

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

KASSIM A. HUSSEIN A/K/A KASSIM A. KUSZIN
A/K/A KASSIM HUSSAIN D/B/A GREEN
VALLEY MINI MART,

Petitioner,

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 March
4, 2015,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 15-147

RESOLUTION OF DECISION

APPEARANCES

Kassim A. Hussein, petitioner pro se.

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

WITNESSES

Kassim A. Hussein, Kevin Grose, and Robert Futral, for petitioner.

Edwin Rodenhaus and James Donohue, Labor Standards Investigators, for respondent.

WHEREAS:

On May 5, 2015, petitioner Kassim A. Hussein a/k/a Kassim A. Kuszin a/k/a Kassim Hussain d/b/a Green Valley Mini Mart filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against him by respondent Commissioner of Labor (Commissioner) on March 4, 2015. The Commissioner filed her answer on June 11, 2015.

Upon notice to the parties, a hearing was held on August 28, 2015 in Buffalo, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (minimum wage order) demands that petitioner comply with Article 19 of the Labor Law and pay the Commissioner \$5,084.00 in unpaid wages due and owing to claimant employee Salim Mohamed for the period from June 22, 2014 to August 7, 2014, interest at the rate of 16% calculated to the date of the order in the amount of \$465.78, liquidated damages in the amount of \$1,271.00, and a civil penalty in the amount of \$5,084.00. The total amount due is \$11,904.78.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioner a civil penalty of \$1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee for the period from June 22, 2014 to August 7, 2014.

The petition alleges that the orders should be dismissed because claimant was never employed by petitioner.

SUMMARY OF EVIDENCE

The Wage Claim

On September 8, 2014, claimant Salim Mohamed filed a claim for unpaid minimum wages with the Department of Labor (DOL) stating that he had been employed as a cashier at petitioner's grocery store during the period from June 22, 2014 to August 7, 2014. Mohamed claimed that he worked seven days per week, from 10:00 a.m. to 10:00 p.m. each day, with a one hour break for lunch, and was not paid any wages during the period of his claim.

Testimony of petitioner Kassim A. Hussein

Petitioner Kassim A. Hussein testified that he operated a convenience store known as the "Green Valley Mini Mart" in North Tonawanda, New York from July 1, 2014 to August 2015. Before opening his store he did renovations and purchased merchandise to stock the shelves. The store occupied a space of 900 square feet and sold drinks, cigarettes, snacks, cell phones, and small grocery items. It did not serve hot meals or make deliveries.

Petitioner testified that from the beginning his business was slow, averaging \$50.00 to \$100.00 in sales per day, and he could never afford to hire any regular employees. He operated the store by himself from 10:00 a.m. to 10:00 p.m. each day, seven days per week, and sometimes closed at 9:00 p.m. On occasions when he needed to run an errand or buy supplies he would close or ask one of his regular customers he was friendly with to watch the store for an hour or two until he returned. When he got back he told them to "go grab some stuff" from the shelves in exchange for their help. Petitioner's 13 year-old son helped him in the store throughout the time it was open and a person named David helped him install sheetrock when he was doing renovations in June.

Petitioner testified that he never employed Mohamed during the period of his claim and that Mohamed never worked in his store at any time. The dispute between the two grew out of a business arrangement where Hussein purchased equipment (coolers) to help Mohamed move to the Buffalo area in June 2014 and open his own convenience store. Mohamed lived in

petitioner's house and worked at another store in the area called the "Bastille Mini Mart" until renovations for his store were complete. After Mohamed opened his business in August, however, he refused to pay petitioner the money he owed him and Hussein told him to leave. The parties then sued each other in Small Claims Court, each claiming they were owed money from the other. After petitioner recovered the equipment he purchased, the civil action was dismissed.

Testimony of Kevin Grose and Robert Futral

Kevin Grose testified that he lived in the neighborhood and regularly visited Hussein's store since it first opened. He visited about five or six times a week to buy snacks and small groceries and chatted with Hussein for 15 or 20 minutes each time, wishing him well for starting a new business. Grose testified that he never saw any individual named Salim Mohamed working in the store when it first opened or at any time during the period it was in operation. Grose corroborated that he and other residents from the neighborhood named Lisa and Amy would watch the store for a few hours and run the cash register when Hussein was out doing errands.

Robert Futral testified that he lived near petitioner's store and first met him about a month after it opened. From that time to its closing he visited the store at least twice a day to buy beer, soda, candy, and snacks. He came in at different times in the morning and afternoon. Futral testified that in August 2014 he did not see any individual working in the store named Salim Mohamed. He corroborated that Kevin, Lisa, and Amy worked behind the counter and ran the cash register when Hussein was out doing errands.

DOL's Investigation

Labor Standards Investigator Edwin Rodenhaus testified that he issued petitioner a collection letter on September 22, 2014 advising him of the details of the claim and requesting that he submit records of all hours worked and wages paid the claimant during the period from June 2, 2014 to August 2, 2014. Petitioner responded that he operated his store by himself from 11:00 a.m. to 8:00 p.m. each day and had never employed Mohamed. He further maintained that claimant owed him money from a business deal that had gone bad. In several conversations with claimant, Mohamed confirmed that he had been employed at petitioner's store and had worked the hours listed in his claim. Claimant also stated that he lived in petitioner's house and was owed money under an arrangement with petitioner where Hussein had agreed to help him open a delicatessen. Both parties indicated that the matter was in civil court. At a compliance conference held on January 23, 2015, they reiterated their respective versions of the events and the matter could not be resolved.

Petitioner did not submit payroll records during the investigation and DOL determined that claimant had been employed by petitioner and worked the hours stated in his claim. Rodenhaus testified that he found it unlikely that Hussein could operate the store by himself when it was open seven days and 70 plus hours per week. The orders under review were issued on March 4, 2015. In support of the civil penalty assessed in the penalty order, Rodenhaus completed a report titled "Labor Law Articles 6, 19 and 19-A Violation Recap" recommending that a \$1,000.00 penalty be assessed because petitioner failed to keep time and payroll records for the claimant.

FINDINGS

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

Petitioner Met His Burden to Establish That Claimant Was Not Employed

Petitioner's 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]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

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

Petitioner testified that he operated a convenience store in North Tonawanda, New York from July 1, 2014 to August 2015. The store was open seven days a week, from 10:00 a.m. to 10:00 p.m. each day, and sometimes closed earlier at 9:00 p.m. Because the store had low business volume, petitioner could never afford to hire any regular employees and operated the store by himself. His son helped him throughout the time it was open and when petitioner had to run errands or buy supplies he would close the store or ask one of his regular customers to watch it until he came back. Petitioner testified that he never employed claimant during the period of the claim and that Mohamed never worked in the store at any time.

Petitioner's testimony was corroborated by one of his regular customers, Kevin Grose, who testified that he visited the store five or six times a week since it first opened and never saw any individual working there by the name of Salim Mohamed. A second customer, Robert Futral, testified that he started visiting the store twice a day about a month after it first opened. In August 2014 he did not see any individual working there by the name of Salim Mohamed. Both witnesses corroborated that neighborhood residents occasionally watched the store and ran the cash register when petitioner was out doing errands.

Petitioner's evidence met his burden of proof to establish that claimant was not "permitted or suffered to work" at his establishment and was therefore not "employed" under the Labor Law. The burden having shifted, DOL failed to rebut petitioner's evidence with credible or reliable evidence establishing that claimant worked at the store during the period of his claim. Claimant did not testify at hearing and the claim form and statements he made to investigators during the investigation are hearsay that does not outweigh petitioner's testimony and proof to the contrary (*Matter of Amlani*, PR 14-265 [July 13, 2016 at 6-7] [citing prior cases, claim form and hearsay statements from claimant during investigation concerning employment relationship with petitioner are insufficient to rebut petitioner's testimony to the contrary]).

The Commissioner argued in closing that it was unlikely petitioner could operate his business by himself without employees because it occupied a 900 square foot space and was open seven days per week. However, we find petitioner's testimony plausible given that he ran the store as a small family business and business was slow from the start. The Commissioner also argued that petitioner's testimony was inconsistent with statements he made during the

investigation concerning the store's hours. The inconsistency is peripheral to the central issue in the case, however. Petitioner's testimony on the issue of whether claimant was ever employed was consistent and not rebutted by the Commissioner. Based on petitioner's uncontroverted evidence, we find that claimant was not "employed" by petitioner and revoke the minimum wage order accordingly.

The Penalty Order 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 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 and maintain them for no less than six years (*Id.*).

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, he must issue an order directing compliance therewith, which shall describe particularly the nature of the violation, and include "an appropriate civil penalty." Where the violation involves "a reason other than the employer's failure to pay wages," the amount of the penalty shall not exceed \$1,000.00 for a first violation, \$2,000.00 for a second violation, and \$3,000.00 for a third or subsequent violation.

The penalty order in this case assessed petitioner a \$1,000.00 civil penalty for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for *each* employee for the period from June 22, 2014 to August 7, 2014. Although petitioner proved that claimant was not employed during that time period, he admitted that various individuals worked in the store before and after it first opened. These included a person who helped him install sheetrock in the store in June, petitioner's son who worked in the store throughout the entire time it was open, and customers who watched the store and ran the cash register when petitioner was not there (*see, Matter of Abdullah*, PR 12-124 at 10 [March 2, 2016] [relatives are not excluded from the definition of "employee" and their coverage within Article 6 and 19 orders to comply is permissible]). While these individuals may have worked in the store for short periods of time, they were nonetheless "permitted and suffered to work" and were therefore "employed." Petitioner did not "maintain" accurate payroll records for *each* of these employees for the time period covered by the penalty order and we affirm the order accordingly.

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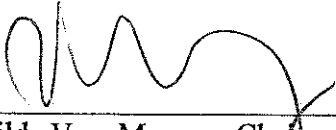
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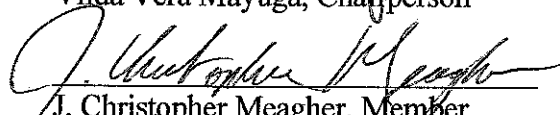
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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

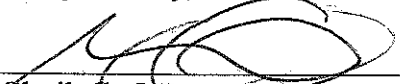
1. The minimum wage order is revoked; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.



Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

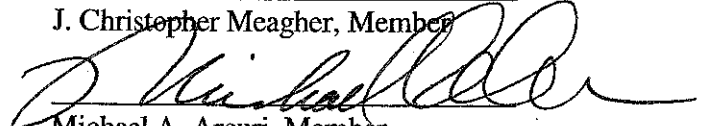
Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York on
September 14, 2016.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.

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 Syracuse, New York on
September 14, 2016.