc. T/A Best Buy Liquors filed a petition in this matter on July 10, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on June 13, 2018. Respondent filed her answer to the petition on September 28, 2018.

Upon notice to the parties a hearing was held in this matter on January 15, 2019, in New York, New York, before Gloribelle J. Perez, Member of the Industrial Board of Appeals, 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.

The order to comply with Article 6 and Article 19 of the Labor Law (hereinafter "order") under review directs compliance with Articles 6 and 19 and payment to respondent for unpaid wages due to Shakhzod Tulabov in the amount of $774.38 for the period from June 9, 2015 to June 14, 2015, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $371.36, liquidated damages in the amount of $774.38, and assesses a 50% civil penalty in the amount of $387.19, and assesses a separate civil penalty for violations of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $500.00, for a total amount due of $2,807.31.

Petitioners allege that the order is invalid and unreasonable because they never employed the claimant and do not have a position of maintenance worker. Petitioners further allege that the interest and penalties assessed in the order should be revoked.

SUMMARY OF EVIDENCE

Wage Claim

On June 30, 2015, claimant filed a claim against petitioners alleging that he worked 69 hours from June 9, 2015 to June 14, 2015 and that he received no pay for those hours of work. More specifically, the form states that he worked for 12 hours each day for the first 3 days, 13 hours for the next 2 days, and 7 hours for the final day of work. The claim form says that claimant's rate of pay was $8.75 per hour and that after working for 6 days, claimant learned that petitioners intended to pay him $8.00 per hour. Claimant told petitioners that the minimum wage was $8.75 per hour and petitioners told claimant not to return to work.

Petitioners' Evidence

Petitioner Edward Vugmayster's Testimony

Petitioner Edward Vugmayster (hereinafter "Vugmayster") testified that claimant never worked for his store and he does not know claimant. Vugmayster interviews all new hires and tells them what wage they will be making, which is either minimum wage or more than minimum wage depending on the person's qualifications.

In 2015, petitioners had about 8 employees working for the store, which was open from 9:00 a.m. to 9:00 p.m. from Monday to Thursday, from 9:00 a.m. to 10:00 p.m. on Friday and Saturday, and from 12:00 p.m. to 7:00 p.m. on Sunday. A manager, also named Edward, works for petitioners and he was working there in 2015. The manager would interview potential employees, but he seldom did so. The manager opened the store in the morning and Vugmayster would come to the store later in the day. Vugmayster testified that his wife handles the payroll for the store.

Vugmayster testified that his store received an email from someone in June 2015 who claimed to be a lawyer who said that petitioners owe someone money for work he did for them. Vugmayster offered, as evidence, payroll records sent to him by ADP for the pay period of May

28, 2015 to June 10, 2015 and quarterly tax records sent to him by ADP for the period April 2015 to June 2015. The payroll records include 9 employees, including petitioner's wife, Victoria Vugmayster.

Victoria Vugmayster's Testimony

Victoria Vugmayster is the petitioner's wife and she works for him in the store from about 9:00 a.m. until 6:00 or 7:00 p.m. from Monday to Saturday. She testified that she did not know the claimant, had never spoken with the claimant, and never met the claimant. Victoria Vugmayster did all of the payroll for petitioners. She testified that the time clock records for employees are maintained electronically and that when she looked into the system after speaking to respondent's investigator, she found that the time clock records from 2015 were no longer in the system.

Respondent's Evidence

Testimony of Shawn Abrilz

Senior Labor Standards Investigator Shawn Abrilz (hereinafter "Abrilz") testified for the respondent. Abrilz testified that he never spoke to the claimant. Abrilz testified that 11 pages of printed out emails were in the respondent's investigative file. Those emails were not received by Abrilz and Abrilz admitted that he did not know what the emails were about and that he does not read Russian. Abrilz also testified that he recommended a $500.00 penalty be assessed for a record-keeping violation because petitioners did not provide respondent with any records. Petitioners did not have a history of violations, so they assessed a $500.00 penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). Petitioners argue that they were not claimant's employer because claimant never worked at the store as a maintenance worker and they did not have the position of maintenance worker as a job at the store. We find, as discussed below, that claimant was not an employee of petitioners.

The Claimant Was Not an Employee

"Employee" is defined in Article 6 of the Labor Law as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). "Employed" as used in Labor Law means "permitted or suffered to work" (Labor Law § 2 [7]).

Petitioners' un-rebutted testimony establishes that claimant was not "employed" by petitioners. Petitioner and his wife, who worked in the store with petitioner, testified that they did not know the claimant and that claimant never worked for them. Petitioner testified that he does most of the hiring and firing and he never hired claimant. Victoria Vugmayster, who works in the store and does all of the payroll for the store, also testified to not knowing the claimant and that claimant never worked in the store. This evidence, while minimal, was sufficient to meet their burden of proof to establish that claimant was not "permitted or suffered to work" at the store and was, thus, not "employed" under the Labor Law (Labor Law § 2 [7]; *Matter of Aftabudeen Ahmad Edun (T/A Edun Variety Store)*, Docket No. PR 09-304, at p. 7 [December 14, 2011]).

The burden having shifted, respondent failed to refute petitioners' evidence with credible proof establishing that the claimant was employed by petitioners during the period of the claim. Claimant did not testify at hearing and there is no evidence that an investigator ever spoke to the claimant. The claim form is hearsay that was never substantiated by an investigator during the course of the investigation nor did Abrilz testify as to any communications that respondent had with claimant (*see Matter of Kassim A. Hussein A/K/A Kassim A. Kuszin A/K/A Kassim Hussan D/B/A Green Valley Mini Mart*, Docket No. PR 15-147, at pp. 4-5 [September 14, 2016]; *see also Matter of Li Jing (T/A Jingli US LLC) and Jingli US LLC*, Docket No. PR 14-293, at p. 6 [July 13, 2016]). Abrilz never spoke to claimant and did not identify who, in respondent's offices, received the claim form from the claimant or establish whether an agent of respondent talked about the information in the claim form with claimant. There was no testimony about whether claimant wrote the information on the claim form or an employee of respondent's wrote on the claim form. The only evidence of any communication with claimant were some emails that were admitted as records that are part of the respondent's investigative file. Those emails did not contain claimant's name, some of those emails were written in a language other than English, and Abrilz testified that they were printed out and placed in the investigative file, not received by him via email. Respondent also did not offer a translation of the emails into the record. The Board gives no weight to the emails. Without more, an unsubstantiated claim form is insufficient to overcome petitioners' evidence that they did not know who claimant is nor did someone by claimant's name ever work for them.

Based on petitioners' evidence, we find that claimant was not petitioners' employee during the claim period and we revoke the wage order accordingly.

The Article 19 Civil Penalty is Affirmed

Article 19 of the Labor Law requires employers to maintain accurate payroll records that include, among other things, their employees daily and weekly hours worked, wage rate, gross wages, deductions from gross wages, and net wages paid (Labor Law § 661; Department of Labor Regulations [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 and maintain them for no less than six years (*id.*)

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. In applying her discretion as to the amount of the penalty, Labor Law § 218 (1) directs the Commissioner to 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 recordkeeping or other non-wage requirements."

In this case, respondent assessed a $500.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about June 9, 2015 through June 14, 2015, in violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6. Abrilz testified that petitioners did not give respondent any records but also had no history of Labor Law violations; thus, they assessed a $500.00 penalty. Petitioners offered payroll records at the hearing, but the payroll records were insufficient to demonstrate compliance with the record keeping requirement of the Labor Law. The records are for the pay period of May 28, 2015 to June 10, 2015. The relevant period in this case is June 9, 2015 to June 14, 2015; yet, petitioners presented no payroll records for the period after June 10, 2015. Additionally, the pay roll records do not reflect the daily hours worked by employees, which is a required piece of information in the records that employers must maintain (Labor Law § 661; Department of Labor Regulations [12 NYCRR] § 142-2.6). The tax records that petitioners offered also do not include the required actual hours worked daily and weekly (*id.*) While petitioners met their burden to prove that claimant was not an employee, they failed to maintain accurate payroll records in compliance with the Labor Law for each employee for the relevant period. As such, we affirm the $500.00 penalty order included in the order to comply for failure to keep and/or furnish true and accurate payroll records for each employee from on or about June 9, 2015 through June 14, 2015.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is revoked; and

2. The penalty order is affirmed; and

3. The petition for review is granted in part and denied in part.

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 May 29, 2019.