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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | |
| FRANK BOVA & APP (AL) JOSEPH (T/A NINA'S AMERITALIA RESTAURANT) | |
| Petitioners, | |
| | DOCKET NO. PR-06-024 |
| To review under Section 101 of the New York State Labor Law: An Amended Order to Comply with Article 19 of the Labor Law, dated February 10, 2006 | RESOLUTION OF DECISION |
| -against- | |
| THE COMMISSIONER OF LABOR, | |
| Respondent. | |

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on April 11, 2006. Upon notice to the parties a hearing was scheduled for November 9, 2006, and was thereafter re-scheduled twice, once at the request of the Respondent, and once at the request of the Petitioners. The hearing was eventually held on February 15, 2007 in the Board's Albany office before Khai H. Gibbs, then Associate Counsel to the Board and the designated Hearing Officer in this proceeding.

The Petitioners, Frank Bova and App (Al) Joseph (T/A Nina's Ameritalia Restaurant) (Petitioners), were represented by Girvin & Ferlazzo, PC, by James E. Girvin, Esq. and the Respondent, Commissioner of Labor (Commissioner), was represented by Jerome A. Tracy, then Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro of counsel. On February 15, 2007, the Petitioners submitted a Statement of Proceedings at the hearing in lieu of calling witnesses or presenting other documentary evidence. Respondent joined in the submission and stipulated to the facts therein. Each party was afforded full opportunity to present oral argument

at hearing and to make statements relevant to the issues. Following the hearing, the Petitioners submitted a Memorandum of Law in Support of Petitioners' Preliminary Statement and the Respondent submitted a Closing Brief.

The Amended Order to Comply under review herein, was issued on February 10, 2006 and directs compliance with Article 19 of the Labor Law and the Minimum Wage Order of Title 12 NYCRR Part 137 (failure to pay the minimum wage). The Order also directs payment to the Commissioner for wages due and owing to 13 named Claimants in the combined amount of $9,318.44, for work performed during various time periods between January 20, 2003 and November 24, 2003, with combined interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $3,855.77, and assesses a civil penalty in the amount of $2,330.00, for a total due of $15,504.21.

The Petitioners' sole contention is that the Commissioner's Order is invalid or unreasonable because the Petitioners were managers and not the "employer" of the named Claimants for the purposes of the Minimum Wage Act, as evidenced by the facts presented in the pleadings and stipulated to in the "Statement of Proceedings." The Petitioners do not contest that the named Claimants were employed in the establishment managed by the Petitioners during the referenced time periods, or that the Claimants are due and owing the minimum wage amounts specified in the Amended Order. The Petitioners seek to have the Order "dismissed against them, and have all wages due and owing assessed against Lucey Brothers, LLC, who is the true employer of the employees of Lucey Brothers Pub & Grill d/b/a Nina's Ameritalia." (*See* Statement of Proceedings.)

Respondent has argued that Petitioners have failed to meet their burden of proving that the Order was invalid or unreasonable. The determination of whether Petitioners were employers revolves around the question of whether the Petitioners exercised sufficient control over the work of the employees (as opposed to control over the business). The Labor Law definition of "employer" includes "managers" who exercise sufficient control over the work of the employees. The management agreement (Agreement) entered into by Petitioners gives Petitioners the power to control the day to day operations of the business which included control over the employees. Petitioners presented no relevant evidence that they did not exercise such control, and therefore, failed to meet their burden.

## SUMMARY OF EVIDENCE

The parties have agreed that the facts are not in dispute. Prior to 2002, Lucey Brothers, LLC owned and operated a restaurant known as Lucey Brothers Pub & Grill (Lucey Brothers). In November of 2002 Petitioners entered into a management agreement (Agreement) with Lucey Brothers providing that Petitioners would manage the restaurant for one year commencing January 1, 2003, with an option to buy the restaurant. The Agreement provides, *inter alia*, that the Petitioners "shall have complete control of said business including concepts, menus, signs advertising, etc." It further provides that the Petitioners shall be responsible for: 1) reimbursement to Lucey Brothers of $2,100 a month; 2) any cost of employees including salary; 3) decisions regarding hours of operation; 4) maintenance of all books and records required by law or kept in regular course of business; 5) cost of new inventory; and 6) payment of restaurant

costs not otherwise stated in the Agreement. Lucey Brothers was responsible for debts of the restaurant prior to January 2003 and for all capital repairs, *inter alia*.

Pursuant to the Agreement, in 2003, the restaurant did business under the name "Nina's Ameritalia." Petitioners incorporated Nina's Ameritalia, Inc. to obtain financing to purchase the restaurant. Lucey Brothers doing business as Nina's Ameritalia and Nina's Ameritalia, Inc. are two separate entities. Petitioners were unable to obtain financing to buy the restaurant and, by verbal agreement with Lucey Brothers in January 2004, continued to act as managers of the restaurant until April of 2004, when the Agreement was terminated and Petitioners were locked out by Lucey Brothers. After locking the doors, a shareholder of Lucey Brothers stated to one of the restaurant's employees that Lucy Brothers was taking over the business and asked if the employee "wanted to run the business' day to day operations." (Affidavit of Stewart Miller, paragraph 11.)

During the year 2003, Petitioners reported work hours to the accountant for Lucey Brothers and distributed paychecks but had no check writing authority. All paychecks were signed by Lucey Brothers and drawn from its bank account. All payroll records were prepared and kept by the accountant for Lucey Brothers. When the doors of the restaurant were closed to Petitioners in April 2004, Petitioners had no access to accounts designated to pay employee wages. At one time Petitioners attempted to hire an employee, but Lucey Brothers overruled this decision and the employee was not hired. All major repairs were the responsibility of Lucey Brothers. Petitioners never had an ownership interest in Lucey Brothers.

## GOVERNING LAW

Standard of Review

In general, the Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for review. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections ...not raised in the [Petition] shall be deemed waived." (Labor Law § 101.)

When reviewing an Order to comply issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

In addition, pursuant to Board Rule 65.30: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." (12 NYCRR 65.30). Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

Definition of Employer under New York Law and the Fair Labor Standards Act

Labor Law § 652 of Article 19 provides that "[e]very employer shall pay to each of its employees for each hour worked a wage of not less than" the minimum wage set by law. In determining whether a person or entity is an "employer" for purposes of the Minimum Wage Act, Labor Law § 651(6) provides:

> "[e]mployer includes any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as an employer."

The general definitions under Labor Law §2 further provide:

> "6. 'Employer' means the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent, superintendent, foreman or other subordinate.
>
> "7. 'Employed' includes permitted or suffered to work.
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> "8. 'Person' includes a corporation or a joint-stock association.
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> "8-a. 'Agent' of a corporation includes, but is not limited to, a manager, superintendent, foreman, supervisor or any other person employed acting in such capacity..."

Therefore, the term "employer" is to be interpreted broadly. Under Labor Law §2(6) the term "employer" is not limited to merely the owners or proprietors of a business, but also includes any agents, managers, supervisors, and subordinates, as well as any other person or entity acting in such capacity. *See People v Sheffield Farms*, 225 NY 25 (1918) (Labor Law protects workers who may not be considered "employees" under the common law).

The New York Minimum Wage Act and the federal Fair Labor Standards Act (FLSA), "embody similar standards" with respect to the definition of employer and therefore, federal law is relevant in deciding whether Petitioners were employers in this case. *See Ansoumana v. Gristede's Operating Corp.*, 255 FSupp2d 184, 189 (SDNY 2003). The FLSA defines "employer" to mean "...any person acting directly or indirectly in the interest of an employer in relation to an employee" (29 USCA §203[d]). "The terms are expansively defined, with 'striking breadth,' in such a way as to 'stretch ... the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.' (*Nationwide Mut. Ins. Co., v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed. 2d 581 [1992];" *see also Ansoummana v. Gristedes Operating Corp. supra* at 188; *Zheng v. Liberty Apparel Co., Inc.*, 355 F3d 61, 66 [2d Cir 2003] ["This definition (of employer) is necessarily a broad one, in accordance with the remedial purpose of the FLSA."] [garment manufacturer who hired contractor to work on garments may be "joint employer" of contractor's employees under the FLSA and New York Minimum Wage Act]).

In addition, Labor Law §2(7) defines the term "employed" to include "permitted or suffered to work." In a virtually identical provision, the FLSA defines the term "employ" to include "...to suffer or permit to work" (29 USCA §203[g]). Given the broad brush of the

statutory language and the remedial purposes of the legislation, it is clear that the Petitioners, even while acting under the title or in the capacity of a "manager," is by no means precluded from the statutory definition of "employer" for purposes of the Labor Law. Moreover, Labor Law §651(6) further expands the definition of the term "employer" to include any individual or entity "*acting as an employer*" (emphasis added). Indeed, the U.S. Supreme Court has observed that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

To determine whether an individual or entity is an "employer" for purposes of the Labor Law, the courts have generally inquired into whether there was "... evidence that the employer exercises either control over the results produced or the means used to achieve those results." (*See Bhanti v Brookhaven Memorial Hospital Medical Center, Inc.*, 260 AD2d 334, 687 NYS2d 667 (2nd Dept 1999). In the context of the FLSA and New York's Minimum Wage Act, where the primary purpose is the protection of, and benefit to, the worker, the courts have looked beyond the mere existence or degree of control in order to examine the economic relationship between the worker and the employer. In applying an "*economic reality*" test, the courts have examined the evidence in each employment relationship against enumerated factors in order to determine whether an individual or entity was an employer. While the factors utilized by the courts under the "*economic realities*" test have varied somewhat, depending upon the purposes and aims of the enacting legislation, the consensus is that "[t]he factors that have been identified by various courts in applying the economic reality test are not exclusive. Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided." (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]; *citing*, United States v Silk, 331 US 704, 91 LEd 1757, 67 S.Ct 1463 [US 1947]; *see also*, Ansoumana v Gristede's Operating Corp., 255 FSupp2d 184 [SDNY 2003]; *cf., Ling Nan Zheng v Liberty Apparel Co.*, 355 F3d 61, 67 [2d Cir 2003]. The economic realities test, in its various manifestations, has been applied to differentiate between an employee and an independent contractor and also to determine, when it is clear that an employment relationship exists, which entity or entities are the employer (*See, e.g., Asoumana v. Gristede's Operating Corp., supra*, and *Zheng v. Liberty Apparel Inc., supra*). "The overarching concern is whether the alleged employer possessed the power to control the workers in question." (*Herman v. RSR Security Services, Ltd.*, 172 F.3d 132, 139 [2d Cir 1999]).

Joint Employment

Under the broad New York and FLSA definitions of "employer," more than one entity can be found to be an employee's employer. Section 791.2 of the U.S. Department of Labor regulations, 29 CFR §791.2, provides that two or more employers may be found to be "joint employers:"

> "[A] joint employment relationship generally will be considered to exist in situations such as:
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> "...
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> "(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

> "(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

The Commissioner's Authority to Issue an Order to Comply and Assess Civil Penalties

If the Commissioner determines that an employer has violated the Minimum Wage Act, the Commissioner is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages, benefits, or wage supplements found to be due and owing. Labor Law § 218 provides, in pertinent part:

> "If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act), article nineteen-A, section two hundred twelve-a, section two hundred twelve-b, section one hundred sixty-one (day of rest) or section one hundred sixty-two (meal periods) of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest, in addition to or concurrently with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Labor Law § 218 provides, in pertinent part:

> "1. ... In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty.... In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.
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> ....
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> "4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter."

## FINDINGS

The Board having given due consideration to the pleadings, the "Statement of Proceedings," the Petitioner's Memorandum, the Respondent's Closing Brief, and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of the Board Rule 65.39 (12 NYCRR § 65.39).

It is undisputed that the named Claimants are due and owing the minimum wage amounts, and that they were employed during the time periods specified in the Amended Order. The sole issue before the Board is whether the Petitioners are "employers" of the named Claimants for the purposes of triggering the protections of Article 19 of the Labor Law. Based on the evidence presented in this proceeding, we find that the Petitioners are employers as defined under §651(6) of the Labor Law, and that they have failed to pay the required minimum wages to their employees as required by Labor Law § 652. Therefore, we affirm the Amended Order.

The Petitioners argue that they could not be employers under the "economic reality" test because a third party was in fact the employer, and the Claimants were employees of such third party. While the Petitioners acknowledge that the central inquiry is "whether the alleged employer possessed the power to control the workers in questions, ...with an eye to the 'economic reality' presented by the facts," (*Doo Nam Yang v. ACBL Corp.*, 427 FSupp2d 327, 342 [SDNY 2005]), the Petitioners' conclusion that the economic reality test was not satisfied, ignores the fact that more than one entity may be the Claimants' employer. Lucey Brothers and Petitioners may be joint employers of Claimants. It also ignores the broad definition of employer under both the FLSA and New York's Minimum Wage Act.

Petitioners cite the case of *Doo Nam Yang v. ACBL Corp.* 427 FSupp2d, 327, 342 (SDNY 2005) where the court identified four factors to consider in examining the economic reality of an employment situation: "whether the alleged employer: (1) had the power to hire and fire employees; (2) supervised and controlled employee work schedules and conditions; (3) determined the rate and method of payment; and (4) maintained employment records."

Petitioners seek to minimize their role in the restaurant's operations by stating that they were merely managers. However, it is clear from the evidence, particularly from the terms of the Agreement, that the Petitioners were more than mere managerial employees of Lucey Brothers since they in fact ran the daily operations of the restaurant. Pursuant to the Management Agreement, they paid Lucey Brothers, $2,100 per month. In addition, the Agreement clearly evidences that the Petitioners are responsible for "*...[a]ny cost of employees including salary, withholding tax, workers compensation, unemployment tax etc*" (emphasis added). The Agreement also states that it was to be effective January 1, 2003, for a term of one year, terminating on December 31, 2003. Petitioners neither contest that all wage claims are within this period, nor argue that the Petitioners were not bound by the pertinent terms of the Agreement. When the Agreement is viewed as a whole, it is clear that Petitioners were in control of the day to day operations of the business. It is telling that when Lucey Brothers locked Petitioners out of the restaurant, it stated that it was taking over the business and offered another person the option of running the day to day operations of the business.

Additionally, under the Agreement Petitioners were responsible for: the maintenance of all books and records required by law or kept in the regular course of business; decisions regarding hours of operation; the purchase, preparation, and service of product; as well as certain costs, taxes and fees associated with the operation of the business. Also, the Agreement states that the Petitioner "shall have complete creative control of said business including concepts, menus, signs[,] advertising[,] etc." The terms of the Agreement, at a minimum, demonstrate that the Petitioners had the power to exercise an appreciable degree of control and supervision over the work of the Claimants. In the realities of a restaurant setting, the creation of menus, and the

implementation of advertising and concepts necessitates that the Petitioners supervise and direct employees in the preparation and presentation of the menus, require their participation in the advertising of the products, and in the implementation of themes and concepts. The Petitioners' control over the hours of operation necessitates that the work hours and schedules of all the employees were determined, supervised and regulated by the Petitioners. The Petitioners' authority over the purchase, preparation and service of products demonstrates further direction and control over the work details of employees of the restaurant. Also, the payment of cost, fees and taxes as well as the maintenance of books and records requires at least a minimal degree of control over the daily work of the employees. We find that the terms of the Agreement clearly evidence that the Petitioners had the authority to supervise and control employee work schedules and conditions, and maintain employment records, sufficient, in the absence of evidence to the contrary, to find the existence of an employment relationship between the Petitioners and Claimants whom they suffered or permitted to work.

Based on the record before us, we cannot determine whether the Petitioner had the power to hire and fire employees or determine the rate and method of payment, for purposes of the economic realities test. One of the affidavits, submitted by Petitioner (Stewart Miller), states that the Petitioners "attempted to hire someone..." and that the third party "refused to allow the hiring of that person and the person was not hired." While the Petitioners argue that this shows that the third party had the exclusive power to hire and fire, we find that a third party's ability, in fact or law, to veto an "attempted" hiring of an employee, especially during a single occurrence, does not rise to the level of proving an individual or entity had the exclusive power to hire or fire an employee. To the contrary, this evidences that the Petitioner, at a minimum, was under the belief that it had the power to hire and fire employees. Another affidavit, submitted by Petitioner (Frank Bova), states that "[t]he only authority Petitioner[] had with respect to payroll checks was to report the hours worked and the wage information to [the accountant]." The fact that the Petitioner reported wage information to a third party, strongly suggests that employee wage rates were adjusted, and that the Petitioner had, at least, some participation in the adjustment of these wages, if not the sole responsibility for the wage rates of the employees. In addition, the Petitioners' statements relating to the third party's check writing authority, neither answers how this particular method of payment was determined, nor whether this fact has any relevance to whether the Petitioners had control over the method of payment. And while it is the Petitioners' burden to show that it did not have the power to determine the rate or method of payment, it has not done so here. Accordingly, we find that the Petitioners are the Claimants' employers under the Labor Law and are therefore liable for the unpaid minimum wages at issue in this case.

## CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Amended Order additionally assessed a 25% civil penalty, in the amount $2,330.00. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

INTEREST

Labor Law § 219 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."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Amended Order to Comply with Article 19 of the Labor Law, dated February 10, 2006, under review herein, is affirmed; and

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

Anne P. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on November 28, 2007.

KHG