STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
FRANK LOBOSCO AND 1378 COFFEE, INC. (T/A JULIANO GOURMET COFFEE),	:	
Petitioners,	:	DOCKET NO. PR 15-287
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order Under Article 19 of the Labor Law, both dated August 24, 2015,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Frank Lobosco, petitioner pro se, and for 1378 Coffee, Inc.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*John-Raphael Pichardo*), for respondent.

WITNESSES

Frank Lobosco, Stephen D. Hans, and Julio Rodriguez, Labor Standards Investigator, for petitioners.

Jeong Lee, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On September 16, 2015, petitioners Frank Lobosco and 1378 Coffee, Inc. (T/A Juliano Gourmet Coffee) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by respondent Commissioner of Labor on August 24, 2015. The petition was amended on October 28 and December 21, 2015. The Commissioner filed an answer on January 21, 2016.

Upon notice to the parties, a hearing was held on April 19, 2016 in New York, New York before J. Christopher Meagher, Esq., Member of 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 wages due and owing to claimant employee Roberto Miranda-Garcia in the amount of $33,236.22 for the period from April 27, 2006 to February 25, 2012, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $6,298.81, 25% liquidated damages in the amount of $8,309.06, and a 100% civil penalty in the amount of $33,236.22. The total amount due is $81,080.31.

The order under Article 19 of the Labor Law (penalty order) assesses petitioners 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 the Commissioner true and accurate payroll records for each employee for the period from April 27, 2006 through December 31, 2010; (2) $250.00 for the same conduct in violation of Labor Law § 661 and 12 NYCRR 146-2.1 for the period from January 1, 2011 through February 25, 2012; (3) $500.00 for violation of Labor Law § 661 and 12 NYCRR 146-2.3 by failing to furnish each employee a complete wage statement with every payment of wages for the period from January 1, 2011 through February 25, 2012; and (4) $500.00 for violation of Labor Law § 661 and 12 NYCRR 146-2.5 by failing to pay employees an hourly rate of pay for the period from January 1, 2011 through February 25, 2012. The total amount due is $1,500.00.

The petition alleges that claimant was paid in full for all hours worked and the penalties assessed in the orders are excessive and unreasonable.

SUMMARY OF EVIDENCE

The Wage Claim

On April 27, 2012, claimant Roberto Miranda-Garcia filed a claim under Article 19 of the Labor Law with the Department of Labor (DOL) alleging that he was employed as a "general helper" at petitioner's coffee shop from 1996 to 2012 and was owed unpaid minimum wages (overtime) during the period from April 27, 2006 through February 25, 2012. Claimant stated that he worked six days per week, Monday to Saturday from 7:00 a.m. to 5:00 p.m., with a half-hour for lunch. He was paid a flat rate of $630.00 per week for all hours worked, including those over 40 per week.

Testimony of Petitioner Frank Lobosco

Petitioner Frank Lobosco testified that he has owned and operated a coffee shop in New York City called "Juliano Coffee" for over 20 years. The restaurant is a small family business that petitioner runs by himself with just one employee. During the claim period from April 2006 to February 2012, and for many years before that time, he employed claimant Roberto Miranda-Garcia to clean the restaurant, order supplies, run errands, and serve customers.

Petitioner acknowledged that he did not keep any time or payroll records for his employee but asserted that he did not owe claimant any wages because he was paid in full and never worked any "extra hours" past the hours the shop was open to the public. According to statements he made at a conference held by DOL during its investigation, these were Monday to Friday from 7:00 a.m.

to 4:00 p.m. and Saturday from 7:00 a.m. to 2:00 p.m. Claimant had an hour for lunch and received one week paid vacation every year. He was paid a salary of $630.00 per week.

Petitioner conceded that it was fair to penalize him for failing to keep time and payroll records but argued that the 100% civil penalty assessed in the minimum wage order was excessive and unreasonable. DOL did not visit his coffee shop to see first-hand that it is a small two-person operation that sells only coffee and small food items. Petitioner claimed he was well known in the area as a good merchant and employer, had no prior Labor Law violations, and always treated claimant fairly. Claimant was a long-time good employee and he paid him at a rate much higher than minimum wage and that paid for similar work in the area. Claimant often came to work late, left early, and was permitted to attend to family and child-care matters during the day, all without loss of pay. Petitioner argued that he cooperated in good faith with the investigation by hiring an attorney and participating in a compliance conference to resolve the dispute.

DOL's Investigation

Senior Labor Standards Investigator Jeong Lee testified that on September 5, 2014, she issued petitioner a collection letter advising him of the details of the claim and requesting time and payroll records showing the hours worked and wages paid his employees during the period from April 27, 2006 to February 25, 2012. The letter further advised him that he should forward the records by September 19, 2014 or DOL would be compelled to calculate an underpayment of wages owed based solely on claimant's statements, including liquidated damages.

Petitioner failed to timely respond and on September 30, 2014, DOL issued him an initial recapitulation of wages due, plus 25% liquidated damages. Petitioner thereafter notified DOL that he was disputing the claim and had retained an attorney to represent him. DOL scheduled a Compliance Conference where the parties could discuss possible resolution of the dispute and where petitioner was invited to produce evidence to substantiate his reasons for disputing the claim.

At the conference held on February 18, 2015, petitioner asserted that claimant worked only during the shop's business hours, had a one-hour lunch break, and did not work to 5:00 p.m. In response, claimant reiterated the hours listed in his claim but clarified that he worked Saturdays from 7:00 a.m. to 2:00 p.m. In a follow up phone call with the investigator he further clarified that he received a one-hour lunch break during the week from Monday to Friday.

Based on claimant's statements clarifying the hours listed in his written claim -- i.e. he worked a total of 51 and one-half hours per week, Monday to Friday from 7:00 a.m. to 5:00 p.m. with an hour for lunch, and Saturday from 7:00 a.m. to 2:00 p.m. with a half-hour for lunch -- on April 1, 2015, Lee forwarded petitioner's attorney a revised recapitulation notice of wages owed in the amount of $16,002.49, plus liquidated damages of $4,000.62, along with a proposed settlement incorporating the terms. As the matter was not resolved, the case was referred for orders to comply. For unexplained reasons, Lee issued petitioner another notice on May 21, 2015, listing $33,236.22 in wages due, plus liquidated damages of $8,309.06. This latter notice was based on an earlier audit calculation DOL completed before claimant clarified the hours he worked and that utilized a 54 hour work week and only a half-hour lunch period Monday to Friday. The orders under review were issued on August 24, 2015 and repeated the error.

In support of the civil penalty assessed in the minimum wage order, Lee completed a report titled "Background Information – Imposition of Civil Penalty" that contains a series of boxes checked and other comments concerning the size of the firm, gravity of the monetary violation, non-wage violations, history of past violations, and other remarks. Lee testified generally that she considered the size of the firm, good faith of the employer, and wage and recordkeeping violations. She believed the employer had not been in good faith because he did not submit any payroll records during the investigation and declined to pay the amount due after a settlement offer had reduced the underpayment owed. Other than establishing a foundation for the penalty form, Lee did not explain how the size of the business and the gravity of the wage violation were considered. Under gravity of the violation, the form lists an underpayment due of $33,236.22, plus liquidated damages of $8,309.06. These amounts are repeated in the final recommendation for a 100% penalty. Finally, the form states that the interest to be assessed should not start until September 5, 2014, which was the date the employer was made aware of DOL's investigation.

In support of the penalties assessed in the penalty order, Lee completed a report called "Labor Law Article 6, 19 and 19-A Violation Recap" recommending that a $500.00 penalty be assessed for petitioner's failure to keep and/or furnish true and accurate payroll records, a $500.00 penalty for failure to issue claimant a complete wage statement with every payment of wages, and a $500.00 penalty for petitioner's failure to pay claimant an hourly rate.

GOVERNING LAW

Petitioners' Burden of Proof

Petitioners' burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; Board Rules (12 NYCRR) § 65.30; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

Minimum Wage and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay each of its covered employees the minimum wage in effect at the time payment is due (Labor Law § 652). During the time period relevant to this proceeding, the minimum wage was $6.75 per hour from January 1, 2006 through December 31, 2006; $7.15 per hour from January 1, 2007 through July 23, 2009; and $7.25 per hour from July 24, 2009 through December 31, 2013 (Labor Law § 652 [1]; 12 NYCRR 137-1.2; 12 NYCRR 146-1.2).[1] An employer must also pay every covered employee an overtime premium of one and one-half times the employee's regular hourly rate for hours worked over 40 in a week (12 NYCRR 137-1.3; 12 NYCRR 146-1.4). When an employee is paid on a salary or any basis other than an hourly rate, the regular rate shall be determined by dividing the total hours worked during the week into the employee's total earnings (12 NYCRR 137-3.5), and after January 1, 2011, by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or by the actual number of hours worked by the employee during the work week (12 NYCRR 146-3.5).

[1] The former Minimum Wage Order for the Restaurant Industry (12 NYCRR Part 137) was replaced by the Hospitality Industry Wage Order (12 NYCRR Part 146), effective January 1, 2011.

An Employer's Obligation to Maintain Adequate Payroll Records

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 and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 137-2.1; 12 NYCRR 146-2.1). 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.*).

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 137-2.2; 12 NYCRR 146-2.3). 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 and 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]; *Matter of Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept 2013]).

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

In a proceeding challenging such determination, the employer must then 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 employees' evidence *(id.*; *Tyson Foods, Inc. v Bouaphakeo,* 136 SCt 1036, 1047 [2016]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies 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 statements (*Doo Nam Yang v ACBL Corp.,* 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee,* PR 10-293 at 16 [April 10, 2014]).

The Board has previously summarized the applicable federal and state principles governing the employer's burden of proof in cases before the Board, holding that petitioners have the burden of showing that the Commissioner's wage order is invalid or unreasonable by a preponderance of

evidence of the specific hours that claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011).

FINDINGS

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

Petitioners Failed to Meet Their Burden of Proof to Establish That They Paid Claimant His Wages Due

We find that petitioners failed to meet their burden of proof to establish the precise hours worked by claimant and that he was paid for those hours or that the inferences supporting the calculation of wages made by the Commissioner in the minimum wage order are otherwise unreasonable.

Petitioner conceded that he did not maintain daily or weekly time records required by the Labor Law to establish the precise hours that claimant worked but asserted in conclusory fashion that he did not owe him overtime wages because claimant did not work any "extra hours" beyond the business hours the coffee shop was open to the public. These hours were Monday to Friday from 7:00 a.m. to 4:00 p.m. and Saturday from 7:00 a.m. to 2:00 p.m. According to petitioner, claimant received an hour for lunch and was paid in full at $630.00 per week. The Board has repeatedly held that such general, incomplete, and conclusory testimony concerning the amount of work performed by an employee is insufficient to meet an employer's burden of proof (*Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general, and conclusory testimony]). Similarly, the Board has held that bare assertions of an employee's alleged work schedule or that the employee never worked overtime are insufficient to shift the burden (*Matter of James A. Kane*, PR 11-092 at 7 [April 29, 2015] [general testimony concerning employee's work schedule and that he never worked overtime or more than a set number of hours per week held insufficient to shift the burden to the Commissioner]).

In the absence of adequate payroll records, the Commissioner may rely on the best available evidence and draw an approximation of claimant's hours worked and wages owed drawn from his statements, even where imprecise (*Mt. Clements Pottery Co.*, 328 US at 687-88 ["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 [recordkeeping] requirements of . . . the Act"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). In this case, the Commissioner's approximation of overtime wages due was based on claimant's statements that he worked Monday to Friday from 7:00 a.m. to 5:00 p.m., with an hour for lunch, and Saturday from 7:00 a.m. to 2:00 p.m., with a half hour for lunch. Petitioners failed to overcome that determination with sufficient and reliable evidence establishing the precise hours he worked, and that he was

paid for those hours, or with other credible and reliable evidence showing the Commissioner's determination to be unreasonable.

For the above reasons, we affirm the Commissioner's determination that petitioner owes claimant unpaid wages but modify the amount of wages owed. By administrative error, the final order directs payment of $33,236.22 in wages due. However, the investigation revealed that the correct underpayment was $16,002.49. We modify the order accordingly and direct the Commissioner to issue an amended order for such amount, with interest and liquidated damages reduced proportionally.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioners did not challenge the interest assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2) ("Any objections to the . . . order not raised in such appeal shall be deemed waived"). As discussed above, we modified the amount of wages owed. Interest, therefore, shall be reduced proportionally from the start date of September 5, 2014, as determined by the investigation.

Liquidated Damages

Labor Law § 663 (2) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due.

Petitioners did not challenge the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). Because we modified the amount of wages owed, as discussed above, the liquidated damages shall be reduced proportionally.

The Civil Penalty in the Minimum Wage Order Is Revoked

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, she must issue an order directing payment of any wages found to be due, plus "the appropriate civil penalty." Where the violation is not willful or egregious and there is no history of prior wage violations, in setting the amount of the penalty the Commissioner is required 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 . . . the failure to comply with recordkeeping or other non-wage requirements" (*id.*).

Petitioner argued various mitigating factors why the 100% civil penalty in the minimum wage order was unreasonable, including that he operated a very small business with just one employee, he paid the claimant at a rate higher than minimum wage and that paid for similar work in the area, and that the penalty was severe because he treated claimant fairly and had no prior Labor Law violations. In explaining the basis for the penalty, outside of establishing a foundation for the penalty form, investigator Lee did not explain how the size of petitioner's business or the gravity of the violation was considered in setting the penalty at 100%, versus a lesser penalty within the Commissioner's discretion. As to the latter factor, the penalty form lists an underpayment of $33,236.22, more than twice the actual monetary violation determined by the investigation. The administrative error was repeated in the final recommendation for a 100% penalty. In the circumstances of this case, we find the Commissioner failed to "duly consider" the factors concerning the size of the employer's business and the actual gravity of the violation and revoke the civil penalty in the minimum wage order accordingly (*Matter of Iqbal Ahmed*, PR 12-081 at 11 [April 13, 2016] [civil penalties in minimum wage order revoked for failure to "duly consider" two of the statutory factors required by Labor Law § 218]).

The Penalty Order Is Affirmed

Counts One and Two

Counts One and Two of the penalty order assess petitioners a $250.00 civil penalty for failure to keep and/or furnish true and accurate payroll records for the period April 27, 2006 through December 31, 2010 (Count One), and $250.00 for the period January 1, 2011 through February 25, 2012 (Count Two), in violation of Labor Law § 661 and 12 NYCRR 137-2.1 and 12 NYCRR 146-2.1, respectively. Petitioners did not submit evidence challenging the two penalties assessed in the order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Count Three

Count Three of the penalty order assessed petitioners a $500.00 penalty for failure to furnish each employee a complete wage statement with every payment of wages for the period from January 1, 2011 through February 25, 2012, in violation of Labor Law § 661 and 12 NYCRR 146-2.3. Petitioners did not submit evidence challenging the penalty assessed in the order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Count Four

Count Four of the penalty order assesses petitioners a civil penalty of $500.00 for failure to pay employees an hourly rate of pay for the period from January 1, 2011 through February 25, 2012, in violation of Labor Law § 661 and 12 NYCRR 146-2.5. Petitioners did not submit evidence challenging the penalty assessed in the order and the issue is thereby waived pursuant to Labor Law § 101 (2).

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to direct the Commissioner to issue an amended order requiring petitioners to pay the Commissioner $16,002.49 in unpaid wages, with interest and liquidated damages on such amount reduced proportionally and interest to start from September 5, 2014, and is otherwise affirmed; and

2. The civil penalty in the minimum wage order is revoked; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

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 May 3, 2017.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to direct the Commissioner to issue an amended order requiring petitioners to pay the Commissioner $16,002.49 in unpaid wages, with interest and liquidated damages on such amount reduced proportionally and interest to start from September 5, 2014, and is otherwise affirmed; and

2. The civil penalty in the minimum wage order is revoked; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York
on May 3, 2017.