STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MELISSA TEJEDA (T/A MELISSA SPA & BEAUTY CENTER, CORP.) ALSO (T/A MELISSA BEAUTY SALON),	
Petitioner,	DOCKET NO. PR 17-063
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 5 and 19 of the Labor Law, dated March 15, 2017,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Melissa Tejeda, Owner, Bronx, petitioner pro se.

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

WITNESSES

Melissa Tejeda, Melida Adames, Ana Tineo for petitioner.

Supervising Labor Standards Investigator Jeong Hwa Lee for respondent.

WHEREAS:

Petitioner Melissa Tejeda (T/A Melissa Spa & Beauty Center, Corp.) also (T/A Melissa Beauty Salon) filed a petition in this matter on April 14, 2017, pursuant to Labor Law § 101, seeking review of an order issued against her by respondent Commissioner of Labor on March 15, 2017. Respondent filed her answer to the petition on May 18, 2017.

Upon notice to the parties a hearing was held in this matter on September 27, 2017, in New York, New York before Molly Doherty, Board Member, 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 under Articles 5 and 19 (penalty order) assesses a $1,000.00 civil penalty 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 September 11, 2015; and a $1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least 30 minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from on or about September 11, 2015. The total amount due is $2,000.00. There is no wage claim at issue in this matter because the wage claim was withdrawn prior to the issuance of the order to comply.

Petitioner alleges that the orders are invalid and unreasonable because she only used independent contractors and the initial claimant was a volunteer, thus, petitioner was not required to maintain and furnish payroll records or provide 30-minute meal periods.

SUMMARY OF EVIDENCE

Petitioner Melissa Tejeda was the owner of a beauty salon located in the Bronx, New York, known as Melissa Spa & Beauty Center, Melissa Beauty Salon or Melissa Beauty Center. Tejeda was the owner of the salon during the relevant period.

Tejeda testified that she did not have any employees working for her but only independent contractors. She further testified that the individual who initially filed a wage claim with respondent was a volunteer who petitioner was helping by letting her wash hair at the salon and having all the stylists at the salon give her some of their tips. Tejeda would also give her some money. Tejeda had four chairs in her salon and each stylist rented one to use in exchange for a percentage of each amount received from their own customers.

Melida Adames, Tejeda's mother, was the salon's prior owner, but continued working in it after selling it to Tejeda. Adames testified that she was an independent contractor and paid 50% of her earnings to rent a chair in petitioner's salon. She charged customers the prices for services on the price list published by petitioner. Adames did not work at any other salon while working at petitioner's salon and did not have workers' compensation insurance.

Ana Tineo was a beautician in the salon. Tineo testified that she was an independent contractor with her own clients, set her own schedule, and paid 50% of her earnings to petitioner to rent the chair at the salon. Tineo testified that claimant helped by cleaning up around the salon and the stylists would all give some money to petitioner or petitioner's mother for claimant.

Supervising Labor Standards Investigator Jeong Lee testified that the Department of Labor received claimant's unpaid wages claim form, made several visits and phone calls to petitioner's salon, and mailed her letters, but never received any information from petitioner. Lee testified that respondent issued a penalty order of $1,000.00 for each count because it did not receive any records from petitioner nor a response during any of their attempts to reach her.

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 (12 NYCRR) § 65.39.

Petitioner's burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). 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]). Petitioner argues that she did not have any employees and, thus, was not required to maintain payroll records or provide a 30-minute meal period. We find, as discussed below, that petitioner was an employer.

Claimant was an Employee not a Volunteer

Petitioner alleges that claimant was a volunteer who they were helping, not an employee. Article 19 of the Labor Law defines an "employee" as "any individual employed or permitted to work by an employer in any occupation" (Labor Law § 651 [5]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). There are a specific number of classes of persons who, although "permitted to work" as a matter of law, are exempted from Article 19, as volunteers (*Id.; see e.g. Matter of DeJean Gathers*, PR 14-239 at 5 [July 13, 2016]). Labor Law § 651 (5) sets forth specific parameters for which someone can be classified as a volunteer including: (1) if the employer is operating solely for religious, charitable or educational purposes; (2) the work is for a religious or charitable institution and in return for the work the person gets charitable aid or the person is a student or the person has a physical or mental impairment impacting their earning capacity; (3) the work is for a summer camp of a religious, educational or charitable institution; (4) the person is a student working for a college fraternity, sorority, student or faculty association; (5) the work is for government; or (6) the work is at a recreational or amusement event for no more than eight days in a calendar year. (*Id.*). Claimant does not fall into one of those specific classes of persons exempted from Article 19 despite petitioner's attempt to classify her as a volunteer (*id.*).

Tejeda's own testimony, as well as that of one of her witnesses, was that claimant received money for the work she performed. Also, petitioner benefitted from claimant's work by providing a service to her business at petitioner's direction (*see e.g. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 300-302 [1985]; *Matter of Carver v. State of N.Y.*, 26 N.Y.3d 272 [2015]). The evidence presented by petitioner herself supports our finding that petitioner suffered or permitted claimant to work and, thus, she was an employer during the relevant period.

Petitioner Failed to Maintain Payroll Records

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things, the number of hours worked daily and weekly,

the amount of gross wages, deductions from gross wages, and allowances, if any (*id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]). Petitioner neglected to offer the legally required records of the days that claimant worked and the wages she paid her either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioner failed to maintain legally required payroll records.

Petitioner Failed to Provide Required Meal Period

Petitioner also failed to meet her burden of proof that employees were provided 30-minute meal periods as required by Labor Law § 162. Petitioner asserted that because all her stylists were independent contractors, they took breaks when they wanted to take breaks and petitioner was not required to provide 30-minute meal breaks each work day. However, as discussed above, at the very least claimant was an employee entitled to 30-minute meal periods and petitioner did not offer any evidence to prove that claimant was provided with the required meal period each work day. As such, we find that respondent's determination that petitioner was not in compliance with Labor Law § 162 is reasonable and valid.

The Penalty Order is Affirmed

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 this case, respondent assessed a $1,000.00 penalty against petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about September 11, 2015 in violation of Labor Law § 661 and 12 NYCRR 142-2.6. Respondent also assessed a $1,000.00 penalty against petitioner for failure to provide employees with at least 30 minutes off for the noon day meal in violation of Labor Law § 162. Petitioner failed to introduce any evidence at hearing that she kept required records or that she provided employees with at least 30-minute meal periods. Thus, we affirm the penalty order as to both counts.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The penalty order is affirmed; and

2. The petition for review be, and it hereby is, denied.

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
December 13, 2017.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The penalty order is affirmed; and

2. The petition for review be, and it hereby is, denied.

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
December 13, 2017.