STATE OF ILLINOIS, DEPARTMENT OF LABOR
HEARINGS DIVISION
160 N. LASALLE STREET, 13TH FLOOR
CHICAGO, ILLINOIS 60601

IN THE MATTER OF:	) FILE NO. 11-A00902
	)
JOSEPH COSTIGAN, DIRECTOR OF LABOR	)
ILLINOIS DEPARTMENT OF LABOR	)
	)
COMPLAINANT	)
	)
v.	) Date: May 8, 2013
	)
Harris Brothers Group LLC d/b/a Beggars Pizza Harvey	
369 E. 147th St, Unit D.	)
Harvey, IL 60426	)
	)
RESPONDENT	)

DETERMINATION PURSUANT TO INVESTIGATIVE CONFERENCE

I. BACKGROUND

Pursuant to the Minimum Wage Law, 820 ILCS 105/1 et seq. ["MWL" or "the Act"], and the regulations promulgated thereunder, 56 Ill. Adm. Code 210 ["the regulations"], Laura Stevenson, a compliance officer for Complainant ("the C.O."), investigated a complaint (dated July 8, 2011) alleging that Respondent was not paying minimum wage, as required, to its employees.

In response to a request from the Department, Respondent made available (to the C.O.) employee detail and payroll register records for the period August 1, 2009 through August 31, 2011. Based on her review of the same, the C.O. concluded that Respondent had failed to properly pay forty (40) employees a total of $23,509.20.

On May 21, 2012, the Department notified Respondent by letter of its findings and requested that Respondent comply. On May 29, 2012, Respondent submitted a letter to the Department, requesting a review of the Department's audit findings as to thirty nine (39) of the forty (40) employees.[1] In that letter, Respondent stated, "*Currently Illinois [law] requires tipped employees to be paid $4.95. As you can clearly see [on the Department's audit summary], our pay rates clearly exceeds that [rate].*"

In response to Respondent's request for review, the Department scheduled an investigative conference, which was conducted by the undersigned on January 15, 2013. Respondent (through co-owner Jonathan Harris), C.O. Stevenson and former employees Nicholas Washington, Ryan Animanshaun and Reginald Parham all participated in the conference.

II. STATEMENT OF THE LAW

For guidance in the application of the Minimum Wage Law ("MWL"), the undersigned refers to the Fair Labor Standards Act of 1938, 29 U.S.C. Section 201 et seq. ("FLSA"), the rules and

[1] As to the remaining employee identified in the audit (Humberto Montes), Respondent submitted full payment of the amount found to be owing stating that its failure to properly pay the individual had been the result of an oversight.

interpretations of the U.S. Department of Labor ("USDOL") issued in connection with its enforcement and administration of the FLSA, and the relevant case law interpreting the MWL and FLSA.

Section 3(b) of the MWL provides: "'Wages' means compensation due to an employee by reason of his employment, including allowances determined by the Director in accordance with the provisions of this Act for gratuities..."

Section 3(f) of the MWL provides: "'Gratuities' means voluntary monetary contributions to an employee from a guest, patron or customer in connection with services rendered."

Section 4(a)(1) of the MWL provides, in relevant part: "...[O]n and after July 1, 2010 every employer shall pay to each of his or her employees who is 18 years of age or older in every occupation wages of not less than $8.25 per hour."

Section 4(c) of the MWL provides: "Every employer of an employee engaged in an occupation in which gratuities have customarily and usually constituted and have been recognized as part of the remuneration for hire purposes is entitled to an allowance for gratuities as part of the hourly wage rate provided in Section 4, subsection (a) in an amount not to exceed 40% of the applicable minimum wage rate. The Director shall require each employer desiring an allowance for gratuities to provide substantial evidence that the amount claimed, which may not exceed 40% of the applicable minimum wage rate, was received by the employee in the period for which the claim of exemption is made, and no part thereof was returned to the employer."

III. STATEMENT OF THE FACTS

Respondent is a restaurant. All thirty nine (39) employees (whose wages are in issue) worked as restaurant servers and/or pizza delivery drivers for Respondent and were paid an hourly wage plus gratuities (or "tips"). Respondent had a bi-weekly pay cycle. In response to a request from the Department, Respondent made available (to the C.O.) employee detail and payroll register records for the period August 1, 2009 through August 31, 2011. The records reflected: 1) the employees' hourly wages; 2) reported tips; and 3) the "additional tip amount" paid to employees by Respondent. In determining whether employees had been paid in accordance with the Minimum Wage Law, the C.O. relied upon all three figures.

During the conference, Respondent suggested that the C.O *may* have used "net wages" rather than "gross wages" in her calculations. At the conclusion of the conference, the undersigned granted Respondent a period of fifteen (15) days to submit documentary or other evidence refuting the C.O.'s audit. On January 31, 2013, Respondent submitted a fifty-two page "pay out detail" report, purportedly reflecting cash payments to assorted employees of Respondent—including $4,647 to Mr. Parham, $1,624 to Mr. Animanshaun and $1,136 to Mr. Washington—on various dates between September 17, 2009 and August 31, 2011. The document is accompanied by a note from Mr. Harris stating, *"Pay out shows that we paid these employees more than [minimum] wage."* Respondent offered no further explanation of the document or what, if anything, it purportedly demonstrates with respect to the C.O.'s methodology, calculations and/or audit findings.

IV. CONCLUSION

In its May 29, 2012 request for review, Respondent states, *"Currently Illinois [law] requires tipped employees to be paid $4.95. As you can clearly see [on the Department's audit summary], our pay rates clearly exceeds that [rate]."* From this statement, it appears that Respondent is under the impression that it is legally sufficient to pay tipped employees the "base" hourly rate; it is not. Employers must ensure that the employee's base hourly wage, plus tips, at least equals the minimum wage. If it does not, the employer is required to make up the difference.

In this case, the C.O's audit was based on time and payroll records made available to her by Respondent. The supplemental "records" submitted by Respondent fail to even suggest—let alone establish—that the methodology and/or calculations employed by the C.O in the audit were flawed in any respect. **For these reasons, the findings of the compliance officer are upheld.**

Dated this 9th day of May 2013

Michael Haggerty, Administrative Law Judge

Notice: This determination is based on the investigation and conference conducted under the MWL and the regulations thereunder. This determination does not preclude either party from pursuing any other legal remedy that may be available.

Note also: Requests for review of a determination from an investigative conference must be made in writing to the Department's Chicago office, **within 15 calendar days after the decision.** The request shall be prominently marked "Request for Review" on both the letter and the envelope. The request must set forth the reasons why the party believes the Director's duly authorized representative misconstrued the evidence or misapplied the law to the facts and any newly discovered evidence which you could not have discovered by the hearing date or, if applicable, why you failed to attend the hearing. Late submissions need not be considered by the Director.

cc: Nicholas Washington
Ryan Animanshaun
Reginald T. Parham