

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

MICHAEL SANSEVERINO AND ROCCO'S PIZZA :
& PASTA OF WEBSTER, INC. AND ROCCO'S :
PIZZA & PASTA OF ONTARIO, INC. (T/A :
ROCCO'S PIZZA AND PASTA), :

Petitioners,

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
November 4, 2010,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 11-002

RESOLUTION OF DECISION

APPEARANCES

Michael Sanseverino, petitioner pro se and for Rocco's Pizza & Pasta of Webster, Inc. and Rocco's Pizza & Pasta of Ontario, Inc.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin A. Shaw, Larissa C. Bates and Matthew Robinson-Loffler), for the respondent.

WITNESSES

Jody Sanseverino, for petitioners.

Brett Griffin, Nicole Cagiano, Heather Duell, Mike Aggas, and Mary Coleman, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on January 3, 2011, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Michael Sanseverino, Rocco's Pizza & Pasta of Webster, Inc. and Rocco's Pizza & Pasta of Ontario, Inc. (T/A Rocco's Pizza and Pasta)

(collectively "Rocco's Pizza") on November 4, 2010. Petitioners filed an amended petition on February 15, 2011.

Upon notice to the parties, a hearing was held in this matter on March 22, 2013, in Rochester, New York before LaMarr J. Jackson, Esq. member 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, make statements relevant to the issues and file legal briefs.

The order to comply with Article 19 (wage order) directs compliance with Article 19 and payment to the Commissioner for wages due and owing to 33 employees in the amount of \$13,592.36 for the time period April 14, 2008 through April 18, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$2,321.04, and assesses a civil penalty in the amount of \$6,796.18, for a total amount due of \$22,709.58.

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against petitioners for violation of Labor Law § 661 for failing to keep and/or furnish true and accurate payroll records for each employee.

The petitioners allege that the orders are invalid because their business had been structured with two separate companies in the belief that they would not have to pay overtime pay rates if their employees worked at the two separate stores in excess of 40 hours per week. The petitioners claimed that their accountant had telephoned the Department of Labor (DOL) and had been told by someone that this structure would permit the avoidance of the overtime pay obligation.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Jody Sanseverino, wife of petitioner Michael Sanseverino, testified that she and her husband had two stores; she was listed as the owner of the Ontario, New York location and her husband was listed as the owner of the Webster, New York location. She further stated that when they were going to open the Ontario store, their accountant called the DOL and was told that keeping the businesses separate each with their own federal employer identification number would prevent having to pay workers overtime if they worked more than 40 hours only by combining the hours worked at both locations. Mrs. Sanseverino denied attempting to circumvent the law by sending workers to one location if they were nearing 40 hours at the other location.

Petitioner Michael Sanseverino testified he had been in business over seven years and never had a problem with the DOL. He stated that he did not open the second store to avoid paying overtime: "Why would I invest that time? I invested because I wanted to open a second business, not to beat people's overtime. I was in business six years before that." He testified that his employees wore the same T-shirt uniform at both locations and that he did scheduling for both stores and that sometimes his managers did the scheduling.

The petitioners rested their direct case without calling any other witnesses or introducing any documents or directly addressing the wage claims or the penalties aside from general statements that they did nothing wrong, that there “was nothing malicious or anybody trying to get anything over on anybody.” Petitioners’ closing statement said that they did not send an employee over to the other location if they were getting close to 40 hours and that: “The reason I allowed employees to work in both locations was to make it easier for them by not having to go look for a second job somewhere else.” Petitioners stated that they did pay overtime to employees as warranted and that the documents they provided to the DOL during their investigation proved it.

Respondent’s Evidence

Claimant Nicole Cagiano testified she worked at both locations and that Mr. Sanseverino was her boss at both stores. Her job was front counter which was making subs and fryers, “a little bit of everything.” She further testified that she wore the same green shirt that stated “Rocco’s Pizza and Pasta” at both locations and that Mr. and Mrs. Sanseverino did the work schedule for both stores. Claimant testified she sent an email to the DOL on January 30, 2010, stating she worked for two and a half years at Rocco’s pizza locations sometimes 70 hours a week and was not paid overtime. She also testified that she sent the email because she was not sure if she should get overtime from working at both stores during the same pay period. She stated that she was paid by two different checks (one for each store) by Mr. Sanseverino when she worked at both locations.

Claimant Brett Griffin testified he worked for the petitioners for three years from March 2007 to early 2010. He first worked at the Webster store and then at the Ontario store when it opened. He started working washing dishes and then moved on to: “doing some line stuff like frying and then I ended up making pizzas and then . . . there was a point where I was supervising other employees.” He performed the same duties at both locations. He testified that the schedule was done by Mr. or Mrs. Sanseverino for both locations for each week and that Mr. Sanseverino was his boss at both stores. He stated he would start work in the morning at the Webster store and finish his shift at night at the Ontario store. He wore the same uniform at both stores and worked a combined total of 55 to 60 hours at both stores during his employment.

Griffin testified that he asked Mr. Sanseverino: “how . . . if they owned both stores and we would get the same two pay checks, signed by the same person, why we would not be receiving overtime,” and that he was told “they are two different entities and that overtime does not need to be paid because of their two separate locations.” Griffin stated he never thought or knew it was a problem until he was contacted by the DOL.

Claimant Heather Duell testified she worked at both Rocco’s Pizza locations from the summer of 2010 until the summer of 2012. She was first hired as a “front end girl” then “moved my way up to doing subs and fryers.” She stated her schedule was set by Mr. or Mrs. Sanseverino or Don Walter, the assistant manager, if the Sanseverino’s were not available. She further stated she wore the same Rocco’s Pizza black and green shirt at both stores and she was paid weekly by check. She received one check for each store, sometimes driving between both locations to get paid. Both checks were signed by Jody Sanseverino. Duell testified she considered Mr. Sanseverino to be her boss at both locations.

Supervising Labor Standards Investigator Mary Coleman testified she was familiar with the investigation against Rocco's Pizza based on a complaint filed for failure to pay overtime. Coleman stated she was not the investigator on the case and that Colleen Balkin of the DOL's Rochester office was the investigator who wrote the reports in the investigative file.

Coleman stated she was familiar with the narrative reports written by Balkin and used to compute the under payments based on a failure to pay overtime and the fact that the investigation included a field visit to the business and interviews with the petitioners. Coleman also stated the employer was advised to do a self-audit and compute overtime owed to employees who worked at both locations. She did not know if the self-audit was accepted by the DOL and believed that the respondent did its own audit. She testified that the DOL believed that both stores were operated by the same employer, and the employer was evading paying overtime by having people work at two different locations. The investigation demonstrated that certain employees worked over 40 hours a week between two locations and they were not properly compensated at time and a half for overtime.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 [1]). An order issued by the Commissioner shall be presumed "valid" (*id.* § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*id.* § 101 [3]).

A petition filed with the Board challenging the validity or reasonableness of an order issued by the Commissioner shall state "in what respects [the order] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). The Board's Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30). Therefore, the burden is on the petitioners to prove, by a preponderance of the evidence, that the orders under review are not valid or reasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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).

The Petitioners were the Claimants' Employers and Failed to Properly Pay Overtime

The respondent determined that petitioners failed to pay overtime. Regulations then in effect required an employer to pay an employee overtime at a wage rate of one and one-half times the employee's regular rate for hours in excess of 40 hours in one workweek (12 NYCRR 137-1.3 [2008]).¹ We find that the evidence amply demonstrates that the petitioners, while setting up separate corporations for their two stores, essentially operated the business as a single

¹ As of January 1, 2011, the restaurant industry is covered by the Hospitality Industry Wage Order (12 NYCRR 146).

enterprise and had an obligation to pay their employees overtime for time worked in excess of 40 hours per week split between two stores.

The petitioners admit that they structured their business with the belief that by having separate corporations they could shift employees between stores and avoid having to pay overtime for time worked at two stores in excess of 40 hours during one work week. This belief was wrong and the petitioners were effectively joint employers of the employees that were shifted back and forth between the two stores. “Employer” as used in Article 19 of the Labor Law includes “individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer.” (Labor Law § 651 [6]). “Employed” means “permitted or suffered to work” (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law, defines “employ” to include “suffer or permit to work” (29 USC § 203 [g]), and “the test for determining whether an entity or person is an ‘employer’ under the New York Labor Law is the same test . . . [used] for analyzing employer status under the Fair Labor Standards Act” (*Chu Chung v. New Silver Palace Restaurant, Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]). Under both laws, more than one entity or individual can be an employee’s employer. (*See, e.g., Zheng v. Liberty Apparel Co.*, 355 F3d 61, 66, 78 [2d Cir 2003]; *Moon v. Kwon*, 248 F Supp 2d 210, 237-8 [SDNY 2002]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010]; and *Matter of Stephen B. Sacher, Travco Inc. and Sacher & Co., CPA, P.C.*, PR 11-151 [April 10, 2014]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the U.S. Court of Appeals for the Second Circuit explained the test used for determining employer status:

“[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the ‘economic reality’ presented by the facts of each case . . . Under the ‘economic reality’ test, the relevant factors include ‘whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records . . . No one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” *Id.* at 139 (internal quotations and citations omitted).

In the present case, Michael and Jody Sanseverino ran their two stores essentially as a single business. They regularly used many of their employees at both locations during the work week; they scheduled the employees for both locations; they hired and had the power to fire employees at both locations; they set the rate and method of payment; and they maintained the employment records for both locations. They met all the *Herman* factors and about the only thing that they did separately was to pay the employees with separate checks for the time that they worked in each store during the pay period. The economic reality was that the workers were not working in separate and distinct businesses. They were doing the same job functions at different locations and when their work time was in excess of 40 hours during one work week they were entitled to the overtime pay rate for those hours.

The petitioners shifted their position regarding the overtime issue between what they said during interviews with the DOL, their petition, and their testimony at the hearing. They shifted from claiming that they had sought advice and been told that it would be acceptable to not have to pay overtime to employees who worked at two separate stores for more than 40 hours per week, to at other points claiming that the overtime issue was of no concern and that they paid many of their employees overtime. While claiming no bad motive, the effect of the shifting of employees back and forth between stores during the same work week and paying them with separate checks resulted in the employees being denied overtime pay for hours worked in excess of 40 during a week. The DOL was able to use the petitioners' payroll records to calculate the total number of hours that the employees who worked at both locations worked during a single week to determine the amount of overtime owed. The petitioners offered no evidence at the hearing to counter the DOL's overtime calculations.

The testimony of employees Cagiano, Griffin and Duell was consistent and established that the workers were doing the same jobs for the same type of business at the two locations; were supervised by Mr. Sanseverino at both locations; wore the same uniforms; and the only difference was the store location and the separate paychecks. The separate corporations for the two stores were joint employers and a common business enterprise and during a single work week the employees were entitled to be paid at the overtime rate for hours in excess of 40 per week.

The petitioners did not meet their burden of proof of offering evidence to show that the wage order was invalid or unreasonable. However, Heather Duell did testify that she worked for petitioners from the summer of 2010 until the summer of 2012. The wage order indicates that Ms. Duell is owed \$421.66 for the period of November 2, 2009 to April 18, 2010. Given Ms. Duell's testimony, we modify the wage order to remove her from the list of employees owed any amount since the period covered by the wage order is before Ms. Duell worked for petitioners. We therefore modify the Commissioner's determinations finding that the petitioners owe the named employees, with the exception of Heather Duell, unpaid wages as valid and reasonable. The amount of the wages owed is reduced to \$13,170.70.

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 percent per centum per annum."

The petitioners did not challenge the interest assessed in the wage order. The issue is thereby waived pursuant to Labor Law § 101 (2). We find that the computations made by the Commissioner in assessing interest in the order are valid and reasonable, but the amount must be recalculated using the new total amount of unpaid wages found to be due as explained above.

Civil Penalties

Although the petition did not challenge the civil penalty assessed in the wage order, and

the issue is therefore waived pursuant to Labor Law § 101 (2), we must modify the amount consistent with our finding that the wage order is reduced to \$13,170.70. Respondent is instructed to recalculate the amount of the civil penalty in the wage order accordingly.

The penalty order is affirmed

The petition did not challenge the penalty order. The issue is therefore waived pursuant to Labor Law § 101 (2). We find that the considerations and computations that the Commissioner was required to make in connection with the penalty assessed in the order is valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified consistent with our decision to reduce the wages due and owing to \$13,170.70, and to recalculate interest and the civil penalty on the new principal amount of \$13,170.70; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, otherwise dismissed.



Vilda Vera Mayuga, Chairperson
At Albany, New York



J. Christopher Meagher, Member
At Albany, New York

LaMarr J. Jackson, Member
At Rochester, New York

Michael A. Arcuri, Member
At Syracuse, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on July 22, 2015.

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The penalty order is affirmed

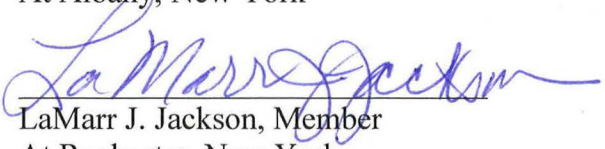
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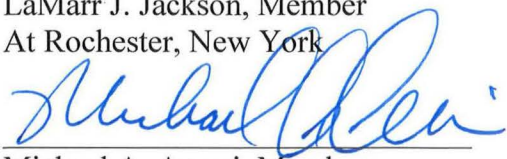
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