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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

L.R.H. SUPERMARKET INC.
(T/A C-TOWN),

Petitioner,

To review under Section 101 of the Labor Law: An Order
to Comply under Article 19 of the Labor Law, dated
June 10, 2005

-against-

THE COMMISSIONER OF LABOR,
Respondent.

DOCKET NO. PR 05-035

RESOLUTION OF DECISION

WHEREAS:

This proceeding was commenced on June 21, 2005, when Petitioner L.R.H. Supermarket, Inc., trading as C-Town (Petitioner), 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 (Rules). (12 Official Compilation of Codes, Rules and Regulation of the State of New York [NYCRR] part 66). The Petitioner asks the Board to review an Order to Comply with article 19 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against the Petitioner on June 10, 2005.

The Order finds that Petitioner paid employees at a wage rate below the minimum prescribed in the Minimum Wage Order of Title 12 NYCRR part 142. It directs payment to the Commissioner of wages due Juan Rene (Tavaras)¹ for the period January 1, 2004 to August 25, 2004 in the amount of \$5,021.43; wages due Balenta Rodriquez (Rodriquez) for the period October 5, 2002 to October 30, 2004 in the amount of \$561.35; wages due Rafael Selvadn (Selvadn) for the period October 5, 2002 to October 30, 2004 in the amount of \$5,877.45; continuing interest on the wages due at the rate of 16% calculated to the date of the Order in the amount of \$1,265.54; and a civil penalty in the amount of \$2,865.00, for a total due of \$15,590.77.

The Petition alleges that the Commissioner's Order overstates the wages due to Tavaras and Selvadn, but concedes that Rodriquez is due wages in the amount of \$561.35. The Commissioner filed an Answer on August 26, 2005, which denies the material allegations of the Petition, asserts the reasonableness and validity of

¹ At hearing, the parties agreed that the correct name of Juan Rene is Juan Rene Tavaras.

The Petition alleges that the Commissioner's Order overstates the wages due to Tavaras and Selvadn, but concedes that Rodriquez is due wages in the amount of \$561.35. The Commissioner filed an Answer on August 26, 2005, which denies the material allegations of the Petition, asserts the reasonableness and validity of the civil penalty assessed pursuant to Labor Law § 218 (1), and interposes an allegation, denominated as an affirmative defense, that the Petition fails to set out facts upon which relief may be granted.

Upon notice to the parties, the Board held a hearing at a Department of Labor (DOL) office in New York City on September 20, 2007, before Sandra M. Nathan, Deputy Counsel to the Board and the designated Hearing Officer in this case. Petitioner was represented by David S. Friedkin, CPA (Friedkin), and the Commissioner was represented by Maria A. Colavito, Counsel to DOL, John D. Charles of counsel. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

RECORD EVIDENCE

In addition to representing Petitioner, Friedkin was its sole witness. DOL labor standards investigator Haing Bo Kim (Kim) was the sole witness for the Commissioner. Neither the Petitioner nor any of its employees appeared at hearing.

Undisputed facts.

Petitioner paid its employees in cash on a weekly basis; their wages were not based on an established hourly rate. The Petitioner did not maintain payroll records that show the actual time that employees worked or that otherwise support the amount of the weekly wages that they were paid. Petitioner did not furnish its employees with wage statements with each payment of wages.

Petitioner operated a supermarket. At all times relevant to the Order, Petitioner paid Tavaras, a stock clerk, a weekly salary which amounted to an hourly rate that was below the then lawful minimum wage of \$5.15 per hour. (Labor Law § 652 [1].) The Order correctly finds that Petitioner owes Rodriquez, a cashier, unpaid wages in the amount of \$561.35. Petitioner paid Selvadn, a butcher, a weekly salary of \$500 for 51 hours of work each week.

Petitioner's evidence.

Since about 2002, Friedkin has handled Petitioner's books and records and testified that he was "very aware" of the Petitioner's accounting practices and internal controls or lack of controls. Friedkin prepared Petitioner's quarterly payroll tax and annual income tax returns and periodic financial statements. However, Friedkin had no personal knowledge of the actual payments made to employees or their work time and breaks, and his accounting firm's records pertaining to Petitioner's business were based on information that the Petitioner told him and schedules that Petitioner created to show when employees were assigned to work; the schedules were not based on time cards or other records of when employees actually did work.

Petitioner presented documentary evidence which Friedkin admitted he prepared only after DOL began its investigation of the Petitioner. Some of the documents compare Petitioner's and DOL's calculations as to the amounts of underpayments due the Claimants. However, Friedkin admitted that the figures on which his various calculations were based, for example, how many hours in a week that Tavaras was on break and how many he

worked, came from conversations with the Petitioner and others and the assignment schedules, but that Petitioner did not have actual records that supported the figures that Friedkin used.

Documents that Petitioner moved into evidence show that Tavaras worked 55 hours a week for which he was paid \$300; that his hourly rate of pay was \$4.80, which was concededly below the then minimum hourly wage of \$5.15, and that his overtime (premium) rate of pay was one and a half times \$4.80, or \$7.20 an hour. By this last figure, the Petitioner appears to argue that a premium rate of pay that exceeds the minimum hourly wage rate is adequate.

Petitioner contends that Selvadn's weekly compensation of \$500 included premium pay for the overtime hours that Selvadn worked. Petitioner's documents in evidence show that Selvadn was paid at an hourly rate of \$8.85 for the first 40 hours of his work week; \$13.28 per hour for each of the 11 hours of overtime that he worked weekly; and that his regular hourly wages added to his premium pay equal the \$500 that both parties agree that he received weekly. Friedkin, whose testimony was very forthcoming, admitted that the \$8.85 hourly rate was not supported by employer records but was arrived at by "backing-out" calculations. These began with the \$500 weekly pay and worked backwards to determine a regular a rate of pay which when used to calculate weekly straight time and premium pay would result in \$500. Friedkin testified that "[i]t was an after-the-fact calculation to show that he was being paid adequately. . . ."

Based on Friedkin's calculations using the Petitioner's figures, the Petitioner asserted that Selvadn is not owed any wages and conceded that Tavaras was underpaid, but not by as much as the amount for which the Order directs payment.

Respondent's evidence.

Kim testified that Tavaras signed and filed a wage complaint with another DOL investigator in August 2004. According to Kim, DOL maintained the Tavaras complaint in its investigatory records files in the ordinary course of its business, and Petitioner did not object to receipt of the complaint into evidence. The complaint asserts that Tavaras worked Sundays from 8:00 a.m. to 6:00 p.m.; Mondays, Tuesdays, Thursdays, and Fridays from 10:00 a.m. to 8:00 p.m.; and Wednesdays from 6:00 a.m. to 8:00 p.m. Petitioner gave him a half-hour meal break on most of these days, paid him \$250 per week, but did not pay him overtime.

As a result of the complaint, DOL commenced an investigation of Petitioner in which Kim participated and took handwritten notes. Her handwritten notes, along with a printed document entitled "Narrative Investigator Interim Report" (Report) were moved into evidence without objection as part of DOL's investigative files, kept in the ordinary course of business.

The documents show that Kim and another DOL investigator, whom Kim testified speaks Spanish, interviewed Petitioner's employees Rodriquez, Selvadn, and Anna Mendez. The Report states that the investigators visited Petitioner's premises on November 1, 2004 to check for compliance with the Labor Law and again on November 29, 2004 to examine the payroll. The Report contains the following information: the investigators observed five employees working, but saw only two time cards; a Hugo Vegas (Vegas) identified himself as the Petitioner's president and Friedkin furnished payroll records and bank statements; Petitioner's business was open 8:00 a.m. to 8:00 p.m., Monday through Saturday, and 8:00 a.m. to 7:00 p.m. on Sundays; the employees who were interviewed worked from 8:00 a.m. to 5:00 p.m. or 8:00 a.m. to 3:00 p.m.; Vegas said that his family covered the evening shift, and there was no indication that any of the employees received payment for overtime hours worked at an overtime rate.

As a result of the investigation, DOL found that Petitioner violated Labor Law § 195.3 and 12 NYCRR 142.-2.7 for paying employees in cash without wage statements; Labor Law § 652.1 for not paying employees overtime and a spread of hours premium, for paying wages on a salary basis instead of an hourly basis, and for paying Tavaras below the minimum wage rate; and Labor Law § 161.1 for not giving Rodriquez a meal period. The Report indicates that on December 13, 2004, a Notice of Violation and Recapitulation of wages due were served on Petitioner by mail.

Kim calculated the wage underpayments due to Tavaras, Rodriquez and Selvadn. The calculations were memorialized in a document kept in the ordinary course of business as part of DOL's investigation file that was admitted into evidence without objection. The numbers used in the calculations came from employee statements and, in Tavaras' case, the written complaint that he filed with DOL.

Kim did not include Tavaras' half-hour lunch breaks when calculating his work time, which she found was nine and a half hours most days and 61 hours a week. She used the \$250 weekly salary that Tavaras' complaint form indicated that he was paid as a basis of her calculations because, she testified, the Petitioner had not maintained records of payment to him. To determine the amount of weekly wages that Tavaras should have been paid, she divided \$250 by the 61 hours a week that he worked and arrived at his regular rate of pay of \$4.10 an hour. As that amount was below the \$5.15 per hour minimum wage rate that was then in effect, she used \$5.15 an hour as his regular rate and multiplied that by the first 40 hours of his work week to find the amount that he should have been paid weekly for his straight time work. She then added that figure to the product of \$7.73 (the premium hourly pay rate, or one and a half times \$5.15) multiplied by the 21 hours that Tavaras worked overtime each week and then subtracted the \$250 that the Petitioner had paid him each week. According to Kim, that difference added to the \$5.15 for each day that Tavaras was present at Petitioner's business for at least ten hours (spread of hours payment) represented the wage underpayment that was due Tavaras.

In computing Selvadn's wages, Kim divided his weekly pay of \$500 by the 51 hours that he worked in a week to reach his hourly rate of pay of \$9.80. She then multiplied his hourly rate by 40 hours to find his straight time pay, multiplied \$9.80 by one and a half to find his premium hourly pay rate, and multiplied that product by the 11 hours that he worked overtime. She then added his straight time pay for 40 hours to his premium pay for 11 hours to determine the amount that he should have been paid per week.

Based on DOL's investigative findings, the Commissioner issued the Order on review here. The figures which the Order finds are due from the Petitioner to the three employees named in the schedule annexed to the Order correspond to Kim's calculations.

On cross-examination, Kim admitted that she was not present when Tavaras filed his complaint with DOL and that the facts asserted in it were accepted at face value, including the assertions that Tavaras earned \$250 a week and had a half-hour meal break. When asked why DOL did not credit claims that Petitioner made with respect to the amount of Tavaras' weekly salary and the amount of break time that he and Selvadn took, Kim responded that in the absence of employer time cards or daily records of the time employees actually work, she must rely on information that employees provide DOL. She also stated that Petitioner's claims with respect to the hours that Tavaras and Selvadn worked were based on a schedule that the Petitioner prepared to make work assignments to employees and not a record of when they actually worked. Kim did state that her calculations for Selvadn were based on her interview of him.

DISCUSSION

At hearing, Petitioner seemed to argue that because, according to it, the complaining employees were satisfied with the wages that they received which were adequate and fair, the Order is not reasonable. Petitioner also advanced an argument that “the evidence that [DOL] has is really no more than we have; they are going just on their [employee] statements versus our interpretation.” The following discussion of the relevant law, in addition to addressing the claims raised in the pleadings, shows that these arguments are without merit and must be rejected.

An Employer’s Obligation to Maintain Records and DOL’s Calculation of Wages in the Absence of Adequate Employer Records.

The law requires employers to maintain weekly payroll records that include, among other things, its employees’ actual time worked, wage rate, and gross and net wages paid. (12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or her designated representative. (Labor Law § 661.)

An employer’s failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of Labor Law, article 19 (minimum wages), DOL must credit the complaint’s assertions and relevant employee statements and calculate wages due the employees based on the information that they have 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 (3d 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 U.S. 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.”

Standard of Review and Burden of Proof in Proceedings before the Board.

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 commissioner under the provisions of this chapter,” (Labor Law § 101 [1]), but also states that an order of the Commissioner “shall be” presumed valid. (Labor Law § 103 [1].)

A petition filed with the Board that challenges the validity or reasonableness of the Commissioner’s order 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 hearing to prove the allegations that are the basis for the claim that the order on review is invalid or unreasonable: “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” (Rules 65.30 [12 NYCRR 65.30].) See *Angello v Natl. Fin. Corp.*, 1 A.D.3d 850, 854 (3d Dept 2003).

The Petition here alleges that the Order unreasonably overstates the wages due to Tavaras and Selvadn. In particular, the Petition asserts that the Order is based on calculations that erroneously include time that Tavaras was on breaks as time worked and ignores that Selvadn was paid on a salary basis that included premium pay for the overtime hours that he worked. Accordingly, these are the allegations that the Petitioner must prove in order to prevail here.

The Regular Rate of Pay and Premium Pay.

Labor Law § 190 defines “wages” as “the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis” and defines “manual worker” to include a workingman or laborer. An employer must weekly pay wages to its manual workers for each hour he or she has worked. Labor Law §§ 191, 652.

The federal Fair Labor Standards Act (FLSA) and New York Labor Law require an employer to pay covered employees at least a basic minimum, statutorily-prescribed hourly wage rate for the first 40 hours of a workweek. (29 USC § 206 [a] [1]; 12 NYCRR 142-2.1.) At the time relevant to the matter here, the minimum wage was \$5.15 an hour. (Labor Law § 652 [1]; 12 NYCRR 142-2.1 [a] [1].)

An employer may pay employees on a weekly basis; however, to determine whether an employee receives adequate compensation, it is necessary to find the employee’s “regular rate” of pay. *Fujun Jiao v Shi Ya Chen*, 2007 US Dist LEXIS 96480 *43 (SDNY 2007). The “regular rate” of pay has been defined as “the hourly rate actually paid the employee for the normal, non-overtime work-week for which he is employed.” *Walling v Youngerman-Reynolds Hardwood Co.*, 325 US 419, 424 (1945); *Doo Nam Yang v ACBL Corp.*, 427 F. Supp 2d 327, 338 (SDNY 2005). New York law defines “regular rate” as “the amount that the employee is regularly paid for each hour of work. When an employee is paid . . . a salary, or any basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee’s total earnings.” (12 NYCRR 142-2.16.)

Employers are also required to pay covered employees overtime pay equal to one and a half times the worker’s hourly rate for each hour worked in excess of 40 hours in a work week. (29 USC § 207 (a) (1); 12 NYCRR 142-2.2.) It must be stressed that premium pay due an employee for time worked in excess of 40 hours a week is based on that employee’s regular or hourly rate even when that rate exceeds the statutory minimum rate. *Cayuga Lumber, Inc. v Commissioner of Labor*, PR 05-009 (Decision of the Board on Reconsideration

September 26, 2007); *see also Overnight Motor Transp. Co. v Missel*, 316 US 572, 578 (1942) (reversing lower court ruling that so long as a salary meets the minimum wage rate and overtime pay is based on the minimum wage rate, the employer is in compliance with FLSA, the Supreme Court held that the FLSA “was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum”).

Employer Obligations Attendant to the Payment of Wages by Salary.

While employers may pay their employees on a salary basis, where a dispute arises concerning compensation, it is the employer’s obligation to establish the employee’s agreement to that basis of payment and that the salary meets minimum wage requirements.

A salary may also include compensation for overtime hours worked; however, an unambiguous and express agreement between the employer and employee is necessary to establish that both parties intended the salary to compensate the employee for both straight time and overtime worked at a premium rate. *Giles v City of New York*, 41 F Supp 2d 308, 318 (SDNY 1999). *Cayuga Lumber, Inc., supra*. September 26, 2007);

Spread of Hours.

A “spread of hours” is defined as the “interval between the beginning and end of an employee’s workday” and “includes working time plus time off for meals plus intervals off duty.” (12 NYCRR 142-2.18.) The Commissioner’s post-hearing brief concedes that a spread of hours payment “is required in any situation where ‘the spread of hours exceeds 10 hours’” (12 NYCRR 142-2.4 [emphasis supplied]), but that her Order for wages due Tavaras includes spread of hours payments for days when Tavaras was present on the job for no more than ten hours.

FINDINGS

At the outset, the Board finds that the Petitioner is doing business in the State of New York as a private employer within the meaning of Labor Law, articles 1, § 2 (6) and 19, § 651 (6) and is subject to the Commissioner’s jurisdiction.

Juan Tavaras.

Petitioner asserts that Tavaras took daily breaks that exceeded a half hour and that the additional break time should be subtracted from the time that the Commissioner credited Tavaras with time worked and for which she ordered wages due him. To meet its burden of proving that Tavaras’ break time exceeded a half hour each day, Petitioner introduced documents into evidence that were generated after DOL began its investigation, that is, at least two months after the last day covered by the Order and therefore not contemporaneous with the time periods that they are intended to reflect. The documents were also based on conversations between Friedkin and Petitioner’s president. Friedkin, who created the documents, himself admitted that he had no personal knowledge of the information contained in them. In short, the evidence, consisting of at least double hearsay and prepared in response to the DOL investigation and not in the regular course of business, is unreliable and has no probative value whatsoever, and Petitioner has failed to meet its burden to prove that the Order is unreasonable in that it is based on an erroneous number of hours worked.

Based on Petitioner's failure to prove that the time Tavaras worked was different than the 61 hours DOL used to calculate his hourly rate of pay, we affirm the Commissioner's finding that Tavaras worked 61 hours as well as the method used to calculate his hourly rate of pay of \$4.10 an hour. That method – dividing his weekly wages of \$250 by the number of hours that he worked in a week – is fully in accord with the law. Similarly, the Commissioner's finding that Tavaras was underpaid for both the first 40 hours of his workweek and the 21 overtime hours that he worked every week is correct. His hourly rate of pay should have been at least \$5.15 an hour; as he was paid only \$4.10 an hour, he is owed the difference for each of the 40 hours of his regular workweek. Furthermore, the Commissioner correctly found that Tavaras' was entitled to the rate of \$7.73 an hour (one and half times the hourly rate of \$5.15) for the overtime hours that he worked.

As to spread of hours payment, the Board finds that the Order should be amended by reducing the amount of wages due to Tavaras by the spread of hours payment of \$5.15 for each work day that he was on the job for no more than ten hours.

Rafael Selvadn

Petitioner has not offered any evidence of an agreement with Selvadn either that his weekly compensation of \$500 was intended to cover regular and premium pay or that his regular rate of pay was \$8.85 an hour, and accordingly, the Petitioner has failed to meet his burden of proof as to these claims. Additionally, DOL's calculations of Selvadn's regular rate of pay at \$9.80 (by dividing \$500 by the 51 hours a week that he worked) are supported by law, as is its method of establishing the premium pay rate of \$14.70 that Selvadn should have received. Accordingly, Petitioner's contention that no wages are due Selvadn is rejected.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19 of the Labor Law, dated June 10, 2005, is affirmed as modified by reducing the wages due to Tavaras in a manner consistent with this decision; and
2. The Petition for review be, and the same hereby is, denied.



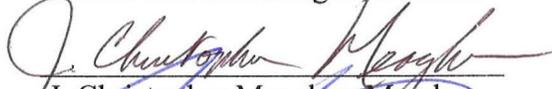
Anne P. Stevason, Chairman



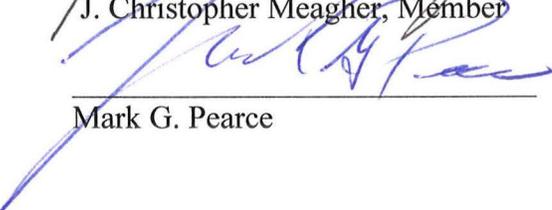
Gregory A. Monteleone, Member

ABSENT

Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member



Mark G. Pearce

Dated and signed in the Office of the Industrial Board of Appeals, at New York, New York, on March 26, 2008.

Filed in the Office of the Industrial Board of Appeals, at Albany, New York, on March 28, 2008

SMN