STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: RONALD SUHANOSKY JR., Petitioner, To Review Under Section 101 of the Labor Law: Two Orders to Comply With Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, each dated February 15, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-113 RESOLUTION OF DECISION

APPEARANCES

Ronald Suhanosky Jr., petitioner *pro se*.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Jeffrey G. Shapiro of counsel), for respondent.

WITNESSES

Ronald Suhanosky Jr. for the petitioner.

Labor Standards Investigator Dawn Hughes for the respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 12, 2011. Upon notice to the parties a hearing was held on July 10, 2013 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, and to make statements relevant to the issues.

The first order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on February 15, 2011 against petitioner Ronald Suhanosky Jr. and Dick Van Stockum and 98 Kenmare Restaurant Group LLC (T/A Civetta Restaurant). Dick Van Stockum and 98 Kenmare Restaurant Group LLC did not appeal or otherwise appear in this proceeding. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due to claimant Elizabeth Sawyer in the amount of $1,750.00 for the time period from June 1, 2009 through August 23, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $424.22, and assesses a 100% civil penalty in the amount of $1,750.00, for a total amount due of $3,924.22.

The second order to comply with Article 6 (supplements order) under review was issued by the respondent Commissioner of Labor (Commissioner) on the same date against the same parties, with only the petitioner appealing. The supplements order directs compliance with Article 6 and payment to the Commissioner for expenses due to claimant Elizabeth Sawyer in the amount of $123.54 for the time period from June 1, 2009 through August 23, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the supplements order, in the amount of $29.95, and assesses a 100% civil penalty in the amount of $123.54, for a total amount due of $277.03.

The order under Article 19 of the Labor Law (penalty order) was also issued on the same date against the same parties, with only the petitioner appealing. The penalty order imposes a $500.00 civil penalty against the petitioner and the other named parties for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 1, 2009 through August 23, 2009.

SUMMARY OF EVIDENCE

Labor Standards Investigator Dawn Hughes testified that on or about December 24, 2009, Elizabeth Sawyer filed a claim with the Department of Labor (DOL) for unpaid wages and expenses against 98 Kenmare Restaurant Group LLC T/A Civetta Restaurant and Dirk Van Stockum as general manager and petitioner Ronald Suhanosky Jr. as chef[1]. Hughes did not investigate the claim. She testified that Senior Labor Standards Investigator Steven Konsistorum, who no longer works for DOL, investigated Sawyer's claim. Sawyer alleges in her claim that she worked as a "fashion designer (uniforms), graphic design, waitress", at a rate of $25.00 an hour, and was not paid for work performed from June 1, 2009 to August 23, 2009. She further alleges in her claim form that she was hired by Michael Bennett (restaurant manager), managed by Dirk Van Stockum, and requested her wages from Van Stockum and the petitioner. There is also an allegation that she was "transferred" to a "sister restaurant" owned by the petitioner. Sawyer, who apparently resides now in the United Kingdom, did not testify at the hearing.

[1] Suhanosky testified that he was not the head chef at Civetta.

Petitioner Ronald Suhanosky Jr. testified that 98 Kenmare Restaurant Group LLC, which traded as Civetta Restaurant, was owned and operated by Luis Saruzie.[2] Suhanosky testified that Saruzie is an investor in a different restaurant owned by Suhanosky, and that Saruzie hired him as a consultant to help with opening Civetta. Suhanosky explained that his role as a consultant was to create the menus, hire a chef and kitchen staff, and to provide input in the design elements of the restaurant. Suhanosky was not involved in hiring the front of the house staff, although once hired, he did speak to them regarding how the restaurant would function and the direction of menu. Suhanosky worked as a consultant at Civetta from the beginning of 2009 until August of that year. He was frequently present the first month, but gradually cut his hours back to concentrate on his own restaurant, Sfoglia.

Suhanosky testified that the claimant was hired as a waitress by the general manager, Michael Bennett and the director of operations, Dirk Van Stockum. Suhanosky testified that he believed Bennett already knew the claimant prior to hiring her, and that, in any event, due to her experience as a designer, Bennett directed Suhanosky to work with her on designing uniforms for the restaurant. Suhanosky told her to make a "proposal" to submit to Bennett. According to Suhanosky, everything had to be approved by "higher up management." Suhanosky knew that the claimant made a proposal to design the uniforms to Bennett and that it was approved, although he does not recall the terms of the agreement that was reached.

Suhanosky testified he was the "in between person" for the uniform design work. Sawyer made drawings and presented fabric ideas to Suhanosky, and he told Bennett to meet with her. Suhanosky characterized his role in the design of the uniforms as a "collaboration" with the claimant. They discussed the design and sometimes Sawyer made changes based on those discussions, although he did not give her directions. Suhanosky, who had no ownership interest in Civetta and was not an officer, testified that he was not responsible for paying the claimant. He understood that Sawyer was supposed to submit an invoice to Van Stockum for the work she performed.

Suhanosky also testified that during the same time period, he hired the claimant to work part-time as a waitress at an unrelated restaurant, Sfoglia, that he owned. He testified that he kept her work at Sfoglia separate from her work at Civetta, and did not meet her at Sfoglia to discuss the Civetta uniforms. The claimant complained to Suhanosky that she had not been paid for the design work she did for Civetta, and he relayed her concern to Van Stockum and Bennett.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

The Petitioner has the burden to show that the Orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

---

[2] Phonetic spelling.

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

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

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire 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" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

There is no evidence in the record to support DOL's determination that the petitioner is individually liable as an employer under Articles 6 and 19 of the Labor Law for unpaid wages and supplements, or that he was required to maintain required employment records. The petitioner credibly testified that he was a consultant at Civetta, that he did not have final authority over the design of the uniforms, that he did not hire the claimant to work at Civetta, and that he did not give her directions there. He also credibly testified that he was not involved in approving her proposal for designing the restaurant's uniforms or responsible to pay her for such work. To the extent that DOL may have found that he was the claimant's employer because he hired her to work at his own restaurant, Sfoglia, we credit the petitioner's testimony that the two restaurants were separate entities with a common investor (Saruzie) and that he maintained such separation by not meeting with the claimant at Sfoglia to discuss the Civetta uniforms. There is, in any event, no allegation that the petitioner failed to compensate the claimant for her work as a waitress at Sfoglia, or any proof that the two jobs were so interconnected as to render the two restaurants joint employers of the claimant. For these reasons, based on the limited record before us, we revoke the orders with respect to the petitioner.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is revoked with respect to Ronald Suhanosky Jr; and

2. The penalty order is revoked with respect to Ronald Suhanosky Jr.; and

3. The petition of Ronald Suhanosky Jr. be, and the same hereby is, granted.

Anne P. Stevason, Chairman

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
October 2, 2013.