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INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Application of:	:	
KAMRAN MALEKAN and IL PREZZEMOLO, INC. (T/A JOE'S PIZZERIA)	:	
Petitioners,	:	DOCKET NO. PR 08-020
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 19 of the Labor Law, dated January 4, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

WHEREAS:

Petitioners Kamran Malekan and Il Prezzemolo, Inc., trading as Joe's Pizzeria, commenced this proceeding on February 29, 2008 by filing 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 (Board Rules) (12 NYCRR part 66). The Petitioners ask the Board to review two Orders to Comply with Article 19 of the Labor Law (Orders) that the Commissioner of Labor (Commissioner) issued against them on January 4, 2008.

The first Order (Wage Order) finds that the Petitioners failed to pay overtime wages to a named Claimant from October 16, 2004 to July 1, 2005 and directs payment to the Commissioner of wages due and owing in the amount of $3,409.00, together with continuing interest at 16% calculated to the date of the Order in the amount of $1,370.32, and a 25% civil penalty in the amount of $852.00, for a total amount due of $5,631.32. The second Order (Penalty Order) assesses civil penalties in the amounts of $500.00 for failing to keep and/or

furnish true and accurate payroll records, and $500.00 for failing to give each employee a complete wage statement with every payment of wages, for a total of $1,000.00.

The Board held a hearing in Garden City, New York on September 25, 2008 before the Board's Associate Counsel, Devin A. Rice, the assigned hearing officer in this case. Also present was Board Member Jean Grumet, Esq. Petitioner Kamran Malekan appeared *pro se*, and the Respondent Commissioner was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Mary McManus of counsel. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

DOL Labor Standards Investigator Frederick Seifried and the named Claimant testified for the Petitioners. Seifried also testified for the Commissioner. Petitioner Malekan, although afforded the opportunity, did not testify.

SUMMARY OF EVIDENCE

DOL Labor Standards Investigator Siefried testified that the Claimant filed a complaint against the Petitioners on July 1, 2005, alleging unpaid overtime from November 15, 1996 to June 30, 2005. Seifried made a visit to the Petitioners' Commack location on June 8, 2006 but Petitioners did not permit him to interview employees at that time. Because he was unable to access payroll records or interview employees at his initial site visit, Seifried made an appointment for a revisit to be conducted the following week,

At the revisit, the Petitioners produced some payroll records that were, according to Seifried, not in compliance with the Labor Law. Accordingly, he issued a Notice of Labor Law Violation for failure to maintain adequate payroll records.

Seifried further testified that during the course of his investigation he learned that the Petitioners' Commack location did not open until October 24, 2004. Accordingly, this is the date that was used by DOL as the first date of the claim. Seifried also testified that Malekan showed him proof that the Petitioners had paid the Claimant's income taxes in the amount of $254.00 which DOL subtracted from the total amount of overtime wages due to the Claimant.

The Claimant testified that he started work at the Petitioners' Commack location in October 2004 and that before that time he had worked for the Petitioners at another location. He stated that some of the information in his complaint was incorrect because he did not understand that his claim would be only for the Commack location. He explained that his hours of work at the Commack location were from 11:00 a.m. to 9:45 p.m. and that the 10:00 a.m. start time written on the complaint form applied to the Petitioners' other location where he worked prior to October 2004.

The Claimant testified that he was paid $455.00 per week in a combination of cash and check. He also testified that he was paid $6.50 an hour and that he wrote that wage rate on his complaint form because he remembered getting a pay raise from $6.00 an hour to $6.50 an hour

around March 16, 2005. The Claimant explained that he was unable to prove how much he made because the Petitioners did not give him receipts for his wages while he worked at the Commack location.

The Claimant further testified that he did not work on Thanksgiving 2004, Christmas 2004 or Easter 2005 because the restaurant was closed. He also did not work for one and one-half days because of a snow storm around January 1, 2005, and he recalled arriving to work three hours late one day because a train accident delayed the Long Island Railroad.

At the conclusion of the hearing, Siefried testified that he believed the Wage Order should be changed to reflect the Claimant's testimony that he had started work at 11:00 a.m., not 10:00 a.m., and to deduct the days he did not work because the restaurant was closed.

GOVERNING LAW

Standard of Review

In general when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. 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). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioners to prove that the Order is not valid or reasonable.

Requirement to Pay Overtime

The Minimum Wage Order for the Restaurant industry provides that "[a]n employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked in excess of 40 hours in one work week" (12 NYCRR 137-1.3). An employee's regular rate is calculated by "dividing the total hours worked during the week into the employee's total earnings" (12 NYCRR 137-3.5).

Record Keeping Requirements

Labor Law § 661 states in relevant part:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly

authorized representative at any reasonable time . . . ."

The Minimum Wage Order for the Restaurant Industry specifies the information required to be maintained. 12 NYCRR 137-2.1[1] 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:
> (1) name and address;
> (2) social security number;
> (3) occupational classification and wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (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 . . . ."

Requirement to Provide Wage Statements With Each Payment of Wages

The Minimum Wage Order for the Restaurant Industry requires "[e]very employer covered by this part [to] 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" (12 NYCRR 137-2.2).

DOL's Calculation of Wages in the Absence of Adequate Employer Records

The law requires restaurant employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rates, and gross and net wages paid (12 NYCRR §§ 137-2.1). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661 and 12 NYCRR § 137-2.1).

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[1] We note that the Penalty Order charges the Petitioners with violating "Section 661 of Article 19 of the New York State Labor Law as supplemented by the Minimum Wage Order for Miscellaneous Industries and Occupations, Part 142 of Title 12 of the Official Compilation of Codes, Rules and Regulations, Section 2.6, by failing to keep and/or furnish true and accurate payroll records for each employee. [Petitioners were] duly requested to provide payroll records for the period from on or about June 15, 2006." However, the wage order applicable to the Petitioner's business is the Minimum Wage Order for the Restaurant Industry and there are minor differences between the time-keeping requirements of the two wage orders. (*Compare* 12 NYCRR 142-2.6 *with* 12 NYCRR 137-2.1.)

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). 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."

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."
>
> Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp., supra*, agreed: "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

FINDINGS

The Board having given due consideration to the pleadings, hearing testimony, arguments and documentary evidence makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

The Petitioners Violated Article 19 of the Labor Law By Failing to Pay Overtime

At the outset we note that because the Petitioners did not produce payroll records, it was reasonable for DOL to calculate the wages due to the Claimant based solely on the information contained in the Claimant's complaint form (*see* Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d at 821). However, based on the Claimant's testimony at hearing, we believe the Wage Order must be modified, as discussed below, to reflect his testimony.

We find that the Petitioners employed the Claimant to work six days per week from 11:00 a.m. to 9:45 p.m., with a thirty minute meal break, from October 24, 2004 to July 1, 2005 at their Commack location and that his weekly salary was $455.00. This differs from the computations that DOL made which assumed that the Claimant worked six days per week from 10:00 a.m. to 10:00 p.m. We find that the Claimant worked 61.5 hours per week.

We therefore find that the Claimant's regular rate under 12 NYCRR 137-3.5 was $7.40 an hour (455 divided by 61.5). We also find that his overtime rate under 12 NYCRR 137-1.3 for the 21.5 hours of overtime he worked per week was $11.10 an hour (7.40 x 1.5), resulting in a weekly underpayment of $79.65 ([(7.40 x 40) + (11.10 x 21.5)]- 455). We further find that the Petitioners have proven that during the relevant time period the Claimant did not work November 25, 2004, December 25, 2004 and March 27, 2005 because the restaurant was closed on these dates. We also find that the Petitioners have shown that the Claimant did not work for one and one-half days on or about January 1, 2005 due to a snow storm and that three hours should be deducted from one of the Claimant's work weeks because he was late on one occasion due to a train accident that delayed the Long Island Railroad.

Finally, DOL should not have deducted the amount the Claimant allegedly owed to the Petitioners for payment of the Claimant's income taxes from the Wage Order because such a deduction from wages is prohibited by Labor Law § 193.

We find that the Wage Order should be modified because the Petitioners have demonstrated that the Claimant did not work as many hours as the Wage Order reflects. Accordingly, we remand this matter to the Commissioner to issue a revised Wage Order consistent with this Resolution of Decision.

The Imposition of a 25% Civil Penalty Was Reasonable

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing (Labor Law § 218[1]).

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages . . . 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 . . . the failure to

comply with recordkeeping or other non-wage requirements."

DOL investigator Seifreid testified that a 25% penalty was imposed on Petitioners because they were uncooperative with DOL's investigation, particularly because they initially refused to allow DOL to interview employees and failed to produce requested records. We also note Seifreid's testimony that the 25% civil penalty imposed in this matter is a low penalty amount. We find the Wage Order's penalty assessment reasonable and valid.

Interest

Labor Law § 219 (1) 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 underpayment t o the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum."

The Penalty Order

Count I of the Penalty Order levies a $500.00 civil penalty against the Petitioners pursuant to Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employer. We find that although the Penalty Order cites to the wrong Minimum Wage Order – the Petitioners are subject to the Minimum Wage Order for the Restaurant Industry, not the Minimum Wage Order for Miscellaneous Industries – the Petitioners failed to maintain and furnish accurate payroll records for each employee as charged, and the Penalty Order and Notice of Labor Law Violation provided the Petitioners with adequate notice of the proscribed conduct.

Count II of the Penalty Order imposes a $500.00 civil penalty against the Petitioners under Labor Law § 661 and 12 NYCRR 137-2.2 for failing to give each employee a complete wage statement with every payment of wages. We find the Claimant's testimony credible that he was not given a receipt with each weekly payment of wages during the time period covered by the Order.

For these reasons we find the Penalty Order valid and reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order issued January 4, 2008 is remanded to the Commissioner to issue a corrected Order consistent with this Resolution of Decision that shall not be in an amount in excess of the amount of the Wage Order herein under review; and

2. The Penalty Order issued January 4, 2008 is affirmed; and

3. The Petition for review be, and the same hereby is, dismissed in all other respects.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 22, 2008.