STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ANGELO A. GAMBINO AND FRANCESCO A. GAMBINO (T/A GAMBINO MEAT MARKET, INC.),	:	
Petitioners,	:	DOCKET NO. PR 10-150
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 March 4, 2010,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Bosco & Mascolo, LLP (John Bosco of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Angelo Gambino, for petitioners.

Leo Lewkowitz, Labor Standards Investigator; Vincent Hammond, Senior Labor Standards Investigator; and Juan Orosa, claimant; for respondent.

WHEREAS:

The Commissioner of Labor (Commissioner, respondent or DOL) issued an order to comply with Article 19 of the New York Labor Law (wage order) and an order under Article 19 of the New York Labor Law (penalty order) against petitioners Angelo A. Gambino (Gambino) and Francesco A. Gambino (T/A Gambino Brothers Meat Market, Inc.), on March 4, 2010. Their petition was mailed on May 14, 2010 and received by the Board on May 17, 2010. An amended petition was filed on July 1, 2010. The Board served the petition on the Commissioner on July 9, 2010. On July 27, 2010, the Commissioner brought a motion to dismiss alleging that

the petition was untimely, pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]). By Interim Decision in this matter, dated November 18, 2010, the Board denied respondent's motion to dismiss and ordered DOL to answer the petition.

By letter dated December 7, 2010, respondent advised the Board that it would re-serve the Orders in this case. On January 25, 2011, petitioner filed a second amended petition, which was answered by DOL on March 14, 2011. A reply was filed on March 28, 2011.

By their pleadings, petitioners allege that the orders are unreasonable and/or invalid for the following reasons: the orders improperly name the individuals Angelo and Francesco Gambino as employers of claimant; insufficient notice was given the individuals prior to the issuance of the orders; the employee was properly paid under the minimum wage laws; the orders were not served properly; collection of all or part of the wages is barred by the statute of limitations and/or laches; there is a miscalculation of wages owed; the interest assessed is improper; and the civil penalties are excessive, punitive and do not consider all necessary statutory factors. Petitioners do not contest that the claimant worked 63.5 hours per week.

Upon notice to the parties, a hearing was held on June 6, 2012 and continued to June 20, 2012, in New York City before Anne P. Stevason, Chairperson 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, to make statements relevant to the issues and to file post-hearing briefs. Post hearing briefing was complete on October 1, 2012.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Angelo Gambino

Mr. Gambino testified that Gambino Brothers Meat Market Inc. (Meat Market) had an oral agreement with claimant Juan Orosa during the period of March 7, 2000 and February 27, 2006 that Mr. Orosa would be paid $6.75 and then $7.00 per hour for regular time, i.e. for 40 hours per week, and an additional $500 per week for all overtime hours, even if he were short a couple of hours.

Although the letters from DOL were addressed to Mr. Gambino in Brooklyn, in 1990 he moved to Staten Island and the meat market went out of business in April of 2008. Mr. Gambino testified that he never received the letter of June 26, 2009 which provided a notice of the labor law violations and a recap of the claim. Mr. Gambino also testified that he could not recognize the tax documents or other financial documents in evidence that had been produced to DOL by his accountant, Pio Andretti, and stated that he was unaware that the documents had been turned over. The accountant kept all of the payroll records, made all of the checks, and paid the taxes. Mr. Gambino only signed the checks. He also testified that Mr. Orosa was only paid in cash and there are no records of the amount of money paid to Mr. Orosa.

Neither Mr. Gambino nor his brother Francsco ever operated Gambino Brothers Meat Market under their individual names. All checks from the business were written on the business

checking account under the corporate name. All licenses, workers' compensation insurance, et al., were in the corporate name.

Mr. Gambino admitted that there was no time clock in the meat market and that he did not keep track of the number of hours that Mr. Orosa worked. However, Mr. Orosa worked a set schedule of five and one-half days per week and he would be paid the same, even if he was short a couple of hours. Mr. Gambino testified that "[e]ven if he was leaving half an hour early or an hour earlier, three hours or half a day, he was getting paid for it. . . ." Mr. Orosa also received at least a half-hour break per day for lunch.

Mr. Gambino was at the meat market almost every day between the years 2000 and 2006 and was Mr. Orosa's boss, gave Mr. Orosa directions and paid him in cash every week. Mr. Gambino's brother, Francesco Gambino was also the boss and gave Mr. Orosa directions and orders and if Angelo Gambino was not there, would be the one to distribute wages.

Documentary Evidence

Mr. Orosa's minimum wage complaint, which was filed with DOL on March 6, 2006, was submitted into evidence. The complaint, which was signed by Mr. Orosa, indicated that he was paid $270 per week. Petitioner also entered into evidence various DOL notices and letters addressed to Gambino Brothers Meat Market.

Respondent's Evidence

Testimony of Leo Lewkowitz, Labor Standard Investigator (LSI)

Mr. Lewkowitz was involved in the DOL investigation of Gambino's meat market which was initiated when Mr. Orosa filed a claim. On September 7, 2006, a field visit was made to the meat market. At that time, Mr. Lewkowitz spoke with Angelo Gambino who indicated that he was the vice president of the meat market. Mr. Lewkowitz also noted that Francesco Gambino was listed as president on a United States Department of Agriculture poster. Mr. Gambino was asked about records and Mr. Gambino stated that once the employees were paid, the times sheets and time cards would be thrown out. There were no payroll records on the premises. Mr. Gambino gave him the name and contact information for his accountant, Pio Andretti, and told him that he had the records.

A notice of revisit was issued and given to Mr. Gambino at the time of the inspection indicating that DOL would return to inspect time and payroll records. Prior to the date set for inspection of records, petitioners' accountant called DOL and postponed the document review. He also told them that the employer kept his records in a book that was thrown out each week after the hours were called in. LSI Lewkowitz went to the accountant's office on November 1, 2006 to review time and payroll records. The only documents produced were W-2 tax documents and quarterly earnings statements for 2000 through 2006. During the inspection LSI Lewkowitz issued a recap of wages due in the amount of $45,866.75. Between November of 2006 and June 27, 2009 there was no contact between petitioners or their accountant and DOL.

LSI Lewkowitz made the computations of wages due to Orosa by using the claimant's statements regarding the hours that he worked and wages paid. Petitioners never submitted any documentation regarding the time worked. A notice of labor law violation was issued because

the employer failed to provide a 30 minute meal period and did not comply with the recordkeeping requirements of the law.

On November 16, 2006, DOL received a letter from petitioners' accountant indicating that Orosa was paid an additional $500.00 per week in cash. LSI Lewkowitz then followed up with claimant and questioned him concerning his salary. At that time, Orosa admitted that he was paid approximately $270.00 per week "on the books" and $500.00 in cash per week "off the books." LSI Lewkowitz then recomputed the wages due based on a salary of $760 per week in 2000 and $780 per week thereafter. The final computation found that Orosa is due $42,013.74.

The minimum wage violation in this case, after finding out that Mr. Orosa was paid an additional $500 per week, concerned the amount that he was paid for overtime. LSI Lewkowitz computed the overtime by dividing the salary, $760 in 2000 and $780 per week thereafter, by the number of hours, 63.5, and coming up with a regular rate of pay ($11.97 and $12.28 per hour, respectively). This regular rate multiplied by 40 constituted payment for non-overtime hours. This regular rate multiplied by the overtime hours of 23.5 and then multiplied by one and one half, which is the overtime premium, in addition to the regular rate for 40 hours, constitutes what Mr. Orosa should have been paid per week. Mr. Orosa was never asked what his hourly rate was. All notices were addressed to Gambino Brothers Meat Market, Inc., or to the accountant, who was named by Angelo Gambino, and not to the individuals Angelo or Francesco Gambino.

At the end of his investigation, LSI Lewkowitiz submitted a final report to his supervisor. The investigation took approximately two and one-half years, which is not uncommon when the employer did not keep or provide all required records. As an LSI, he performs at least one hundred investigations per year and relies on reviewing his file to refresh his recollection of any particular case.

Testimony of Vincent Hammond, Senior Labor Standards Investigator (SLSI)

SLSI Hammond testified that he supervised LSI Lewkowitz in this case. Hammond spoke with the claimant Mr. Orosa, and based on the statements from the claimant that the individual petitioners Angelo and Francesco Gambino owned the business and gave him directions on how to perform his duties, Hammond determined that they were also liable as employers. Hammond recommended the civil penalties in this case, as well, and recommended a 100% penalty. In recommending that percentage, he took into account the size of the business, prior violations and the cooperation of the employer. The employer did not respond to notices and the notices were never returned.

Testimony of Claimant Juan Orosa

Claimant Orosa testified that he started working for petitioners as a butcher in 1983 and worked there as a butcher until February 14, 2006. Both Angelo and Francesco Gambino were his bosses and he took orders from both of them. There was always one brother at the store. There was no time clock and Mr. Orosa worked six days per week, 7:30 a.m. to 6:30 p.m. Monday through Thursday (excluding Wednesdays) and 7:30 a.m. to 7:00 p.m. Friday and Saturday. He was paid $270 on the books and $500 off the books. Mr. Orosa was never told that the $500 was for the overtime hours.

Mr. Orosa did not indicate that he was also paid $500 per week in addition to the $270 per week, on his DOL claim form. Mr Orosa testified that he put $270 on the claim form because that is what was paid to him on the books. On cross examination Mr. Orosa stated that he agreed to work for minimum wage because there were no jobs around.

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 [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]); State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

I. Angelo Gambino and Francesco Gambino are Liable as Employers.

A. Employer status

Labor Law § 190 defines the term "employer" as "includ[ing] any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). An "employee" is described in the statute as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). Furthermore, to be "employed" under the Labor Law means that a person is "permitted or suffered to work" (Labor Law § 2 [7]).

The Board has found individuals to be employers if they possess the requisite authority over employees (*see e.g. Matter of David Fenske [T/A] AMP Tech and Designs, Inc.*], PR 07-031 [December 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [January 27, 2010]). In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the court articulated this test for determining employer status:

> ". . . the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality'...[T]he 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 these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id*).

Both Mr. Gambino and Mr. Orosa testified that Angelo and Francesco Gambino were Mr. Orosa's bosses, directed his work, and paid him. They determined his pay, his schedule, that he was to be paid partially on the books, and that he was to be paid in cash. Mr. Gambino was at the store all of the time. Angelo and Francesco Gambino were the president and vice-president of the business, the owners and listed as the responsible persons on the various filings of government records such as tax records and the Department of Agriculture certificate.

Petitioners argue that the individuals cannot be held liable because the provisions of Business and Corporation Law § 630, which provides for shareholder liability of a corporate debt for wages were not met. However, liability in this case is based on the fact that the individuals fell within the Labor Law definition of employer and not due to their shareholder status (*See, e.g. Matter of Frank R. Kline, et al,* PR 06-068 [December 17, 2008]).

The Board finds that Angelo Gambino and Francesco Gambino are liable as employers, as defined by the Labor Law, and are properly named in the Orders.

B. Due Process

Petitioners allege that the individual petitioners were not afforded due process because they were not given notice, prior to the orders, that they were to be held liable in their individual capacities. The Board has previously held that due process is satisfied by the opportunity that petitioners have to contest the orders at the hearings before the Industrial Board of Appeals where they have the right to present evidence and cross-examine witnesses and where the Board views the order *de novo* and renders its decision based on the evidence presented at the hearing (*See, e.g. Matter of Michael E. Fischer [DBA MEFCO Builders],* PR 06-099 [April 23, 2008]).

II. The Wage Order is Upheld.

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:

(1) name and address;
(2) social security number;
(3) wage rate;
(4) the number of hours worked daily and weekly, ...;
(5) when a piece rate method of payment is used, the number of units produced daily and weekly;
(6) the amount of gross wages;
(7) deductions from gross wages;
(8) allowances, if any, claimed as part of the minimum wage;
(9) net wages paid; and
(10) student classification.

"...

"(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a (2010) provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews. As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3rd 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 calculations to the employer."

B. Petitioners have failed to keep adequate records.

In the instant case, petitioners have failed to maintain the required time records or accurate payroll records for its employee Juan Orosa. In his testimony, Mr. Gambino admitted

that there were no time records and that there were no records of payments made to Mr. Orosa. The tax documents only reflected the wages paid to Mr. Orosa that were "on the books."

The Board finds that petitioners failed to maintain adequate records. Therefore, the petitioners' burden is to show that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for the those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078, October 11, 2011, *appeal pending.*)

C. Calculation of Wages Due under the Minimum Wage Order

Article 19 of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Miscellaneous Industries, 12 NYCRR 142-2, requires an employer to pay employees "at a wage rate of 1 ½ times the employee's regular rate" for all hours worked over 40 in a work week. The term "regular rate" is defined at 12 NYCRR 142-2.16:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece rate basis, salary or any other basis than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

> "The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating, would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, et al.*, 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944)" (*Giles v. City of New York*, 41 FSupp2d 308, 317 [SDNY 1999]).

Petitioners argue that they paid Mr. Orosa correctly because they had an oral agreement that he would be paid $260 per week during the year 2000, and $280 per week thereafter, for regular hours and $500 per week for all overtime hours. Petitioners argued that the wage for the regular hours was based on the minimum wage rate and that this was bolstered by Mr. Orosa's testimony that he agreed to minimum wage because there were no jobs around. Mr. Orosa also testified that the minimum wage was the wage that was to be on the books and that he never agreed that the $500 was for overtime hours. Petitioner's argument is not credible. First of all, minimum wage in the year 2000 was $5.15 per hour, after March 31, and $4.25 before. This was not raised until 2005 to $6.00 per hour and then $6.75 in 2006 (Labor Law § 652). If the agreement was to pay minimum wage for regular hours in 2000 then he would be paid $5.15 x

40 hours or $206 per week instead of $260. Even if the agreed rate was $6.75, which did not become minimum wage until 2006, he would be paid $270 per week and not $260. The Board finds that the parties never agreed to an hourly rate.

The evidence supports a finding that Mr. Orosa was paid a salary of $760 per week in the year 2000 and $780 per week thereafter until the termination of his employment in 2006, but that only $260 or $280 per week were reported by petitioners to the taxing authorities. A finding that Mr. Orosa was paid on a salary basis is supported by the testimony of Mr. Gambino that Mr. Orosa was paid the same amount each week no matter how many hours that he worked. He could have been short one hour, three hours or a half-day and he would still be paid the same. Petitioners did not contest the number of hours worked by Mr. Orosa.

Pursuant to the above regulation, the weekly salary given to Mr. Orosa must be divided by the actual hours worked to determine whether the minimum wage was paid and also, to determine the regular rate of pay for purposes of determining the premium due for the overtime hours. This was the method used by DOL in calculating the overtime premium wages due to Mr. Orosa.

D. Statute of Limitations

Petitioners allege that the unpaid wage claim must be reduced so that it does not go beyond the six year statute of limitations listed in Labor Law § 663 for actions to recover a liability under the minimum wage law. The current version of Labor Law §663 (3) provides, in pertinent part:

> "An action to recover upon a liability imposed by this article must be commenced within six years. *The statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier, until an order to comply issued by the commissioner becomes final. . .*" [Italics added.]

The tolling provision, in italics, was added in 2010 and therefore, after the facts in this case. Although petitioners have given various interpretations as to when the action should be deemed to commence, they have provided no authority for such interpretations.

Claimant Orosa filed his claim on March 6, 2006 and the Order to Comply with Article 19, issued on March 4, 2010, was for wages for the period covering March 7, 2000 until February 27, 2006. After Mr. Orosa's claim was filed, DOL made a field visit to the meat market on September 7, 2006 where the investigator met with Angelo Gambino. A request for records was made, Mr. Gambino referred the DOL investigator to his accountant and DOL met with the accountant on November 1, 2006 when DOL presented the accountant with a recapitulation of the wages it found due to Juan Orosa.

In the case of *238 Food Corp. T/A Riverdale Diner*, PR 05-068 (April 23, 2008), the Board held that the Board's proceeding was not an "action" under Labor Law § 663 (3) since it was not a judicial proceeding and that therefore, the standard by which to evaluate the period of recovery is whether DOL's action is reasonable. In that case, the Board held that a six year

period dating back from the filing of the employee's claim with DOL, was reasonable. We follow that ruling here.

Although there was a long delay from the filing of the claim to the issuance of the order, petitioners were on notice of the claim early on and there appears to be no basis to apply laches to limit the claim in any way.

The Board affirms the wages found due and owing to the claimant Juan Orosa.

E. The Civil Penalty in the Wage Order is Upheld.

The order imposes a 100% civil penalty against the petitioners. Senior Labor Standards Investigator Hammond testified that he recommended this penalty based on the size of the business, prior violations and the cooperation of the employer. He could have recommended 200% of wages due.

The Civil Penalty of 100% of the wages due is affirmed.

III. The Penalty Order is Affirmed in Full.

Petitioners were cited $750 for failure to maintain and furnish payroll records; and $750 for failure to provide wage statements with wages.

Petitioners failed to allege or prove any defense to this order and therefore, the Board affirms the penalty order in full.

IV. Interest is due.

Labor Law § 219(1) (2010) 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 banks 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 percent per centum per annum." Therefore, the interest imposed by the wage order is affirmed.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed in full; and

2. The Penalty Order is affirmed; and

3. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 25, 2013.