STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ANDREY LEPIN AND GVR PLUS INC.,	
Petitioners,	
	DOCKET NO. PR 10-284
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 and an Order Under Article 19 of the Labor Law, both dated July 1, 2010,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Andrey Lepin[1], petitioner *pro se* and for GVR Plus Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Andrey Lepin, Elena Raffloer, and Leonid Kaplan, for petitioners.

Leo Lewkowitz, Labor Standards Investigator, for the respondent.

WHEREAS:

On September 2, 2010, Petitioner Andrey Lepin filed a petition with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (12 NYCRR Part 66), seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner or Respondent) issued on July 1, 2010. The first Order, issued pursuant to Article 6 of the Labor Law (Wage Order), finds that Genna Paverin, Leonid Kaplan, Audrey[2] Lepin [sic.] and GVR Plus Inc. failed to pay wages to Leonid Zavlunov (Claimant) and demands payment of $476.00 in wages due and owing, interest at the rate of 16% calculated to the date of the Order in the amount of $100.16 and a civil penalty in the amount of $476.00 for a total amount of $1,052.16. The second Order, under Article 19 of the Labor Law (Penalty Order), finds that Petitioners failed to keep and/or furnish true and accurate payroll records and demands payment in the amount of $500.00. Neither Genna Paverin nor Leonid Kaplan filed a petition.

[1] We note that DOL's orders spell the petitioner's name incorrectly as "Audrey" Lepin.
[2] Id.

The petition argues that Lepin interviewed various candidates for the position of cook in his restaurant, including Claimant, but that Claimant was not hired and never worked for Petitioners.

Respondent filed an answer to the petition with the Board on November 15, 2010. Respondent's answer states that Claimant filed a claim for unpaid wages with Respondent's Division of Labor Standards for wages due him while employed by Petitioners as a cook at the rate of $14.00 an hour and that he was due and owed wages for the period March 4, 2009 to March 8, 2009. The answer also alleged that Petitioners failed to provide payroll records as required by law and that in absence of such records it found that Petitioners failed to meet their burden to prove that Claimant was paid the claimed wages.

Upon notice to the parties, a hearing was held with the Board on April 19, 2013, in New York, New York, before Board member and designated hearing officer, J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. The Claimant was not present at the hearing and did not testify.

SUMMARY OF EVIDENCE

Wage Claim

Andrey Lepin owned a small restaurant in Brooklyn, New York, (Caspiy Restaurant) for seven years that sat approximately 40 customers. Normally, the restaurant opened Wednesday through Sunday at noon and closed at 9 or 10 p.m. Lepin explained that the restaurant mostly served parties through advanced reservations. Walk-in diners might be accommodated depending on the number of reservations.

According to Lepin, in early 2009, he, Elena Raffloer, Leonid Kaplan, and Gennadiy Kaverin, worked in the restaurant. Lepin described Raffloer as the manager who handled the reservations and meal orders, though she waitressed at times; Leonid Kaplan was in charge of entertainment, such as music and karaoke; and, Kaverin was the cook. Lepin also described Kaplan and Kaverin as his business partners, and stated that they did not receive W-2 Wage Statements until 2010.

Lepin testified that in 2009, he interviewed a number of applicants for an assistant cook position, including Claimant, who told him that he had been a cook for almost 15 years. Lepin always tests job applicants by requiring them to complete three cooking tests in the restaurant's kitchen - tests that usually take a total of 40 to 60 minutes. According to Lepin, Claimant was tested because he had not cooked in a number of years, and, ultimately was not hired. Lepin maintained that after he told Claimant that he had "lost his experience" and didn't fit the restaurant's needs, he got angry and insisted on being paid $50 for time he spent being tested. When Lepin refused to pay Claimant, he began cursing and threatened to submit a claim to the Department of Labor (DOL) and the Department of Health. Lepin added that shortly after Claimant's threats, the Department of Health appeared for an unannounced inspection and told Lepin that they were responding to a complaint.

Lepin also testified that he hired a person that he could only identify as Sergev for the assistant cook position, who worked at the restaurant for ten months. Lepin said that Sergev was paid in cash, and "worked for 1099."

Elena Raffloer testified that she placed the advertisement for the assistant cook position and recalled that applicants were interviewed and tested for the job. She conceded that she did not specifically remember Claimant and was not certain who worked as an assistant cook in 2009. However, she recalled that an individual named Sergev, and not Claimant, was hired as the assistant cook.

Leonid Kaplan remembered that in March 2009, five or six applicants were interviewed for the position of assistant cook, including Claimant. Kaplan recalled that Claimant was given the cooking test, that he was not satisfactory, and that he was not hired. Kaplan added that when Claimant was not hired he became "very rude." Kaplan testified that an unscheduled health inspection was done on Petitioners' restaurant after the search for the assistant cook.

Leo Lewkowitz is a DOL investigator. He did not investigate the claim. Lewkowitz identified various documents constructed by another DOL investigator who Lewkowitz "heard" had retired. He identified Claimant's wage claim as one for $14 an hour for 34 hours over three days in the week ending March 8, 2009, for a total of $476.

Lewkowitz was also asked whether he had had cases where a job applicant was asked to demonstrate their abilities as part of a pre-employment or training stage. He responded that he had, and that "this type of claim" was something that he had previously witnessed.

Record Keeping

Lepin testified that there are two apartments above his restaurant and that the tenants in those apartments do not speak English. Lepin admitted that he did not respond to DOL's correspondence for records and attempts to contact him, but insisted that he did not receive any letters, requests, or complaints. Lewkowitz, testified that no material sent to Petitioners was returned as undeliverable, and that there was nothing in the case file that would lead him to believe that Petitioners did not receive correspondence forwarded to them.

Lewkowitz also testified that the minimum legal requirements for the production of proper payroll records include hours worked, beginning and ending workday times, payroll deductions, and that records that Petitioners introduced at hearing were not proper records under the Labor Law, but rather were merely quarterly tax and unemployment filings.

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).

1. The Wage Order

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 137.2.1[3] provided, in relevant 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) occupational classification and wage rate;
> (4) the number of hours worked daily and weekly . . . ;
> (5) the amount of gross wages;
> (6) deductions from gross wages;
> (7) allowances, if any, claimed as part of the minimum wage;
> (8) money paid in cash; and
> (9) student classification
> " . . .
> "(e) Employers . . . shall make such records available upon request of the commissioner at the place of employment."

§ 137-2.2 further provided:

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

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821). In a proceeding challenging such determination, the employer must then "come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery,* 328 U.S. 680, 688; *Matter of Mid-Hudson Pam Corp. v Hartnett, supra* at 821 [employer has the burden to negate the reasonableness of Commissioner's determination]).

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[3] As of January 1, 2011, all restaurant and hotel industries are covered by the Hospitality Wage Order (12 NYCRR 146).

B. Petitioners Have Met Their Burden to Show That They Did Not Employ Claimant.

Petitioners did not keep and/or provide upon demand, payroll records for Claimant that were in compliance with Labor Law § 661 and 12 NYCRR § 137-2.2. It was therefore Petitioners' burden to come forward with sufficient evidence to "negate the reasonableness of the inference" drawn by the Commissioner that Claimant was employed as an assistant cook for the period March 4, 2009 to March 8, 2009. We find that Petitioners have met this burden.

Lepin credibly testified that Claimant was interviewed and tested for the position of assistant cook, but that an individual named Sergev was hired for the position and not Claimant, as Claimant did not perform satisfactorily on a cooking test administered by Lepin. Lepin's testimony was corroborated by Petitioners' restaurant manager, Elena Raffloer. Though Raffloer conceded that she did not specifically recall Claimant, she testified with certainty that Sergev was hired for the position and not Claimant. Also, Leonid Kaplan testified that a number of individuals applied for the assistant cook position, including Claimant; that Claimant was given the cooking test, but was unsatisfactory; and, that he was told that he did not get the position.

Commissioner relied upon the claim submitted by the Claimant, who did not testify. The testimony of Lepin, Raffloer, and Kaplan was credible and sufficient to rebut the Claim in the absence of any corroborating evidence that the Claimant worked for the Petitioners, and therefore we revoke the Commissioner's Wage Order.

2. The Penalty Order

The Penalty Order finds that the Petitioners failed to keep and/or furnish true and accurate wage and hour records. While we have no reason based on the record before us to contradict the Petitioners' testimony that wage records were never demanded, it is uncontested that the records produced at hearing failed to demonstrate that the Petitioners maintained records that complied with Labor Law § 661 and NYCRR, § 137.2.1, which was in effect during the time period in question. Since the Petitioners did not show records at the hearing that demonstrated they were in compliance with the record keeping requirements of Article 19 during the period covered by the Penalty Order, they failed to meet their burden to prove that the Penalty Order is unreasonable or invalid. Accordingly, we affirm the Penalty Order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is revoked in its entirety.

2. The Penalty Order is affirmed.

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

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
November 20, 2013.