STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
RICHARD TAGLIARINO, NANCY HAYDEN AND TALENT TOUR USA, LTD. (T/A DANCE XPLOSION),	
Petitioners,	DOCKET NO. PR 11-338
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19, and an Order Under Article 19 of the New York State Labor Law, both dated September 7, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Richard Tagliarino, *pro se*, for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Richard Tagliarino and Nancy Hayden for petitioners.

Luis Acosta, Claimant, and Armando Gonzalez, Labor Standards Investigator for respondent.

WHEREAS:

On October 26, 2011, petitioner Nancy Hayden (Hayden) filed a petition on behalf of herself, Richard Tagliarino (Tagliarino) and Talent Tour USA, Ltd. T/A Dance Xplosion (Talent Tour) with the Industrial Board of Appeals (Board), to review two orders to comply with the Labor Law that the Commissioner of Labor (Commissioner, respondent, or DOL) issued on September 7, 2011. The first order (wage order) directs payment of $11,426.14 in wages due and owing to Luis Fernando Acosta (Acosta or Claimant) for the period January 20, 2009 to April 9, 2010, together with $2,584.50 in interest calculated to the date of the order, and a civil penalty in the amount of $11,426.78, for a total due and owing of

$25,436.78.[1] The second order (penalty order) assesses a civil penalty in the amount of $750.00 for failing to keep and/or furnish true and accurate payroll records, and an additional $750.00 civil penalty for failing to give each employee a complete wage statement with every payment of wages, for a total due and owing of $1,500 for the period January 20, 2009 to April 9, 2010. The petition alleges that Acosta was paid all wages due. A hearing was held on January 9, 2014, in Hicksville, N.Y. before Jean Grumet, Esq., then Member of the Board and designated hearing officer. Each party was afforded a full opportunity to present evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments.

I. SUMMARY OF EVIDENCE

Undisputed Facts

Talent Tour, located on Long Island, conducts dance competitions at locations across the United States during a season extending from January to the beginning of summer. Competitions were normally on weekends, and there were weeks during a season when no competition was held. Hayden, who started Talent Tour in 1999, is its owner and president. Tagliarino is the manager. After working for Talent Tour in 2001, Acosta was rehired in 2007 to act as "music man" and load and unload at competitions, to which he drove or sometimes flew, and to do odd jobs. In 2007 and 2008, he worked for Talent Tour only during its season. On April 12, 2010, he filed with Respondent a sworn Claim for Unpaid Wages (claim) stating that he was owed wages for the period January 20, 2009 through April 9, 2010.

Testimony of Petitioner Nancy Hayden

Hayden testified that Talent Tour paid Acosta $175 a day beginning in 2007, usually for working up to two and a half days a week at competitions. In January 2009, his pay was changed to $12.00 per hour through a verbal agreement. According to Hayden, this rate was the same regardless of what type of work Acosta was doing, and the time cards, which were kept in an office cabinet, served "to know what hours he was to be paid for." Hayden stated that Acosta told petitioners how many hours he spent traveling to competitions, Tagliarino called work hours in to Talent Tour's then payroll company, and the only documentation of Acosta's actual work hours was the time cards. Hayden testified that Acosta never raised an issue with her concerning his pay.

Testimony of Petitioner Richard Tagliarino

Tagliarino testified that Acosta was never promised a fixed weekly salary, and denied having written or signed a November 13, 2009 letter, which he stated could have been prepared by anyone using office stationery. He testified that Acosta never complained of being short on wages, and that the only reason Acosta worked for petitioners in the fall of 2009 at all was that after the 2009 season ended, Acosta did not want to file for unemployment compensation since he hoped to help relatives come from Honduras and "had

[1] The wage order was stated to be under Article 19 of the Labor Law, that is, the "Minimum Wage Act." However, the wage order found that Acosta was not paid the wage he was allegedly promised, a matter governed by Article 6 of the Labor Law. Since that was always clear and the issues were litigated on that basis, there was no prejudice to Petitioners resulted from the mislabeling, which we find harmless error, and deem the wage order amended to refer to Article 6.

to show some kind of income per week." In October 2009, Acosta, who at the time was working elsewhere, called Tagliarino and asked for any work petitioners had because he could not continue with his other job. To help Acosta out, petitioners found or created what Tagliarino called "warehouse" work for him, such as restocking and preparing materials for the 2010 season.

Tagliarino testified that he began in October 2009 to keep what he called "time cards" for Acosta – actually, weekly records Tagliarino made, including retroactively to the beginning of 2009, of Acosta's "approximate" hours, the type of work he did and his pay. Tagliarino testified that because petitioners had often advanced Acosta money, most recently for a trip to Honduras in July 2009, he began keeping these records "to see just how far ahead he was going to be." Tagliarino did not show Acosta the records, and did not give them or other documentation to the DOL at what Tagliarino described as a short, unexpected meeting with Labor Standards Investigator Gonzalez or any other time until the week before the Board hearing. Tagliarino introduced in evidence the "time cards," and two more canceled Talent Tour checks to Acosta beyond those for which pay stubs were included in Acosta's claim.

Testimony of Claimant Luis Acosta

Acosta testified that in 2007 and 2008 he worked for Talent Tour on a part-time, seasonal basis. In July 2008, at the final competition of the 2008 season, he told Tagliarino that he needed to bring his family to the United States; immigration guidelines required that to do so, he must earn $26,000 a year; and he would therefore need to find another job unless petitioners paid him that amount. Acosta and Tagliarino reached a verbal agreement that in 2009, Acosta would be paid $700 per week from January to July and $400 per week thereafter, on a "take home clean" and "full time" basis.

Acosta explained the paystubs that he attached to his claim form. He stated that they show a payment of $10 or $12 an hour, depending on whether he was working at the studio, or whether he was at a venue. He added that he only agreed to an hourly rate of pay "during the hours worked at the studio or at the warehouse." However, on cross- examination he testified that in 2009-2010 he was supposed to be paid a salary – not an hourly wage rate. According to Acosta, he was never actually paid $700 and $400 per week, as promised and testified, "...I gave him the benefit of the doubt the whole year and he never paid me." Claimant also testified that Tagliarino and Hayden never showed him time cards, although he did acknowledge that he knew that Tagliarino kept a handwritten record of his hours.

He testified that at his request, Tagliarino signed a November 13, 2009 letter memorializing their earlier agreement in front of him, at Talent Tour's office. The letter was addressed "To Whom It May Concern" on Dance Xplosion stationery, apparently signed by Tagliarino as "V.P. of Talent Tour USA." According to the letter, Acosta:

> "has currently been employed by this company since January 2007. His employment status has been seasonal since January 2007 until December 2008. His employment status has changed from being a seasonal worker to a full time employee starting January 2009.
>
> "His current salary is as follows:
>
> "January – July is $700.00 a week x 26 weeks = $18,200.00

> "August – December is $400.00 a week x 26 weeks = $10,400.00
>
> "This is Mr. Acosta's take home yearly salary.
>
> ".... This is my decision to hire Mr. Acosta on a full time basis. Any other information that you may need, please feel free to contact me personally."

Acosta did not work for Talent Tour at all in August or September 2009, when he testified he was visiting Honduras and did not expect to be paid. He testified that petitioners advanced him several loans which were repaid by being taken out of his checks pursuant to a verbal agreement with Tagliarino, and that these deductions were separate from and unrelated to the shortage in payment referred to in his claim.

Documents Included with Acosta's Claim

With his April 12, 2010 claim, Acosta filed with the DOL 51 stubs from Talent Tour paychecks issued to him during the period from January 20, 2009 to March 26, 2010.[2] All the stubs listed gross pay, deductions and net pay. Forty-two listed a $12.00 hourly rate, one a $10.00 hourly rate, and six, all but one from January or February 2010, listed no hourly rate at all. Six stubs listed a number of hours worked ranging from 7.5 to 41.67; the rest listed a gross "salary" amount, which varied widely. Through July 2009, the gross "salary" listed was a round figure whose amount varied week to week: for example, $300.00, $1,000.00 and $500.00, with net pay after deductions of $251.80, $723.86 and $395.90 respectively. Beginning in October 2009, the gross "salary" was usually a to-the-cent figure like $354.16 with net pay a round figure, most often $300.00.

Acosta's claim stated that his agreed-on pay was "$700.00 net a week" in season and "$400.00 a week take home" outside the season, but "I was never paid the agreed salary." The claim included a chart of claimed underpayment for each paycheck. The "Grand Total" of Acosta's underpayment calculations stated in his claim was $13,056.07.

Testimony of LSI Armando Gonzalez and Calculation of the Wage Order

Labor Standards Investigator Armando Gonzalez (Gonzalez) investigated this case. He testified that on January 25, 2011, he met with Tagliarino, who stated that petitioners did not keep time records but would have their accountant Edward Secker (Secker) contact him. Gonzalez spoke by phone with Secker on three occasions. Although Secker agreed to provide payroll records, he never did. Gonzalez conceded that he never spoke to Hayden during the investigation.

Gonzalez stated that after review of Acosta's $13,056.07 wage claim, the underpayment was recalculated to $11,428.14, as indicated in the DOL's recapitulation sheet sent to Talent Tour. He testified that his recalculation was based on crediting Acosta with a $700.00 weekly salary for every week between from January through July 2009, and from January 1, 2010 until Acosta's employment ceased on April 9, 2010, and $400.00 for every week for off-season work.

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[2] The stubs do not state what pay period checks covered. Acosta's claim lists each as pertaining to a week ending the date the check was issued. The DOL's recapitulation sheet assumes each pertained to a week ending Thursday, so that, for example, a check issued March 26, 2010 was for a week ending the previous day, March 25. The exact period each check covered is immaterial in this case.

In making its calculation the DOL did not assume, as Acosta had, that he should have been paid $700.00 or $400.00 net wages each week and then compare that amount with his net pay. Instead, Gonzalez testified and the recapitulation sheet shows that the DOL assumed Acosta was owed $700.00 or $400.00 gross wages each week, which was then compared with his gross pay as reflected in the stubs.

Gonzalez testified and the recapitulation sheet shows that the DOL assumed Acosta was owed pay every single week from January 1, 2009 to April 8, 2010, even though the claim had actually omitted many weeks, for which Acosta did not file pay stubs. Among weeks in 2009 that were omitted from the claim but included in the DOL calculation were the first two weeks of January (which also fall outside the relevant period), the weeks of March 5, June 18 and 25, July 9, 16 and 30, nine weeks in August and September (when Acosta testified he was in Honduras), and the weeks of December 3, 17 and 31. Among weeks in 2010 that were omitted from the claim but included in the recapitulation sheet were the first two weeks of January and the weeks of March 11 and 18 and April 1 and 8. For each of these weeks, the DOL assumed Acosta was owed gross pay of $700.00 (January through July) or $400.00 (August through September) and was paid nothing.

Totaling the weekly gross amounts it believed Acosta was owed and comparing that total to the total gross amount he was paid for the whole period January 1, 2009 to April 8, 2010, the DOL concluded that he was underpaid $11,426.14, the amount stated in the wage order. Because it was based on comparing total gross wages paid for the whole period with the total Acosta was owed for the whole period, the DOL calculation effectively allowed overpayments in some weeks (relative to the assumed $700.00 or $400.00 weekly salary) to offset underpayments in others. The total underpayment calculated included 26 weeks for which Acosta had never claimed to be owed wages; the DOL calculated he was owed $14,600.00 for those weeks, at $700.00 or $400.00 per week depending on the time of year.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The Labor Law provides that "any person in interest may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner 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] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). The petitioner has the burden of proving that the order is invalid or unreasonable (Board Rules of Procedure and Practice (Board Rule) § 65.30, 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; *Angello v National Finance Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore the petitioner's burden to prove, by a preponderance of the evidence, that the orders under review are invalid or unreasonable.

Because the Board hearing is *de novo* (12 NYCRR § 66.1[c]), we must consider the testimony and other evidence received at the hearing and make necessary credibility determinations when deciding whether to affirm, revoke or modify the Wage Order. *Matter of Zi Qi Chan a/k/a Zi Qi Chen and Jason Tong a/k/a Zi Rong Tang and Henry Foods, Inc.*, Board Docket No. PR 10-060 [March 20, 2013].

III. 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).

Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is stated 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 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:....
> (3) wage rate;
> (4) the number of hours worked daily and weekly.... ;....
> (6) the amount of gross wages;
> (7) deductions from gross wages;....
> (9) net wages paid....
> "(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, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

This recordkeeping provides proof to the employer, employee and Commissioner that the employee was properly paid.

When a violation of the Labor Law is shown, DOL may credit a complainant's assertions and calculate wages due based on such information, and the employer then bears the burden of showing that the Commissioner's calculation is invalid or unreasonable by proof of the specific hours claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. *Matter of Ram Hotels, Inc.*, Board Docket No. PR 08-078 [October 11, 2011]; *Matter of Angello v National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 [1949].

The Penalty Order is Affirmed

While Acosta's pay stubs included "gross wages,... deductions and net wages" as required by 12 NYCRR § 142-2.7, his hours and rates were usually either omitted, or recorded inaccurately or imprecisely. The weekly payroll records which § 142-2.6 required were not kept at all, and the time cards kept by Tagliarino, were not made available to the Commissioner when Gonzalez visited the place of employment, although Acosta testified that he knew that Tagliarino maintained contemporaneous written time records, although he had not seen them. Because the daily and weekly hours in the wage statements and time records

were sometimes recorded inaccurately or imprecisely, we find that the penalty order was valid and reasonable.

The Wage Order is Revoked

We find that the petitioners met their burden of proof and that it was unreasonable for the DOL to calculate underpayment based on the claim that Acosta was promised a fixed net salary of $700.00 per week January through July and $400.00 per week August through December. Acosta testified and the wage order is based on the idea that he was promised a fixed weekly salary, yet his actual pay varied week to week, consistent with the idea that it was not in fact fixed at a set amount, but was based on time worked. Indeed, when asked on cross-examination if he ever agreed to an hourly pay rate, Acosta answered: "Only during the hours worked at the studio or at the warehouse." By his own account, that included *all* weeks for which he was supposedly promised a $400.00 weekly salary, and his notations on stubs filed with his claim (such as "studio" on stubs dated January 20, February 12, April 16 and May 14, 2009 and January 19 and February 18, 2010) indicate it also included weeks for which he was supposedly promised a $700.00 weekly salary.

While Acosta insisted that Tagliarino promised him a fixed weekly salary in July 2008, Acosta did not provide a credible explanation of why he did not inquire when this supposed promise did not materialize. Tagliarino and Hayden credibly denied that Acosta ever asked why he was never actually paid his supposedly promised salary. Acosta agreed he never asked Hayden or mentioned Tagliarino's supposed agreement to her. He testified in response to her questions:

> "Q. You worked for approximately sixteen months on his so-called agreement?
>
> "A. Yes, unknownst to you.
>
> "Q. Unknown to me, the owner? Did you ever come to Mr. Tagliarino or myself and say your pay was short?
>
> "A. I believe I approached him.... and he said I'll get to you next week.
>
> "Q. You worked for sixteen months at the wrong pay rate without questioning it?
>
> "A. Yes."

At another point Acosta testified: "I gave [Tagliarino] the benefit of the doubt [for] the whole year." Asked at still another point if he ever asked Tagliarino why he was not actually receiving his salary, Acosta testified:

> "I'm going to say no, because the man is usually under a lot of stress. So I gave him the benefit of the doubt. But I did approach him later on, you know, what's going on. So yes, I did approach him.
>
> "Q. What was his response?
>
> "A. He says right now was the slow season."

It is undisputed that the pay stubs Acosta filed with his claim accurately recorded his pay; Acosta claimed only that he was promised a higher rate. His claim was also not based on any contention that there were unpaid hours. At one point Acosta testified he worked

more hours than petitioners acknowledged, stating that during the competition season, "since I was with him full time it could average between seventy-eight hours a week, sometimes more, because show hours are long." Acosta did not explain, however, how his job when supposedly working such long hours differed from in earlier years, when show hours were similar. When he noted "missing drive pay" on stubs filed with his claim, amounts shown were small, in no way suggesting a 78-hour week. Most important, neither his claim nor the wage order reflect any unpaid hours, only that he was supposedly promised a salary of $700.00 or $400.00 net.

Tagliarino's notations on the time cards he testified he began keeping in October 2009, and which Acosta tacitly acknowledged were maintained, also imply Acosta was paid based on time worked. When Acosta was working at competitions, cards often indicate a basic daily rate such as $175.00, through notations like "4 days @ 175 $700." At times, Acosta appears to have received *net* pay of $12.00 per hour, with petitioners topping up his gross "salary" accordingly. Time cards from the fall of 2009, when Acosta was often paid $354.16 gross "salary" and $300.00 net, show him working 25 hours in a week and bear notations like "pay $300 clear" which amounts to $12.00 per hour for 25 hours of work. Based on the evidence, Hayden's testimony that he was paid $175 a day and later $12.00 per hour does not appear totally accurate or to describe a completely consistent practice, but it does appear much closer to reality than any claim that there was ever a promised weekly salary. While Acosta's actual rate seems to have varied, that does not violate the law as long as he was always paid at least the legal minimum wage (including an overtime premium if applicable) and received the wage he was promised. The wage order is not based on any finding other than that he was denied the $700.00 or $400.00 supposedly promised as a salary.

The main evidence relied on by the DOL and claimant to show that even though he never actually received it, Acosta was in fact promised a $700.00 or $400.00 salary is the November 13, 2009 "To Whom It May Concern" letter purportedly signed by Tagliarino stating that Acosta's "current salary" is

> "January – July is $700.00 a week x 26 weeks = $18,200.00
> "August – December is $400.00 a week x 26 weeks = $10,400.00
>
> "This is Mr. Acosta's take home yearly salary."

However, a W-2 tax form, attached by Acosta to the claim he filed with the DOL, lists his gross pay from Talent Tour in 2009 as $22,752.34. Acosta acknowledged that Hayden did not know about either the November 2009 letter, or the July 2008 agreement it supposedly memorialized. Tagliarino denied either making the agreement or signing the letter. Acosta gave shifting testimony about why he requested the letter, variously stating that it was to help if he was ever asked to show financial responsibility, that Tagliarino "reneged" on an agreement "to go to help me bring my family over, and I said listen, I need that letter typed up," and, without explanation, that the letter was not for the purpose of bringing his family over but "for the sole purpose of covering my ass."

Regardless who wrote the letter, we find that under the circumstances of this case, such a letter 16 months after the purported agreement it supposedly memorialized would not prove a binding contract promising a specific salary. To accept the letter as proof that Acosta was promised a fixed salary as he testified, the Board would have to believe that Tagliarino agreed in November 2009 to sign a letter confirming an agreement he actually reached in July

2008, but which petitioners never followed and continued not to follow after the letter's signing, all with little or no protest or inquiry from Acosta. Since we find that petitioners met their burden to rebut this claim, there was no valid or reasonable basis to find any underpayment to Acosta.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is revoked; and

2. The Penalty Order is affirmed; and

3. The Petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr Jackson, Member

Michael A. Arcuri, Member

Absent
Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
August 7, 2014