STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RICHARD M. AUFRICHTIG AND AUFRICHTIG BROTHERS INC. (T/A BIG APPLE PRODUCE MARKET), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated June 6, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-260 RESOLUTION OF DECISION

APPEARANCES

Hoffman & Associates (Andrew S. Hoffman of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Paul R. Piccigallo of counsel), for respondent.

WITNESSES

Labor Standards Investigator Jose Mendez, Arturo Lara, and Richard Aufrichtig, for petitioners.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on August 9, 2011, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on June 6, 2011 against petitioners Richard M. Aufrichtig[1] and Aufrichtig Brothers Inc. (T/A Big Apple Produce Market). The Commissioner filed his answer on December 16, 2011.

[1] Petitioners' attorney stated at hearing that Mr. Aufrichtig's middle initial is not "M."

Upon notice to the parties, a hearing was held in this matter on January 8, 2015, in New York, New York, before Devin A. Rice, Associate Counsel to 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 to file post-hearing briefs.

The order to comply with Article 19 (wage order) under review directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to six named employees in the amount of $165,344.09 for the time period from December 3, 2000 to December 10, 2006, as follows:

> $22,271.60 to Alberto Castro for the period from May 23, 2004 to December 10, 2006;
>
> $42,081.80 to Arturo Lara for the period from December 3, 2000 to November 26, 2006;
>
> $12,727.10 to Ventura Luna for the period from September 11, 2005 to December 10, 2006;
>
> $17,730.50 to Aureliano Popocia for the period from March 7, 2004 to December 10, 2006;
>
> $18,386.00 to Antonio Robles for the period from June 6, 2004 to December 10, 2006; and
>
> $52,147.09 to Alejandro Xochimitl for the period from December 17, 2000 to December 10, 2006.

The wage order includes continuing interest at the rate of 16% calculated to the date of the order in the amount of $119,195.47, and assesses a civil penalty in the amount of $330,688.18, for a total amount due of $615,227.74.

At hearing the wage order was amended on the record to reduce the wages due and owing to $87,089.26 as follows to reflect wages owed only for the six year period from the date respondent notified petitioners of the claims against them:

> $15,593.81 to Alberto Castro for the period from March 21, 2005 to December 10, 2006;
>
> $12,534.00 to Arturo Lara for the period from March 21, 2005 to November 26, 2006; and
>
> $12,727.10 to Ventura Luna for the period from September 11, 2005 to December 10, 2006;

$12,489.35 to Aureliano Popocia for the period from March 21, 2005 to December 10, 2006;

$14,141.50 to Antonio Robles for the period from March 21, 2005 to December 10, 2006; and

$19,603.50 to Alejandro Xochimitl for the period from March 21, 2005 to December 10, 2006.

The amended wage order includes interest at 16% to be recalculated on the new principal, and a civil penalty of $174,178.00.

The order under Article 19 (penalty order) assesses two $1,000.00 civil penalties 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 December 3, 2000 to December 3, 2006, for a total due of $2,000.00. Respondent revoked the penalty order in its entirety on the record at hearing.

Only one of the six claimants – Arturo Lara – testified. The parties stipulated that the other claimants would all testify consistent with the claims they filed.

Petitioners argued that due to unreasonable administrative delay, the claims are barred by laches. For the reasons set forth below, we find laches did not bar issuance of the orders on review, and affirm the wage order as amended.

SUMMARY OF EVIDENCE

DOL's Investigation

Wage claims

On November 28, 2006 and December 11, 2006, several employees of Aufrichtig Brothers Inc., a small grocery store located in Brooklyn, New York, filed claims with the Department of Labor alleging unpaid wages.

Alberto Castro claimed he worked 72 ½ hours per week for petitioners from May 17, 2004 to December 9, 2006. Petitioners paid him $5.50 an hour from May 17, 2004 to July 1, 2005, $6.75 an hour from July 1, 2005 to September 1, 2006, and $7.50 an hour from September 1, 2006 to December 9, 2006. Castro's claim states he received "$0.00" for overtime.

Arturo Lara claimed he worked 75 hours per week for petitioners from November 28, 2000 to November 24, 2006. He alleged petitioners paid him $4.00 an hour from November 28, 2000 to November 30, 2001, $4.50 an hour from December 1, 2001 to December 30, 2001, $5.00 an hour from January 1, 2002 to December 30, 2002, and that he received a $.50 per hour raise each year. The claim also alleged that his last rate of pay was $9.00 an hour and that he did not receive overtime.

Ventura Luna claimed he worked 69 hours per week for petitioners from September 8, 2005 to December 9, 2006. He claimed petitioners paid him $400.00 per week from September 9, 2005 to October 1, 2006 and $330.00 per week from October 1, 2006 to December 9, 2006. Luna's claim alleges he received "$0.00" for overtime.

Aureliano Popocia claimed he worked 69 hours per week for petitioners from February 1, 2004 to December 9, 2006. Petitioners paid him $400.00 a week from February 1, 2004 to December 31, 2004, $420.00 per week from January 1, 2005 to December 31, 2005, and $450.00 a week from January 1, 2006 to December 9, 2006. Popocia claimed petitioners did not pay him for overtime.

Antonio Robles claimed he worked 69 hours per week for petitioners from June 1, 2004 to December 9, 2006. He claimed petitioners paid him $400.00 per week from June 1, 2004 to May 31, 2006, and $450.00 per week from June 1, 2006 to December 9, 2006. Robles claimed the petitioners paid him "$0.00" for overtime.

Alejandro Xochimitl claimed he worked 68 hours per week for petitioners from March 12, 1999 to December 9, 2006. Petitioners paid him $4.00 an hour from March 12, 1999 to September 1, 2000, $4.50 an hour from September 1, 2000 to March 1, 2001, and $8.20 an hour from August 1, 2006 to December 9, 2006. The claim alleges petitioners paid no overtime. Xochimitl's claim does not indicate a pay rate for the period from March 2, 2001 to August 31, 2006, but notes in the DOL's file indicate an investigator spoke to Xochimitl and confirmed that his rate never changed from March 2000 to August 2006.

Testimony of Investigator Jose Mendez

Labor Standards Investigator Jose Mendez testified that on October 8, 2008, he was assigned to investigate claims against petitioners filed in November and December 2006. The case was assigned to a Senior Labor Standards Investigator prior to assignment to Mendez. Mendez testified that Xochimitl called DOL on February 25, 2007 to state he believed the store was about to close. Mendez testified that no action was taken by DOL on the information provided by Xochimitl. Nothing was done with respect to the claims until July 2009, when Mendez made a field visit to the petitioners' business address and discovered the store was no longer in business.

Following the field visit, Mendez conducted an Accurint®[2] search on July 20, 2009 to determine the owner of Big Apple Produce and find current contact information. The search provided Mendez with the name and contact information of an owner, petitioner Richard Aufrichtig. Despite obtaining this information in 2009, DOL made no effort to notify petitioners they were under investigation until Mendez sent a letter to Aufrichtig, dated March 21, 2011, advising him of DOL's investigation. Mendez explained the delay of one year and eight months was because he was "directed to investigate other cases." He further explained that he had to finish older cases before moving to newer ones. Mendez testified that current DOL policy is to notify employers within 90 days of a claim filed against them.

[2] A subscription database containing access to over 37 billion current public records used by DOL to conduct investigations.

Mendez testified that the petitioners never provided any payroll records to DOL. He further testified that DOL imposed a 200% civil penalty against petitioners because of prior record-keeping violations.

Petitioners' Evidence

Testimony of Richard Aufrichtig

Richard Aufrichtig testified that he was a part owner of a small grocery store in Brooklyn, New York, originally known as Aufrichtig Brothers, which closed in 2004 and reopened in 2005 as Big Apple Produce. Big Apple closed in February 2007. Aufrichtig testified that the store was open seven days a week from 8:00 a.m. to 10:00 p.m. No employees worked after 10:00 p.m. Aufrichtig testified that Ventura Luna, Antonio Robles, and Aureliano Popocia did not work for petitioners.

Aufrichtig testified that petitioners maintained records of the hours employees worked. A manager wrote down the hours on index cards which were given to Aufrichtig at the end of each week. Aufrichtig then calculated the wages due to the employees by paying them $6.00 an hour for 40 hours, and time and a half for hours over 40. The index cards for each employee were copied and given to the employees when they were paid. Petitioners kept the original index cards, which were signed by the employees to acknowledge payment. After the store closed, Aufrichtig kept these records in boxes at his home until November 2010, when he moved to a smaller apartment, and threw the records out because "I didn't want to take them with me. I haven't heard from anybody I would say in close to four years so I assumed – I ran a clean business all my life and I was moving on. I was retired and I was moving on." Aufrichtig did not hear of the DOL's investigation until March 2011; however, Aufrichtig admitted that DOL had investigated petitioners in the past, and he had paid to settle a violation concerning one employee, although nobody from DOL had explained the record-keeping laws to him at that time.

Aufrichtig testified that he learned from a friend where claimant Arturo Lara's new job was located. He went to see Lara at work to ask him why he had filed a claim with DOL. Lara told Aufrichtig that the "guys" had gone through a wage dispute with another employer and received money and were going to do the same thing to petitioners. Lara told Aufrichtig he did not want to be part of it, and agreed to sign an "affidavit" stating that petitioners had properly paid him. Aufrichtig testified he explained the contents of the "affidavit" to Lara, that Lara read and understood it, and that he signed it before a notary at a bank. The "affidavit," which is written in English, signed by Lara, notarized, but not sworn, states that Lara was paid above minimum wage and whatever wages he was entitled to were paid in full.

When Aufrichtig saw Lara at the hearing and asked him why he was there, Lara replied that "Now I have a family and need the money."

Testimony of Arturo Lara

Arturo Lara testified he worked at Big Apple Produce, which was known as Aufrichtig Brothers at the time he was hired. Lara testified the store closed in 2004 for several months and reopened as Big Apple Produce. Lara worked at Big Apple until November 28, 2006. He

testified that at first the store was open 24 hours per day, and later started to close at midnight. He testified that he does not remember, but believes, the store sometimes closed at 10:00 p.m.

Lara testified that from 2000 to 2006 he worked six days a week at the store from 7:00 a.m. to 7:00 p.m. Petitioners paid him $9.00 an hour in 2006. They did not pay him overtime. Petitioners paid Lara's wages in cash and did not provide him with a receipt.

Lara recalled that Alberto Castro, Ventura Luna, and Aureliano Popocia also worked at the store. Castro started working for petitioners when the store reopened as Big Apple Produce. Lara testified that Castro first worked 10:00 p.m. to 10:00 a.m., and later worked 12:00 p.m. to 12:00 a.m. Luna also started working for petitioners when the store reopened as Big Apple, but Lara could not recall his working schedule.

Lara testified that in May 2011, Aufrichtig visited him at his new job. Aufrichtig asked about the claim Lara had filed with DOL. Lara told Aufrichtig he filed the claim because he was upset that Aufrichtig's brother fired him without paying him. Lara further testified that Aufrichtig brought him an "affidavit" to sign, which he signed without reading it because he trusted Aufrichtig. Lara stated he signed the "affidavit" of his own free will, although he did not "exactly" understand it, because he wanted to help Aufrichtig "get rid" of the "situation" with DOL.

Lara also testified that Aufrichtig asked him at the hearing what he was doing there. Lara responded that, "Things have changed . . . I have a family."

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30). We find that petitioners have not met their burden of proof, and affirm the wage order as amended.

Petitioners argue that the claims are barred by laches because of the four year administrative delay from the date the claims were filed until respondent notified petitioners of its investigation. We disagree. Employers are required by New York law to maintain certain payroll records indicating the time worked by employees and wages paid for six years (Labor Law § 661; 12 NYCRR 142-2.6 [a]). DOL requested during its investigation that petitioners provide statutorily required records. The records were never produced. Aufrichtig testified petitioners maintained weekly index cards for each employee indicating wages paid and hours worked, but that he disposed of them several years after petitioners closed Big Apple Produce. DOL did not notify petitioners they were under investigation until four years after the store had closed. Petitioners argue that they have been prejudiced in this proceeding, because had they been notified within a reasonable time that they were the subject of an investigation the records would not have been discarded and could have been produced. Petitioners, however, were required by statute to maintain the records for six years (*id.*; *see also* Labor Law § 663 [six year

statute of limitations to commence wage claim]; *Matter of 238 Food Corp.*, PR 05-068 [April 23, 2008] [reasonable for Commissioner to recover wages for period six years from date employee files claim with DOL]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 1989] [failure by employer to provide information to rebut employees' claim regardless of the reason does not shift burden to employees]). There is no exception that allows an employer to dispose of its records in less than six years because it has gone out of business or for any other reason, and where the wage order, as amended at hearing, only seeks to recover unpaid wages for six years from the date petitioners were notified of the investigation, we find no prejudice to petitioners when weighed against the strong public policy of enforcing wage and hour laws (Labor Law § 650; *Giant Supply Corp. v City of New York*, 248 AD2d 231, 234 [1st Dept 1998]).

In the absence of payroll records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d at 851; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). The petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.* PR 08-078 [October 11, 2011]). Where no wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

We find petitioners failed to meet their burden of proof, in the absence of required payroll records, to show that the calculation of unpaid wages made by respondent was unreasonable. The calculations were based on the best available evidence – the employee statements and claim forms – and were confirmed at hearing by Lara's credible and candid testimony, which was consistent with his claim, and corroborated that Castro, Luna, and Popocia worked for petitioners. The parties stipulated that the other claimants would testify consistent with their claims,[3] which must be upheld where we have no credible evidence to rebut them.

Civil Penalty

Respondent imposed a 200% civil penalty against petitioners because of a prior record-keeping violation. Labor Law § 218 (1) provides that the Commissioner shall impose a 200% civil penalty where an employer has previously been found in violation of Article 19 of the Labor Law. We find imposition of a 200% civil penalty reasonable where DOL alleged a prior violation which was admitted by petitioners.

[3] Robles and Xochimitl were present at the hearing but were not called to testify.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then 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 Section 14-A sets the "maximum rate of interest at sixteen per centum per annum." We affirm that interest must be calculated at 16% per annum from the date of underpayment to the date of payment.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The amended wage order is affirmed; and

2. The penalty order is revoked; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Absent
Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
June 10, 2015.

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LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 10, 2015.