STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MICHELE BARNETT OCCHINO A/K/A MICHELLE YVETTE OCCHINO AND MICHELE BARNETT OCCHINO AGENCY, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 5, 6 and 19 of the Labor Law, dated October 1, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 18-078 <u>RESOLUTION OF DECISION</u>

APPEARANCES

Michele Barnett Occhino, for petitioners pro se.

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

WITNESSES

Michele Barnett Occhino, for petitioners.

Erika Baptiste and Senior Labor Standards Investigator Tara Byrnes McLaughlin, for respondent.

WHEREAS:

On December 3, 2018, petitioners Michele Barnett Occhino a/k/a Michelle Yvette Occhino (hereinafter "Occhino") and Michele Barnett Occhino Agency, Inc. filed a petition for review of an order issued against them by respondent Commissioner of Labor on October 1, 2018. Respondent filed her answer on January 7, 2019. Upon notice to the parties a hearing was held on June 19, 2019 in White Plains, New York, before Administrative Law Judge Jean Grumet, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Articles 5, 6, and 19 of the Labor Law (hereinafter "order") directs payment of $29,152.06, including $7,876.00 for wages due and owing to claimant Erika Baptiste (hereinafter "Baptiste") for the period July 27, 2015 to December 31, 2015, together with interest calculated to the date of the order in the amount of $3,469.76, liquidated damages in the amount of $7,876.00, and a civil penalty of $3,938.00, for a total amount of $23,159.76 in wages; $520.00 in supplemental wages owed to Baptiste, together with interest calculated to the date of the order in the amount of $222.02 liquidated damages in the amount of $520.00, and a civil penalty of $260.00, for a total amount of $1,522.02 in supplemental wages; $400.00 in unlawful deductions owed to Baptiste, together with interest calculated to the date of the order in the amount of $176.22, liquidated damages in the amount of $400.00, and a civil penalty of $200.00, for a total amount of $1,176.20 in unlawful deductions; $100.00 in wages owed to Baptiste, together with interest calculated to the date of the order in the amount of $44.06, liquidated damages in the amount of $100.00, and a civil penalty of $50.00, for a total amount of $294.06 in wages. The petitioners were also assessed a $1,000.00 civil penalty for failing to provide a meal break pursuant to Labor Law §162; a $1,000.00 civil penalty for failing to maintain records in violation of Department of Labor Regulations (12 NYCRR) § 142-2.6; and a $1,000.00 civil penalty for failing to provide wage statements in violation of Department of Labor Regulations (12 NYCRR) § 142-2.7 for a total of $3,000.00 in civil penalties.

The amended petition alleges that the order is invalid and unreasonable because: (1) Baptiste was paid minimum wage; (2) Baptiste was provided with 30-minute meal breaks; (3) petitioners kept proper records for all employees during the relevant period; (4) Baptiste was not an employee until January 2016; (5) Baptiste was not owed supplemental wages; and (6) no unlawful deductions were taken from Baptiste's pay. The petition also contested all civil penalties, liquidated damages and interest assessed in the order.

SUMMARY OF EVIDENCE

Wage Claim

Baptiste's February 17, 2016 claim for unpaid wages states that Occhino hired her as a "marketing account representative – sales" on July 27, 2015 and that her pay rate was $12.00 per hour through September 2015 and $13.00 per hour in October through December 2015. The claim lists the hours Baptiste worked each biweekly payroll period ending from July 24, 2015 to January 8, 2016, and wages she was paid including cash payments beginning August 14, 2015 and checks beginning October 23, 2015. The claim stated that Occhino never gave Baptiste her last paycheck, and that Baptiste may have had 10 breaks throughout her employment. Baptiste also filed a claim for unpaid wage supplements on February 17, 2016 asserting that petitioners owed her wage supplements including holiday pay for three holidays (Labor Day, Christmas Eve and Christmas), one day of vacation pay and two days of sick pay; reimbursement for expenses; and an "undetermined amount of compensation for commissions. I am not sure of the structure…. I asked Michele to explain it to me. She gave me a check for $364.59 with no explanation."

Testimony of Petitioner Michele Barnett Occhino

Occhino is the owner of a State Farm Insurance (hereinafter "State Farm") franchised agency in Mahopac, New York, which, she testified, opened for business on August 1, 2015. The

agency's hours of operation were 9:00 a.m. to 5:00 p.m. Monday, Tuesday, Wednesday and Friday, and 9:00 a.m. to 7:00 p.m. on Thursdays. The staff came in to work at 8:45 a.m. and left at 5:15 p.m. except on Thursdays, when they worked later. Employees were provided with a 30-minute lunch break. Saturday hours were initially 10:00 or 11:00 a.m. to 2:00 p.m. but were discontinued after a month and a half due to lack of business and thereafter, were by appointment only.

The agency employed three employees at the start, but by the second month, "Ashleigh" was the only employee besides Occhino, with Baptiste "coming in and out." In addition, two high school summer interns paid by a Putnam County youth program, one of whom was Baptiste's daughter, also assisted at the agency during July and August 2015. During the agency's pre-opening period, Baptiste drove her daughter to the office, "hung out" there, and assisted with painting the office and hanging things up. Because Baptiste was on site all the time while her daughter was interning and expressed an interest in learning the business, Occhino gave her restricted access to the State Farm website at the end of August or early September. With restricted access, Baptiste could log in, see the names of clients, and have access to the State Farm library which provided course materials and other educational tools. The system prevented Baptiste from quoting or selling insurance until she was licensed. At Occhino's suggestion, Baptiste took a pre-licensing property and casualty class required by New York State, at Bryant & Stratton College in New Windsor, New York from September 19, 2015 to September 29, 2015. Occhino charged the $799.00 cost of the class on the agency's debit card and she and Baptiste had an agreement that if Baptiste passed the test and continued to work for 90 days, Baptiste would only be responsible for $399.00 of the cost of the course.

Occhino "officially" hired Baptiste on October 5, 2015, and she signed a New York State pay and notice acknowledgement form during that first week of employment. Baptiste's license went into effect on October 11, 2015. Baptiste spent her first week or so "on boarding," taking State Farm internet seminars, classes and modules. She was provided full license access to State Farm's system on October 19, 2015 and was able to start doing sales that day. During October and November 2015, Baptiste worked the agency's regular hours, five days per week, Monday through Friday, and was paid $12.00 per hour for eighty hours every two weeks. Baptiste was paid in full for the hours that she worked, and her paychecks from October 23, 2015 to December 18, 2015 were direct deposited to her bank account. Baptiste was out of the office for a couple of days in November 2015 dealing with personal business, and had a paid holiday for Thanksgiving. In December 2015 Baptiste worked the first two weeks, but in the last two weeks "only worked a couple hours, a few days leading up to Christmas," because Baptiste "got sick. She left the office." Occhino later testified that "Erika was out sick and then she came back."

Baptiste's timesheet for the period December 13 to December 25, 2015, signed by Baptiste on December 23, 2015, lists her hourly rate as $13.00 per hour, and indicates that she worked a total of 15 hours during that biweekly period — specifically, from 9:00 a.m. to 12:00 p.m. on December 15, 16, 18, 22, and 23, 2015. Baptiste signed the timesheet on December 28, 2015. It appears that hours initially entered for December 21, 2015 were whited out. A space for Gross Pay is blank. On December 31, 2015, Occhino terminated Baptiste's employment because the agency had received harassing anonymous letters and Occhino wondered "if Erika was responsible for these letters, which I'm not saying she was."

Occhino testified that she gave Baptiste cash gifts of $190.00 on August 13, 2015 and $400.00 on August 18, 2015 "during the time when Erika was onsite and learning and doing all

this wonderful stuff, prior to being hired," because "when she had rough spells and rough times, I actually gave her cash…. They were just me helping a friend." Occhino testified that debits on the agency's bank statements reflected these two cash gifts. Occhino withdrew $1,000.00 from the agency account on October 9, 2015 "because Erika needed some help," and she also used the agency account the same day to pay Bryant & Stratton College for Baptiste's 10-day life and health insurance class. Occhino also used the agency checking account on October 30, 2015, to buy a $130.00 State Farm gift card for Baptiste. Occhino testified that a November 20, 2015 debit on the agency's bank statement indicates a $700.00 withdrawal from which she gave Baptiste $660.00 and kept $40.00 for herself. Occhino denied that Baptiste was not provided with a lunch break, and stated that debit card payments shown on the agency checking account for October 6, 2015 and November 12, 2015 indicate that she took Baptiste out for lunch on those days.

Occhino entered into the record "Pay Stub Detail" forms that she obtained for the hearing from her payroll company Managepayroll.com. Similar pay stubs listing total hours worked (but not daily hours) and workers' hourly rates for a biweekly period were provided to employees with each wage payment. The following table shows relevant information from Baptiste's pay stub detail forms:

Pay date	**Payroll Period**	**Pay**	**Rate**	**Hours**	**Gross**
10/23/15	10/3-10/16/15	Regular	$12.00	80	$960.00
11/6/15	10/17-10/30/15	Regular	$12.00	65	$780.00
11/20/15	10/31-11/13/15	Regular	$12.00	60	$720.00
12/4/15	11/4-11/27/15	Regular	$12.00	80	$960.00
12/18/15	1/28-12/11/15	Regular	$12.00	80	$960.00
12/31/15	12/12/-12/25/15	Regular	$13.00	--	$ 0.00
		Commission	--	--	$396.09

There is no payroll detail form for the period December 24, 2015 to January 8, 2016. Occhino offered in evidence a handwritten check dated December 31, 2015 from the agency's business checking account, made out to Baptiste in the amount of $364.59, with the word "Commissions" on the memo line. The back of the check shows that Baptiste cashed it on February 1, 2016.

Occhino also produced a January 21, 2016 "Payroll Summary" for Baptiste which Occhino testified was created at her request by the payroll company. This summary lists the payments in the table above for pay dates October 23 through December 18, 2015, in each case showing "DD" (presumably, "Direct Deposit") for the check number. For pay date December 31, 2015, the summary states that during that payroll period, Baptiste worked 0.0 hours, but includes a total payment of $396.09 ($364.59 net), by check number 160, rather than by direct deposit. The Payroll Summary also includes a January 1, 2016 entry indicating payment to Baptiste for $295.00 ($271.23 net) for 15.00 hours[1]. The Payroll Summary lists the check number as "DD" although Occhino did not provide a corresponding pay stub detail form for this entry. While Occhino testified that she mailed Baptiste her last check for the pay period ending January 1, 2016, "and it was obviously received because it was cashed," Occhino did not provide a cancelled check, or any other documentary proof of actual payment to Baptiste with respect to the January 1, 2016 payroll summary entry.

[1] This entry in the Payroll Summary implies an hourly rate of $19.67 per hour.

Occhino testified that while she has payroll files including biweekly timesheets for all other employees, Baptiste's file, including timesheets which Baptiste completed, "miraculously" disappeared, the only file to do so, and as a result, the only timesheet Occhino has for Baptiste is for the period December 13 to December 25, 2015. Occhino stated that Baptiste had access to the office. She also testified that she has everyone else's' file and Baptiste's file would help to substantiate Occhino's case. At the hearing, Occhino did not produce timesheets for any employee for the relevant period, although she did produce timesheets for employees who worked after the relevant period.

Occhino modified the employee handbook that she used from one State Farm provided. She does not have a copy of the handbook signed by Baptiste because it would have been in the file that is missing, but everyone in the office had access to the handbook, which Occhino claimed "clearly states that overtime was not permitted… unless authorized by the agent." Occhino offered in evidence two pages from the September 19, 2015 handbook, explaining that she did not produce the whole handbook because it is "a little voluminous." The excerpts produced by Occhino do not include any provision concerning overtime, only sections on Jury Duty, Maternity Leave, Paid Holidays, Personal Time, Retirement, Sick Leave, and the beginning of a section on Team Member Development.

The Paid Holidays section provided for three paid holidays in 2015: Labor Day, Thanksgiving and Christmas. The Personal Time section, referring to "times when you need to be away from work other than when you are sick (i.e. appointments, school events, etc.).," stated: "Each January, <u>all</u> team members will be given 2 Personal Time days for the year." The Sick Leave section stated that on January 1, an employee with less than six months' service would be entitled to one paid sick leave day and an employee with less than one year to three paid sick leave days. The beginning of the Team Member Development section stated: "Compensation for expenses incurred by team member attending a conference or seminar will be determined as follows when attendance is required **<u>and</u>** ***pre***-approved by the agent: 1. The agent will pay any required fees."[2]

Occhino also offered in evidence a one-page excerpt of the employee handbook that Baptiste gave to DOL during the investigation, which states that the agency was required to have two full-time insurance account representatives, at least one fully licensed; that licensed account representatives were to be compensated up to $15.00 per hour plus commission (paid on the 5th of the month); and that unlicensed team members "*start at $12/hr. and earn an extra $1/hr for each license (P&C and L&H)*". Occhino testified that neither Baptiste, nor any other employee, was entitled to commissions because no employee's production ever met the goal.

Occhino disputed the work hours claimed by Baptiste, who Occhino alleged "was technically not an employee… prior to October 5th. But even if she was trying to say she was, these hours are just outrageous." For example, Baptiste's claim stated she worked 110 hours on twelve days during the two-week period ending August 7, 2015, 108.5 hours on twelve days during the period ending September 18, 2015, and 79.5 hours on ten days during the period ending October 2, 2015. Occhino stated these hours were impossible because the agency was not open for that many days or hours, and Baptiste was taking her pre-licensing class from September 14-28 or

[2] Baptiste identified and respondent entered into the record the next page of the handbook pertaining to Team Member Development, which stated that "The team member will receive full pay for the time during attendance." The vacation policy, also on this page, provides for one paid vacation day for employees with less than six months of service.

29, 2015 "so there's no way she could have been working in the office." According to Occhino, the pre-licensing classes are full day classes, and New York State requires 96 hours of class time in order to be licensed. Another reason Baptiste could not have worked the long weeks and hours she reported is that no one at the agency worked on Saturdays or Sundays, and if Baptiste did work on weekends, it was on a totally voluntary basis. Occhino additionally stressed that Baptiste's claim for unpaid wages for the payroll period December 12 through 25, 2015, reflected 47.5 work hours during a period for which her signed timesheet shows only 15 hours worked.

Testimony of Claimant Erika Baptiste

In July 2015, Baptiste's daughter had an internship at Occhino's agency through a community program run by Putnam County. Baptiste drove her daughter back and forth to the agency, and her daughter told her that Occhino was looking for help starting the agency. One morning during the second week of July 2015, after dropping her daughter off, Baptiste spoke to Occhino about working there, and Occhino agreed to start Baptiste at $12.00 an hour and if she got licensed, raise her pay to $13.00 per hour. Occhino also stated that "every third Friday, you'd get a commission check." Neither overtime nor any other term of employment such as vacations or hours worked was discussed.

Initially, for about a week, Baptiste and her daughter helped Occhino set up the office and build desks, including a desk for Baptiste on which she put her biography. During this period, Baptiste arrived at the office at 8:00 a.m. or 9:00 a.m. and on some nights, worked with her daughter, Occhino and Occhino's husband until 11:00 p.m., with Occhino buying them pizza. Baptiste does not remember how many hours she worked the week she helped set up the office, but she was there every day.

On July 22 or 23, 2015, Occhino held a group meeting with petitioners' four initial employees: Baptiste, Dylan, Ken, and Ashleigh. At this meeting, Occhino explained that the four would all make phone calls to solicit life insurance sales from lists of potential customers provided by Occhino. Beginning July 22 or July 23, 2015, Baptiste worked seven days per week, calling potential customers to solicit life insurance sales, marketing which included opening a Facebook page and Google accounts, visiting car dealerships and local businesses throughout the surrounding two counties, and leaving fliers on people's doors. She also dealt with problems with the agency's phone connections, and offered in evidence her notes of conversations with Comcast. Baptiste arrived at the office at 9:00 a.m. to telephone potential clients; her departure time varied because customers interested in opening policies were sometimes only available after hours. Initially, Baptiste worked both Saturdays and Sundays at the agency office, which was open for business seven days per week during its first month of operation, and also worked in the field as described above.

Baptiste offered in evidence several emails and other documents relevant to her employee status, including an email sent by Occhino to Baptiste and the three other initial employees at 9:05 p.m. on July 27, 2015 thanking the "Team" for a great meeting and purporting to attach a Business Plan, Team Member Handbook, Sales Playbook, Acquisition Playbook, and "Work [sic] Tracks."[3] The email instructed team members to remember the "Hot List (50 sales, 25 service and

[3] Baptiste testified that she could not open the attachments and was never provided with the Team Member Handbook, although Occhino promised to provide it. According to Baptiste, when she told Occhino that she could not open the attachments, Occhino printed and gave her only some of the attachments, including the Word Track script.

marketing)," "think of 3-5 marketing opportunities for the Agency (share Wed.)," and "Provide desired hours for the first 2 weeks of August." Because Baptiste could not open the attachments to the July 27, 2015 e-mail, Occhino printed a copy of the "Word Track" script for her to use when calling potential customers in scenarios including internet leads, cold calls, and responses to potential customer requests for online quotes. The print-out directed those using it to document the outcome of the call, and after an initial conversation, "Transfer to Michele."

A July 28, 2015 email from Occhino reminded the four employees of a scheduled 7:00 p.m. conference call to discuss topics including "Determine Work Schedule for the next 2 weeks," "Marketing Ideas" and "Office Basics." An August 4, 2015 email to Baptiste from Pre-License.com stated that "Agent Occhino would like you to sign up for Pre-License training." An August 7, 2015 email to Baptiste from Occhino listed "action items for today" including contacting radio stations, community newspapers to get advertising rates and how to submit articles, and the Carmel movie theater for advertising opportunities and rates. A "New Agent/Team Member Onboarding Packet" addressed to Baptiste by State Farm dated August 26, 2015 provided instructions on how to set up a password and log into the State Farm system, which Baptiste testified enabled her to get a State Farm email address. On August 28, 2015, Occhino emailed Baptiste instructing her to plan to attend a two-day "Auto Sales Boot Camp" in New Windsor, New York. An August 31, 2015 email from Occhino to Ashleigh Protsko and Baptiste – by then, according to Baptiste, the agency's only employees – forwarded various State Farm documents and stated: "We have work to do team!!!"

Baptiste received her first pay from Occhino, in cash, on August 7 or 14, 2015. Although Occhino had told Baptiste that she would be paid $12.00 per hour until she got licensed, Occhino did not pay for all the hours Baptiste worked; her first cash payment was only about $130.00 for a full two weeks of work. When Baptiste complained that she was not being paid as promised, Occhino's "response was always the same… things are going to get better… we'll get there soon."

For most of August and September, Baptiste and Ashleigh were the only employees. Occhino encouraged Baptiste to get licensed because while Baptiste could solicit sales, she could not complete a sale without a license. Baptiste told Occhino that she could not afford to pay $800.00 for the licensing class, and Occhino agreed to "go half with me. And if I passed, then I wouldn't have to pay back the half." Occhino asked Baptiste to prepare a written agreement and significantly revised Baptiste's draft, including adding a requirement that for repayment by Baptiste to Occhino of the $400.00 to be waived, Baptiste would have to not only pass the test the first time she took it, but also stay employed for a minimum of 90 days. The two then signed the agreement, which states that on September 11, 2015, Occhino will pay $400.00 toward the P&C course cost and includes the conditional waiver of Baptiste's repayment of the $400.00. Baptiste also told Occhino she could not afford to miss two weeks of work to attend the pre-licensing class, and Occhino told Baptiste she would be paid for her time taking the class. Baptiste attended the two-week course, and on two days when the class let out early, Baptiste also went to the office to work.

Baptiste testified that she was licensed by the first week in October, however, instead of fulfilling her agreement to continue to pay Baptiste wages while she attended the class, Occhino told Baptiste that the wages she earned that pay period would be applied towards both Baptiste's and Occhino's halves of the tuition. Baptiste did not receive a raise to $13.00 per hour on becoming licensed as promised, and was not even paid $12.00 per hour for many of the hours she worked.

Occhino's response to complaints continued to be "that she's just working on it and things are going to get better."

Following completion of the class, Occhino told Baptiste to speak with Bob Fios, who according to Occhino, was a DOL representative[4] who had said that because petitioners had a small business, his agency would pay Baptiste's wages or for her training. Baptiste testified that Occhino kept telling her not to worry, "because this guy is going to pick up my wages." Baptiste and Occhino were required to fill out timesheets for Fios to show Baptiste working forty hours a week, and probably during the second week in October, Baptiste signed four blank timesheets which she left on her desk to be collected. Fios interviewed Baptiste but when she called him at the beginning of November to follow up, she learned that her application was denied because she had already received her license and Occhino was seeking retroactive reimbursement rather than payment for training.

Baptiste again asked Occhino about her wages in November and Occhino told her she did not qualify for commissions, but never explained the commission structure or provided her with a copy of it. At this point, Baptiste was Occhino's only employee, with a job that included calling people who owed bills and taking their payment over the phone, and calling back on-line applicants for insurance to open their policies, and cold-calling potential customers from a list provided by Occhino. Baptiste worked 9:00 a.m. to 5:00 p.m. Monday to Friday at the office, staying until 8 or 9 p.m. if necessary to meet customers, without a regular lunch break. She also worked on weekends for Saturday customer appointments and to market the agency outside the office, which entailed hanging agency advertisements on doorknobs, going to car dealerships and other business to solicit business for the agency, representing the agency at street fairs, and making chocolate covered pretzels with Occhino's business card attached to hand out when soliciting business for the petitioners. Baptiste was never reimbursed for the cost of the ingredients of the chocolate covered pretzels. On November 20, 2015, after requesting to be paid for the unpaid wages she was owed, Baptiste followed Occhino to the bank, where Occhino withdrew money in an amount Baptiste can no longer remember, gave some of the money to Baptiste and kept the remainder for herself. Baptiste testified that she was directed by Occhino to work on Sundays, and that Occhino "directed a hundred percent" what times Baptiste needed to work. Although Baptiste occasionally complained to Occhino about not getting a lunch break, she was never provided with one.

During the second week of December, Baptiste was working in the field for many hours putting fliers on doors without eating, and felt lightheaded. Occhino told her to go home if she was not feeling well. Baptiste went home, and then came back to work and worked as normal.

On December 28, 2015, Baptiste filled out and signed the timesheet for the bi-weekly period ending December 25, 2015. Baptiste testified this timesheet was not accurate, because she worked additional hours but put in the hours that Occhino told her to."[5]

Baptiste last worked on December 31, 2015 when she again asked Occhino about getting paid. Occhino gave her a commission check, told her that she needed to get help because she had

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[4] Fios' email address on correspondence in evidence suggests he worked for Westchester County, not the DOL.

[5] Baptiste's claim for unpaid wage supplements indicates that during this payroll period, Baptiste claimed she was entitled to vacation pay for December 14, 2015, sick pay for December 17, 2015, and pay for Christmas Eve and Christmas Day.

a stroke, and that corporate wanted a doctor's letter. With respect to the December 31, 2015 check, Baptiste testified that this was the only commission check Baptiste ever received. Baptiste asked Occhino for, but never received, a paycheck for the period from December 12 to December 25, 2015.

While Baptiste had a key to the front door of the office, she did not have a key or access to Occhino's office where Occhino's files were maintained. Baptiste denied ever receiving cash gifts or a gift card from Occhino, and could not identify debits from the agency's checking account which Occhino claimed were for gifts to Baptiste, with the exception of the November 20, 2015 payment which Baptiste testified was "Because she owed me money for - - for pay."

Baptiste testified that the claims she filled out for unpaid wages and unpaid wage supplements and filed with DOL accurately list monies she is owed by the petitioners. Her unpaid wage claim indicates that she worked 47.5 hours over 7 days (including Christmas Eve and Christmas Day) during the biweekly payroll period ending December 25, 2015, and 21 hours worked over 4 days during the bi-weekly payroll period ending January 8, 2016.

Testimony of Senior Labor Standards Investigator Tara Byrnes McLaughlin

Tara Byrnes McLaughlin (hereinafter "McLaughlin") offered in evidence documents from the DOL's investigatory file and testified concerning respondent's investigation. McLaughlin testified that following investigation including communication with Baptiste and requesting time and payroll records from petitioners without receiving any in response, she wrote to Occhino on July 7, 2016. The letter, which was entered into evidence, explained that due to a lack of adequate information, respondent was not pursuing Baptiste's claim for unpaid commissions but had "computed the information for straight overtime" plus 24 hours' pay for three holidays and eight hours' pay for each day of vacation and sick pay. The letter indicated that Baptiste reported that she was out sick on November 13 and December 17, 2015, and the DOL found she was entitled to one of those days as sick pay. The letter also described Baptiste's allegations that she "had $400.00 deducted from her wages in the week ending September 11, 2015 for training that you had agreed to pay for" and that she was asked "to prepare chocolate covered pretzels for an office promotion that she spent $100.00 for but was never reimbursed."

On July 13, 2016 Occhino responded, among other things, that Baptiste was not an employee from July 31 to October 9, 2015, and the wages claimed from October 23 to December 18, 2015 were incorrect. Occhino claimed that until October 2015, Baptiste "was clearly aware that her visits to the office and occasional service were voluntary and in no way constituted employment," and that Baptiste's claims about how many hours she worked were "false. The office was only open a maximum of 46 hours a week…. Additionally, <u>overtime</u> is strictly prohibited unless authorized by the Agent." As to reimbursement of $400.00 for the ten-day class and $100.00 for pretzel preparation, Occhino stated that $400.00 could not have been deducted from wages since her agreement "[a]s a friend… to split the cost of the class…. had nothing to do with the Agency and [Baptiste] wasn't an employee with wages to charge against," and that Baptiste "unilaterally" made pretzels without first asking Occhino. As to holidays, vacation and sick leave, according to Occhino, pursuant to the employee handbook, Baptiste was only eligible for one day's pay for Christmas and was also ineligible for commissions, although Baptiste's final check included both commissions and holiday pay for Christmas and New Year's Day as a courtesy, even though she abandoned the job in December 2015.

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 Rules of Procedure and Practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Burden of Proof and Standard of Review

Petitioners' 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; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 66.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotel, Inc. (T/A Rodeway Inn)*, Docket No. 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 (Labor Law § 101 [2]). The Labor Law provides that an order of the commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). For the reasons discussed below, we affirm the order as modified.

The Definition of Employee Under New York Law

Labor Law § 651 [5] defines "employee" for purposes of Article 19 to mean "any individual employed or permitted to work in any occupation." Likewise, Labor Law § 190 [2] defines "employee" for purposes of Article 6 to mean "any person employed for hire by an employer in any employment." "Employed" is defined at Labor Law § 2 [7] as including "permitted or suffered to work."

In determining that an employer was liable for unauthorized overtime since it suffered or permitted the work, the court in *Chao v Gotham Registry, Inc.*, 514 F3d 280, 287 [2d Cir 2008], stated that "an employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work" (internal citations omitted). Conversely, the court found that "[a]n employer who has knowledge that an employee is working, and who does not desire the work to be done, has a duty to make every effort to prevent the performance." (*id.* at 288)

> "[A] presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work." (*id.* at 290).

"[T]he law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime" (*id.* at 291[internal citations omitted]; *see also Matter of Jaroslaw S. Skorupski and Best Choice Renovation Inc.*, Docket No. PR 16-019, at p. 10 [September 13, 2017]).

In *People ex rel. Price v Sheffield Farms-Slawson-Decker Co.*, (225 NY 25, 30 [1918]), the New York Court of Appeals found an employer liable for illegally employing a minor where there was a "sufferance" of the employment by the employer. In that case, Justice Cardozo observed that "[s]ufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge." (*id.*)

Baptiste Was an Employee of Petitioners Throughout the Relevant Period

We find that the record amply demonstrates that Baptiste was an employee throughout the relevant period and we give no credence to Occhino's assertion that Baptiste was not "officially" hired until October 5, 2015 and was not an employee prior to that time.[6] We credit Baptiste's testimony that Occhino hired her in mid-July 2015, before the insurance agency even opened, agreeing to pay her $12.00 per hour and if she got licensed, raise her pay to $13.00 per hour, and that beginning July 22, 2015 Baptiste worked full-time and overtime for the agency, initially helping Occhino set the office up, and after its August 1, 2015 opening, marketing and publicizing the agency, soliciting sales, and setting up accounts with internet providers and utilities.

Occhino essentially claimed that prior to October 2015, Baptiste was just hanging around the office, accompanying her daughter, or hoping to learn about the insurance business, but Baptiste's specific testimony and documentary evidence show the contrary. On July 27, 2015 Occhino e-mailed Baptiste and the three other members of the agency's "Team" to thank them for a great meeting and provided the agency's script for calling potential customers, with instructions to document the outcome of the call and after an initial conversation, transfer the call to Occhino. A July 28, 2015 email from Occhino reminded the four employees of a scheduled evening conference call to discuss topics including determining the work schedule for the next two weeks. An August 7, 2015 email from Occhino to Baptiste listed "action items for today" including contacting community newspapers and the Carmel movie theater for advertising rates. On August 28, 2015, Occhino e-mailed Baptiste instructing her to plan to attend a two-day "Auto Sales Boot Camp." An August 31, 2015 email from Occhino to Baptiste and the agency's other employee stated: "We have work to do team!!"

We credit Baptiste's testimony that from the beginning, Occhino wanted her to obtain a license and promised her a raise from $12.00 to $13.00 per hour when she did so. Baptiste's testimony is consistent with the terms of the team handbook stating that unlicensed team members "*start at $12/hr. and earn an extra $1/hr for each license (P&C and L&H)* " [italics in original]. The importance to petitioners of getting Baptiste licensed is also clear from a provision in the team handbook requiring the agency to have two account representatives, at least one fully licensed. Following the departure of another employee, Baptiste was the agency's only account representative and needed to be licensed. An August 4, 2015 email to Baptiste from Pre-License.com stated: "Agent Occhino would like you to sign up for Pre-License training."

As Occhino herself stressed at the hearing, she agreed in writing to pay half the cost of Baptiste's required pre-licensing class provided Baptiste passed on the first try and continued to work for the agency for another 90 days. Occhino sought to portray this as disinterested personal friendship, even assuring respondent in her July 13, 2016 letter that it "had nothing to do with the

[6] The amended petition alleged that Baptiste was not an employee until January 2016. At the hearing, Occhino stated she has "always maintained that [Baptiste] was employed October 5th."

Agency." Occhino's characterization of the agreement as having "nothing to do with the Agency" is belied by the conditions she placed on the financing — that Baptiste get the license quickly so she could complete sales and keep working for the agency for 90 days — and by Occhino's use of an agency debit card for the tuition payment. We are not persuaded that Occhino's agreement to pay for half of Baptiste's pre-licensing class was only an act of friendship.

Similarly, Baptiste's testimony that Occhino paid her wages in cash, albeit in insufficient amounts, is far more plausible than Occhino's claim to have periodically presented Baptiste with cash gifts for no particular reason, "just me helping a friend." Occhino used agency funds, not personal funds, for these purported personal gifts. At the hearing, Occhino even implied a payment to Baptiste which she made after withdrawing money from the agency's bank account on November 20, 2015, when petitioners no longer dispute Baptiste's employee status, was something she "gave" Baptiste — even though the payroll summary Occhino produced lists a standard direct deposit of wages to Baptiste's account that day, and Baptiste testified that "I followed her to the bank …. because I was complaining about my wages and she took out money, but she did keep something for herself." Baptiste further testified that when she complained that payments to her were less than promised Occhino's response was typically just that "things are going to get better." Baptiste's account of these incidents is credited, and is consistent with employee status.

Occhino's denial that Baptiste was an employee before October 2015 and that Baptiste's work for the agency was undertaken spontaneously and not directed by Occhino is also not credible. Occhino incredibly asserted that Baptiste would merely "hang out" when she actually spent long hours marketing and soliciting clients for the agency during the critical first two months of the agency's existence; that no one from the agency had to work outside the office or on weekends; that Baptiste "unilaterally decided to make pretzels[,] she was never asked"; and that "if she did work on Sundays, it was totally volunteer. It wasn't required." We credit Baptiste's testimony that Occhino "directed a hundred percent" the time that Baptiste worked.

We find it was reasonable and valid for DOL to conclude that Baptiste was "employed" by petitioners throughout the relevant period, including while working outside the agency's office or regular office hours.

Petitioners Failed to Maintain Payroll Records

Articles 6 and 19 of the Labor Law require employers to maintain for at least six years contemporaneous and accurate records of the hours their employees worked and the wages paid to them (Labor Law §§ 195 [4] and 661; Department of Labor Regulations [12 NYCRR] § 142-2.6). 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 (Labor Law §§ 195 [4], 661; Department of Labor Regulations [12 NYCRR 142-2.1 [a]). 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]); Department of Labor Regulations [12 NYCRR] § 142-2.1 [e]).

It is undisputed that Occhino did not maintain any payroll records pertaining to Baptiste for the period July 27, 2015 to October 4, 2015, when Occhino claimed that Baptiste was not an employee. For the period October 5, 2015 to December 31, 2015, Occhino did not provide records of the daily and weekly hours Baptiste worked. Occhino sought to justify her failure to maintain

these records by claiming that although she had payroll files including timesheets for all other employees, Baptiste's payroll files "miraculously" disappeared. At the hearing, however, Occhino did not produce timesheets for *any* employees from the relevant period. Petitioners did not offer the legally required records of the daily and weekly hours that Baptiste worked either during the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's imposition of an $1,000.00 civil penalty for petitioner's violation of Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee for the period July 27, 2015 through December 31, 2015 was reasonable and valid and we affirm the civil penalty.

The petitioners were also assessed a $1,000.00 civil penalty for failing to provide wage statements in violation of Department of Labor Regulations (12 NYCRR) § 142-2.7. The record reflects that Occhino did not provide wage statements for the period July 27, 2015 through October 4, 2015 and wage statements for the subsequent period of October 5, 2015 through December 31, 2015 were not accurate representations of what Baptiste earned because they did not reflect the hours that she actually worked. We therefore affirm the $1,000.00 civil penalty for failure to provide wage statements.

<u>In the Absence of Required Records, Petitioners Bore the Burden of Proving the Claimant Was Paid Earned Wages</u>

In the absence of records required by the Labor Law, an employer bears the burden of proving that earned 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, and shift the burden of negating the reasonableness of the Commissioner's calculations to the employer (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]; *Matter of Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]; *Matter of Bae v Industrial Bd. of Appeals*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]). Accordingly, petitioners had the burden of showing that the Commissioner's order finding that Baptiste was underpaid was invalid or unreasonable through evidence of the specific hours that she worked and that she was paid for those hours, or other evidence showing the Commissioner's findings to be invalid or unreasonable (*Matter of RAM Hotels, Inc.(T/A Rodeway Inn)*, Docket No. PR 08-078, at p.24 [October 11, 2011]; *(Matter of Joseph Baglio and the Club at Windham, Ltd.*, Docket No. PR 11-394, at p. 7 [December 9, 2015]).

The employer in such a case "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" as required (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688-689 [1949]). Even if DOL estimates based on employee claims are imprecise, "reasonable estimates are allowed since it is the employer's burden to maintain accurate records" (*Matter of Karl Geiger A/K/A Karl Geiger and Geiger Roofing Company, Inc.*, Docket No. PR 10-303, at p. 8 [Jan. 16, 2014] *affd sub nom. Matter of Geiger v New York State Dept. of Labor*, 131 AD3d 887 [1st Dept 2015]; *see also Reich v S. New England Telecoms Corp.*, 121 F3d 58, 67 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"]).

The Order As It Pertains to Unpaid Wages Is Affirmed As Modified

We find that Occhino was not a credible witness and petitioners failed to meet their burden of proving the specific hours that Baptiste worked and that she was paid for those hours or that the inferences supporting the calculation of wages made by the Commissioner in the wage order were otherwise unreasonable. Article 19 of the Labor Law requires employers to pay covered employees an overtime premium of one and one-half times the employee's regular hourly rate of pay for hours worked over 40 per week (Department of Labor Regulations [12 NYCRR] § 142-3.2). The "regular rate" is defined as the amount the employee is regularly paid for each hour of work (Department of Labor Regulations [12 NYCRR] § 142-2.16).

We credit Baptiste's testimony concerning the hours she worked and what she was paid, and reject Occhino's claims that much of the work Baptiste performed should not be counted as employment because it was performed outside the office or on weekends, because "the team handbook clearly states that overtime was not permitted," or because "if she did work on Sundays, it was totally volunteer." Under the Labor Law, Occhino's assertions that Baptiste's long hours were voluntary would be beside the point even if credited, which they are not. The court in *Chao v Gotham Registry, Inc.*, (514 F3d at 287-290) found that while "actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work," overtime rules "apply to work performed off premises, outside of the employer's view and sometimes at odd hours" and that an employer wishing to prevent unauthorized work must make "every effort to prevent its performance … even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours." As explained in *Gotham Registry Inc.*, an employer may not avoid its overtime obligations even "upon proof that its employees voluntarily engage in inadequately compensated work" (*see also Matter of Melissa Tejeda (T/A Melissa Spa & Beauty Center, Corp.) also (T/A Melissa Beauty Salon)*, Docket No. PR 17-063, at p. 3 [Dec. 13, 2017]; *Matter of Floral Park Community Church*, Docket No. PR 07-014, at pp. 3-4 [Apr 25, 2008]). Petitioners had the benefit of Baptiste's marketing work outside the office and on weekends and did not make "every effort to prevent its performance" (*Gotham Registry, Inc.*, 514 F3d at 287-290).

In light of the finding that Baptiste was generally credible, respondent was permitted and indeed required by Labor Law § 196-a and precedent to rely on Baptiste's statements concerning the hours she worked and what she was paid as the "best available evidence" to use when computing underpayment to Baptiste (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d at 821). Recognizing that Baptiste's statements concerning her hours and payments to her were estimates and not precise, an employer "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" (*Anderson v Mt Clemens Pottery Co.*, 328 US at 688-89).

Much of Occhino's criticism of the hours claimed by Baptiste was predicated on stressing that the agency's regular office hours, after an initial opening burst, were limited to 9:00 a.m. to 5:00 p.m. Monday, Tuesday, Wednesday and Friday, and 9:00 a.m. to 7:00 p.m. on Thursdays. Yet Baptiste testified that in addition to that regular office work, she also worked late and on Saturdays at the office to meet with customers and potential customers, and outside the office on marketing activities including distributing and hanging fliers, visiting car dealerships and other businesses, attending street fairs and making chocolate covered pretzels as promotional gifts on both Saturdays and Sundays. We find this testimony credible, and discredit Occhino's general

denial that such activities took place. The Board has consistently held that general, conclusory and incomplete testimony is insufficient to satisfy the high burden of precision required to meet the employer's burden of proof in the absence of complete and accurate required records *(Matter of Kehinde O. Adebowale (T/A Saramik Day Care)*, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh A/K/A young H. Oh, and Cheong Hae Corp. (T/A Cheong Hae Restaurant)*, Docket No. 11-017, at p. 12 [May 22, 2014]).

At the hearing, Occhino attempted to discredit Baptiste by claiming that she overstated the hours listed in her signed timesheet for payroll period December 12 to December 25, 2015, which indicated that Baptiste worked a total of 15 hours over five days during that biweekly period, although Baptiste's claim lists 47.5 hours worked during that same period. However, as demonstrated by Baptiste's claim for unpaid wage supplements, Baptiste claimed she was entitled to vacation pay for December 14, 2015 and sick pay for December 17, 2015. Baptiste also claimed she was entitled to holiday pay for Christmas Eve and Christmas Day. In addition, Baptiste credibly testified that her December 28th timesheet reflected the hours which Occhino told her to include. The evidence does not support Occhino's inference that Baptiste's having claimed more hours for this pay period than are reflected in the December 28th time sheet discredits her claim, either for that pay period or, even more clearly, in general.

The evidence does, however, require a modification of the wage amount found due for that time period in the order issued by respondent, which, as just discussed, included four days for which Baptiste was really claiming vacation, sick or holiday pay, amounts also included in the order's award of supplemental wages, as discussed below. Baptiste was not entitled to be paid twice for these hours (and as discussed below, was not entitled to holiday pay for Christmas Eve). Accordingly, the wage underpayment amount found in the order for this pay period must be reduced by four days' (32 hours') pay, resulting in a $416.00 reduction in the total wage underpayment.

It is undisputed that Baptiste was paid nothing for the payroll period December 12 to December 25, 2015. The pay stub detail form shows that Baptiste was paid no wages during that pay period, only commission. We find that Baptiste was paid on January 1, 2016 for her work during the payroll period December 26, 2015 through January 8, 2016, for a total of four days worked from December 28 through December 31, 2015, rather than for the prior payroll period.

We find that respondent reasonably computed the wages due to Baptiste by accepting as accurate her statements as to how many hours she had worked and how much she had been paid, assuming her promised wage rate was $12.00 per hour until October 2015 when she obtained her license and $13.00 per hour thereafter, using these data to calculate wages earned including an overtime premium for hours worked beyond forty in a week, and calculating the difference between the wages earned and what Baptiste stated she had been paid. As discussed above, the order must be modified by deducting $416.00 (32 hours' pay at $13.00 per hour) for days during the payroll period December 12 to December 25, 2015 when Baptiste did not actually work, and as modified, we affirm this aspect of the order.

The Order As It Pertains to Supplemental Wages Is Affirmed As Modified

New York does not require employers to provide wage supplements such as vacation pay, holiday pay or sick pay to employees. However, when an employer does have a paid leave policy, Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of wages (Labor Law §§ 190 [1] and 198-c [2]). With respect to paid vacations, holidays and sick pay, as with respect to other forms of wages, an employer's failure to keep required records entitles the DOL to make just and reasonable inferences and use other evidence to establish an employee's entitlement *(see, e.g. Matter of Marchionda v* Industrial Bd. of Appeals of State of N.Y. Dept. of Labor, 119 AD3d 1342, 1343 [4th Dept 2014]). Labor Law § 198-c requires that the employer provide vacation pay or other wage supplements in accordance with the established terms of an agreement *(Gennes v Yellow Book of N.Y., Inc.*, 23 AD3d 520, 522 [2d Dept 2005]; *Matter of Glenville Gage Co.* v *Industrial Bd. of Appeals of State of N.Y., Dept of Labor*, 70 AD2d 283 [3d Dept 1979] *affd* 52 NY2d 777 [1980]; *Matter of Stephen S. Mills and the New York Hospital Medical Center of Queens*, Docket No. PR 14-104, at p. 11 [July 22, 2015]).

As explained in respondent's July 7, 2016 letter to Occhino, "[t]he department has added Labor day and two Christmas days for holiday pay, December 14, 2015 for vacation pay and one day (out sick November 13 and December 17, 2015) for sick day pay, since [Baptiste] was entitled to one sick day." Since the $520.00 in supplemental wages found due in the order is equivalent to forty hours' pay at $13.00 per hour, this aspect of the order was obviously based on finding Baptiste entitled to eight hours' pay at $13.00 per hour for each of five days for which she was found entitled to leave. The Claim for Unpaid Wage Supplements which Baptiste filed with respondent claimed holiday pay for Labor Day and Christmas, a vacation day on December 14, 2015 and sick days on November 13 and December 17, 2015; it stated that Occhino "closed two days for Christmas." Baptiste testified that claims she filed were accurate.

As stated earlier, it was petitioners' burden to establish by a preponderance of the evidence that the Commissioner's order was invalid or unreasonable, and petitioners did not present evidence to refute the claim that Baptiste was not paid for the days she claimed. The excerpts of the Team Handbook in the record indicate that Baptiste was entitled to paid holidays for Labor Day and Christmas,[7] and to one sick day prior to completing six months' service. Additionally, she was entitled to one day of vacation pay. Under these policies stated in the handbook, which respondent did not argue were not applicable, Baptiste was entitled to pay for Labor Day and Christmas, but not Christmas Eve. In addition, her promised pay as of Labor Day was $12.00 rather than $13.00 per hour, since as of September she was not yet licensed. Baptiste was also entitled to one paid sick day and one day of paid vacation. We therefore modify the order's findings concerning supplemental wages due to: (a) provide holiday pay for one, not two, days for Christmas (reducing the total amount found due by $104.00), and (b) calculate holiday pay for Labor Day based on $12.00, not $13.00 per hour (reducing the amount found due by $8.00). The effect is to reduce the total supplemental wages found due from $520.00 to $408.00.

[7] Occhino testified without contradiction that Baptiste received a paid holiday for Thanksgiving.

The Unlawful Deductions Order Is Affirmed

Labor Law § 193 prohibits employers from making "any deductions from the wages of an employee" by direct charge or separate transaction, except for those deductions enumerated in the statute and similar payments for the benefit of the employee *(Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 584 [2006]; Department of Labor Regulations [12 NYCRR] § 142-2.10).

The order found that petitioners unlawfully deducted $400.00 from Baptiste's pay for a licensing course that she took and owed her an additional $100.00 in wages to reimburse her for chocolate covered pretzels that Baptiste made as promotional gifts for petitioners. We credit Baptiste's testimony that when she told Occhino she could not afford to miss two weeks of work to go to the pre-licensing class, Occhino stated that she would be paid for her time at class, but subsequently reneged and stated that wages Baptiste earned would not be paid to her but instead go towards Occhino's half of the tuition. Occhino disputed this testimony only by arguing, for example in her July 13, 2016 letter to respondent, that her agreement "[a]s a friend… to split the cost of the class…. had nothing to do with the Agency and [Baptiste] wasn't an employee with wages," claims we have rejected. It is undisputed that Occhino agreed to pay half the $799.00 cost of the class and to waive repayment if Baptiste passed on her first try and continued to work for the agency for at least 90 days, and undisputed that Baptiste did pass on her first try and became fully licensed by October 11, 2015. Labor Law § 193 prohibits unauthorized deductions from wages, with exceptions not relevant here. We find that deduction of $400.00 from Baptiste's wages to fund an expense Occhino had agreed to bear violated Labor Law § 193.

Neither Baptiste nor Occhino testified at the hearing concerning the failure to reimburse Baptiste for the pretzels, although Baptiste did testify about making them. We find that petitioners failed to meet their burden of proof on this issue and we affirm the unlawful deductions order in its entirety.

Petitioners Failed to Provide Required Meal Periods

Labor Law § 162 (2) provides that where employees work more than six hours extending over the noon day meal period from 11:00 a.m. to 2:00 p.m. they shall be afforded an uninterrupted 30-minute meal period. Baptiste testified that she worked for petitioners without a lunch break; her claim for unpaid wages stated: "I may have had 10 breaks throughout employment." Occhino testified that employees were provided with a 30-minute lunch break, and stated that debit card payments shown on the agency checking account for October 6 and November 12, 2015 indicate she took Baptiste out for lunch on those days. According to Occhino, employees could take breaks when they wished "because there was enough coverage and I was always there. So… people didn't have to sign in for a lunch break or a lunch hour. It was just consideration. It's a small office." At another point, Occhino testified that people "pretty much had a certain time" to take lunch breaks, and that Ashleigh "pretty much took her little smoke break at the same time."

We do not credit Occhino's vague, general and contradictory testimony, and find that petitioners failed to meet their burden of proving that employees were provided 30-minute meal periods as required by Labor Law § 162. Occhino's testimony that she took Baptiste out to lunch on two occasions has nothing to do with Labor Law § 162. Petitioners did not offer any specific evidence to prove that Baptiste was provided with the required meal period each work day. As

such, we find that respondent's determination that petitioners were not in compliance with Labor Law § 162 and the imposition of a $1,000.00 civil penalty for that violation is reasonable and valid.

The Civil Penalties Pertaining to Wages, Supplemental Wages, and Unlawful Deductions Are Revoked

Labor Law § 218 [1] provides that when the Commissioner determines that an employer has violated certain provisions of the Labor Law, including but not limited to Labor Law § 162 and Articles 6 and 19, she must issue an order directing payment of any wages found to be due, liquidated damages in the amount of one hundred percent of unpaid wages, plus "the appropriate civil penalty." In all cases, the Commissioner "shall 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."

During the hearing, petitioners amended their petition, and respondent consented to the amendments, to challenge the assessment of civil penalties pertaining to wages, supplemental wages, and unlawful deductions. McLaughlin testified that a 50% penalty was imposed in this case which was a quarter of what the statute permitted for a willful or egregious violation. McLaughlin, however, did not testify about the statutory factors listed in Labor Law § 218 [1] to show that due consideration was given to these factors.[8] We find that respondent provided no valid and reasonable explanation for the imposition of a penalty and modify the order by revoking the 50% civil penalty in the minimum wage order, the supplemental wage order, and the unlawful deductions order.

Liquidated Damages and Interest Pertaining to Wages, Supplemental Wages, and Unlawful Deductions Are Affirmed; Amounts Must Be Recomputed to Reflect the Modification of Wages and Supplemental Wages

Labor Law § 218 [1] requires respondent to include liquidated damages in the amount of 100% of the wages found due with the order unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law." The petitioners here provided no such proof. Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, the order directing payment of those wages 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."

Here, petitioners did not prove a good faith basis to believe that underpayment was in compliance with the law, and we find that respondent correctly determined that claimant was not

[8] While respondent entered a three-page document titled Order to Comply Referral at hearing, it is insufficient for respondent to simply state or otherwise list the statutory factors with no explanation of their relevance (*Matter of Benjamin G. Abraham*, Docket No. PR 18-012, at p. 8 [May 29, 2019] ["[Respondent's investigator's] scant testimony, and the supporting documentation entered at hearing, fails to provide a coherent, relevant explanation regarding the information respondent gathered during its investigation relevant to the four statutory factors and how the respondent applied that information, once gathered, to the statutory factors, i.e., how respondent calculated or otherwise reached the 50% civil penalty."]; *Matter of Charles Allen and Charosa Foundation Corporation*, Docket No. PR 15-063, at p. 10 [September 14, 2016] ["[The Board does] not believe that simply stating the statutory factors with no explanation of their relevance is sufficient."].

paid all wages, wage supplements, and unlawful deductions and that petitioners did not offer any evidence to challenge the imposition of interest. We affirm the imposition of liquidated damages and interest in the order, but the amounts of liquidated damages and interest must be modified to conform to the modification of the supplemental wage order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Except as specifically set forth below, the order to comply is affirmed as modified to reflect that $7,460.00 rather than $7,876.00 in unpaid wages and $408.00 rather than $520.00 in supplemental wages was owed to Erika Baptiste.

2. The order to comply's findings that petitioners also owed $400.00 in unlawful deductions and an additional $100.00 in wages; liquidated damages calculated as 100% of unpaid wages, unpaid supplemental wages, unlawful deductions and the additional $100.00 in wages; and interest calculated at 16% per annum on all such amounts from the date of underpayment to the date of payment are affirmed.

3. The order to comply's award of a civil penalty calculated as 50% of the amounts listed above is revoked.

4. The order to comply's award of three $1,000.00 civil penalties for violations of each of Labor Law § 162, Department of Labor Regulations (12 NYCRR) §§ 142-2.6 and 2.7 is affirmed.

5. The total due under the order to comply as modified is $8,368.00 in wages and wage supplements underpaid to Baptiste, $8,368.00 in liquidated damages, interest on the above amounts from the date of underpayment to the date of payment, and $3,000.00 in civil penalties.

6. The petition for review be, and the same is, otherwise denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on June 24, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Patricia Kakalec, Member
Brooklyn, New York

Gloribelle J. Perez, Member
New York, New York

Najah Farley, Member
Brooklyn, New York