

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

November 25, 2019

Middlesex, ss.

Docket Nos. LB-18-0038, LB-18-0039

**KHALID MAHMOOD and SWAT FOOD CORP., d/b/a New York Fried Chicken,
Petitioners**

v.

OFFICE OF THE ATTORNEY GENERAL FAIR LABOR DIVISION, Respondent

DECISION

Appearance for the Petitioners:

Daniel Briansky, Esq.
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Boston, MA 02109

Appearance for Respondent:

Lilian Hiraes, Esq.
Assistant Attorney General
Office of the Attorney General
Fair Labor Division
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Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Wage and Hour Laws violations - Failure to pay wages timely - Failure to pay minimum hourly wage - Failure to produce payroll and other records - Restitution - Reduction - Recomputed hours worked based upon testimony and other evidence - Civil penalties - No modification despite reduced restitution - Adverse impact of petitioners' failure to keep and produce payroll records - Hindered enforcement of Wage and Hours Law, and significantly-impeded determination of unpaid wage amount by Fair Labor Division and, on appeal, by Division of Administrative Law Appeals (DALA).

The petitioners appealed three citations issued to them by the Massachusetts Attorney General's Fair Labor Division that demanded payment of restitution totaling \$6,052.50 and civil penalties totaling \$ 4,000, for alleged violations of the Massachusetts Wage and Hour Laws—unintentional failure to pay wages timely to a former employee who delivered food orders for a restaurant owned and operated by the individual petitioner, who was also the sole officer and director of the corporate petitioner that was organized to own and operate a restaurant business; unintentional failure to pay the employee the full amount of the \$11 per hour minimum wage he was owed, from July 15 to October 8, 2017; and failure to produce payroll records the Division had requested. Following a hearing:

- (1) The former employee is found to have worked at the restaurant over a ten week and two day period, from July 15 to September 24, 2017, after which the restaurant was closed;
- (2) The hours worked by the former employee are recalculated based upon six slips he had on which he, or the restaurant's manager, wrote down his daily hours worked during workweeks from Monday to Sunday. The slips, both dated and undated, show his hours during the last six of his ten work weeks. The remainder of his hours are estimated based upon the daily average hours worked that the slips show (11.1 hours per day);
- (3) The number of hours worked for which restitution is owed is calculated to be 710.3 hours, for the period July 15-September 24, 2017, rather than 797.9 hours, as the Fair Labor Division estimated, for the period July 15-October 8, 2017;
- (4) The restitution owed to the former employee is \$4,261.80, which is computed by multiplying \$6 per hour—the difference between the \$5 per hour rate at which he was paid, and the required minimum wage rate of \$11 per hour—by the 710.3 hours the former employee is found to have worked from July 15, 2017 to September 24, 2017; and
- (6) The civil penalties assessed are sustained without reducing the penalty amount, based upon the petitioners' failure to keep and produce payroll records as required by the Wage and Hour Laws, and the significant degree to which that failure hindered the Fair Labor Division's enforcement of the Wage and Hour Laws, as well as the determination of unpaid wages owed to the former employee by the Division, and by DALA on appeal.

Background

Petitioners Khalid Mahmood and SWAT Food Corp., d/b/a New York Fried Chicken, timely appealed to the Division of Administrative Law Appeals (DALA) three citations that were issued to them by respondent Office of the Attorney General–Fair Labor Division for unintentional violations of the Commonwealth’s Wage and Hour Laws.

In Docket No. LB-18-1038, the petitioners appealed:

(1) Amended Citation No. 17-10-47378-001, issued to them on October 17, 2018 for failure, without specific intent, to make timely payment of wages to a former employee, Samuel (Sam) Hrono, from July 15, 2017 to October 8, 2017, in violation of M.G.L. c. 149, § 148. The citation ordered the petitioners to pay \$1,430.00 in restitution and a \$700 civil penalty, for a total of \$2,130; and

(2) Citation No. 17-10-47378-003, issued to them on October 17, 2018 for failure, without specific intent, to pay Mr. Hrono the state minimum wage from July 15, 2017 to September 24, 2017, in violation of M.G.L. c. 151, § 1. The amended citation ordered the petitioners to pay \$4,622.50 in restitution and a \$2,300 civil penalty, for a total of \$6,922.50.¹

¹/ Both citations were issued originally by the Fair Labor Division on January 3, 2018 as a single citation (No. 17-10-47378-001) for failure, without specific intent, to make timely payment of wages to Mr. Hrono from July 15, 2017 to October 8, 2017, in violation of M.G.L. c. 149, § 148. That citation ordered the petitioners to pay \$6,052.50 in restitution and a \$3,000 civil penalty, for a total of \$9,052.50. The petitioners timely appealed original Citation No. 17-10-47378-001 on January 11, 2018. The Division determined, subsequently, that it had incorrectly issued a single citation seeking restitution for unpaid wages on Mr. Hrono’s behalf when it should have divided the restitution sought into two components, one for failure to pay wages timely to Mr. Hrono, and another for failure to pay Mr. Hrono

In Docket No. LB-18-1039, the petitioners appealed Citation No. 17-10-47378-002, issued to them on January 3, 2018, for failure, without specific intent, to furnish records for inspection by the Fair Labor Division on November 21, 2017 (pursuant to a payroll records request the Division mailed to the petitioners on November 7, 2017; *see* Exh. 3), in violation of M.G.L. c. 151, § 15. The citation ordered the petitioners to pay a \$ 1,000 civil penalty for this alleged violation.

The appeals were consolidated for adjudication. I held a prehearing conference on June 6, 2018, and scheduled a hearing for November 6, 2018. Prior to the hearing, the Division filed ten proposed exhibits (Exhs. 1-10). These include Division Investigator Yolanda Kruczkowski's audit of the restitution the Division claims is owed to Mr. Hrono but was not paid to him during the period July 15, 2017 through October 8, 2017 (Exh. 8.).

I held the hearing on November 6, 2018, as scheduled, at DALA's prior location at 1 Congress Street in Boston. The hearing was recorded electronically. Both parties appeared and were represented by counsel. The petitioners offered a single exhibit, which comprised copies of pages from a spiral notebook on which New York Fried Chicken's manager, Asil Zada, recorded New York Fried Chicken's daily receipts, bill payments and bank deposits, and the number of food deliveries by the restaurant to customers, for the period Monday July 10, 2017, through Sunday September 17, 2017. (Exh. P-1.) I marked all of the proposed exhibits in evidence, without objection. There are, as a result, a total of eleven hearing exhibits in evidence.

the state minimum wage. It did so by issuing the amended and additional citations on October 17, 2018. Amended Citation No. 17-10-47378-001 was issued solely for the alleged untimely wage payment violation, and Amended Citation No. 17-10-47378-003 was issued solely for the alleged minimum wage violation. Together, the two amended violations seek the same total restitution and civil penalties as did original Citation No. 17-10-47378-001.

Because the Fair Labor Division prepared the appealed citations and computed the restitution amount and the civil penalties the citations demanded, it presented its direct case first. Its two witnesses were the former employee, Sam Hrono, and Fair Labor Division Investigator Yolanda Kruckowski.² Each was cross-examined by petitioners' counsel. The petitioners then presented testimony by a single witness, Asil Zada, New York Fried Chicken's manager. Division counsel cross-examined him. Both parties presented closing arguments after all testimony had concluded. I then closed the evidentiary record, but left the record open for the receipt of posthearing memoranda if the parties chose to file them. The Fair Labor Division alone filed a posthearing memorandum, on December 10, 2018, which closed the record fully.

Findings of Fact

1. Petitioner Khalid Mahmoud has been in the takeout and counter-service restaurant business in Lynn, Massachusetts since at least 2010. On April 10, 2010, he obtained a certificate of use and occupancy from the City of Lynn, Massachusetts Inspectional Services Department for the use of 235 Lynn Street in that city as a restaurant. On April 16, 2010, Mr. Mahmoud applied to the city for, and the city granted him, a business certificate to operate Caruso's Pizza at 235 Lynn Street between the hours of 10:30 a.m. and 10:30 p.m., seven days a week. The certificate was valid for four years, until March 13, 2019. (Exh. 7: 2010 use and occupancy certificate, business certificate

²/ The parties agreed that Mr. Hrono, who now lives in Windemere, Florida, would testify by conference call as a matter of convenience, and I approved this arrangement. *See Order re Continued Hearing and Related Matters* (Oct. 19, 2018). Mr. Hrono called in to the hearing room, confirmed his identity, was audible and confirmed that he was able to hear the proceedings, and was sworn-in via the conference call before he testified.

application, and business certificate for Caruso's Pizza.)

2. On March 15, 2015, the City of Lynn issued to Mr. Mahmood a common victualer's license to operate Caruso's Pizza as a restaurant. The license listed Mr. Mahmood as Caruso Pizza's sole operator. (Exh. 7: common victualer's license issued on Mar. 15, 2015).

3. Nearly two years later, on March 7, 2017, petitioner SWAT Food Corporation (SWAT) filed its Articles of Organization with the Secretary of the Commonwealth pursuant to M.G.L. c. 156D. SWAT is a Massachusetts domestic profit corporation with an address at 48 State Street in Lynn, Massachusetts. It was organized "[t]o own and operate a restaurant business." Khalid Mahmood was then, and remains, SWAT's sole officer and director. (Exh. 5: Swat Food Corporation Articles of Organization.)

4. In early July 2017, Mr. Mahmoud opened a second restaurant in Lynn—New York Fried Chicken, at 48 State Street, approximately half a mile from Caruso's Pizza. New York Fried Chicken prepared and sold sandwiches and subs, fried chicken, other entrees including Jamaican beef patties, and side orders including fries, cheese fries and onion rings, primarily as orders to take out or for delivery to customers who had placed their orders by telephone or fax. (Exh. 2: 2017 New York Fried Chicken receipts; Zada direct testimony; Hrono direct testimony.)

5. Mr. Mahmood hired Asil Zada as New York Fried Chicken's manager, and the restaurant began operating on July 1 or 2, 2017, before the city had issued a common victualer's license for this restaurant's operation. (Zada direct testimony; Hrono direct testimony.)

6. On August 15, 2017, the City of Lynn issued to Mr. Mahmood a common victualer's license to operate New York Fried Chicken as a restaurant. The license listed Mr. Mahmood as the

sole operator of New York Fried Chicken. (Exh. 7: common victualer's license issued on Mar. 15, 2015).

7. Mr. Zada worked both behind the counter at New York Fried Chicken, where he cooked, and in the front, where the cash register was. Another person ("Ceci") also worked at the cash register. (Zada direct testimony.)

8. At some point in early July 2017, Mr. Zada posted a "help wanted" sign in New York Fried Chicken's front window. According to Mr. Zada, the sign read "Help Wanted for Delivery," and he was looking for someone to deliver take-out food orders. Samuel (Sam) Hrono, who lived about a mile and a half away in Lynn at the time, saw the sign and applied for the position at the restaurant. According to Mr. Hrono, the sign said "Help Wanted." At the time, Mr. Hrono was a realtor with little business and an inactive license to sell real estate. He had no prior experience working for a "fast food operation." (Hrono direct testimony; Zada direct testimony and cross-examination.)

9. Mr. Zada interviewed Mr. Hrono for the position. He offered to pay Mr. Hrono eleven dollars per hour, the then-applicable minimum wage. Mr. Zada told Mr. Hrono that (a) he needed to use his own car to deliver customers' food orders; (b) he expected that the \$11/hour rate would comprise six dollars from tips Mr. Hrono received from customers to whom he made deliveries, and five dollars that Mr. Zada would pay personally in cash, with Mr. Zada making up any remainder of the minimum hourly rate later; and (c) he wanted Mr. Hrono to prepare subs, sandwiches and side orders behind the counter, as well as make deliver food orders when he was asked to do so. (Hrono direct testimony and cross-examination; Zada direct testimony and cross-

examination.)

10. Mr. Hrono accepted the position Mr. Zada offered. Mr. Zada did not have him fill out any employment papers, and the employment arrangement was informal at best. The two men had differing recollections about Mr. Hrono's work and hours:

(a) Mr. Hrono testified that: (1) starting in July 2017, he worked 6-7 days per week, usually for 11-12 hours per day, including Sundays; (2) from the start of his employment, he packed up and delivered food orders to New York Fried Chicken customers who had called or faxed in their orders, and sometimes he cooked these orders as well; (3) he used his 2008 Cadillac to make these deliveries; (4) some deliveries were not to nearby locations, and in that case a delivery round-trip could take an hour or so to complete; (5) occasionally, he would also deliver orders to customers from Caruso's Pizza when Mr. Zada asked him to do so; (6) he also worked at New York Fried Chicken stocking shelves with canned goods and placing other food supplies in the restaurant's freezer; (7) he did not work the restaurant's cash register, as that work was done by "Ceci," and neither was he the regular cook; (8) a young man—Mr. Mahmoud's son, Irfan—worked in the store as well, mostly cooking; and (9) Mr. Zada, known as "the boss" or simply "Asil," was "everywhere" and "did everything," including cooking and packing up take-out orders.

(b) Mr. Zada testified that Mr. Hrono was available most of the day, and he called him when he needed a food order delivered to a customer; otherwise, Mr. Hrono was not in the store for 10-11 hours each day, and never between 9 and 11 a.m., or after 9 p.m., when Mr. Zada cleaned the store. Mr. Zada also testified that Mr. Hrono did not work on Sundays. Mr. Hrono testified that he worked on Sundays, and that Mr. Zada expected him to be available, upon phone call from the restaurant,

to make deliveries for a ten-hour period, between 11 a.m. and 9 p.m., when New York Fried Chicken was open, meaning Monday through Sunday, even though Mr. Hrono was not necessarily making deliveries during all of that time. Mr. Zada also testified that Mr. Hrono only cooked for himself, and not for customers, that Mr. Hrono was “not a store guy,” and that his job was solely to deliver food orders. (*Id.*) (Hrono direct testimony and cross-examination; Zada testimony and cross-examination.)

12. On cross-examination, Mr. Hrono was unable recall the precise date in July 2017 on which he started working at New York Fried Chicken, or the last day on which he worked there. (Hrono cross-examination.) In 2018, when he filed a claim for unpaid wages with the Fair Labor Division, he told Division Inspector Yolanda Kruczkowski that the first and last days he worked for Mr. Zada were, as best as he could recall, July 15, 2017 and October 8, 2017 respectively.³ None of the slips showing Mr. Hrono’s daily hours shows hours worked on July 15, 2017 or on October 8, 2017. Mr. Hrono had no documentation of his first and last days of work at New York Fried Chicken, and neither did Mr. Zada or the petitioners. Mr. Zada admitted that neither he nor the

³/ July 15, 2017, the date on which Mr. Hrono told Inspector Kruczkowski he began work at New York Fried Chicken, was a Saturday. In addition to his first two days of work (Saturday, July 15, 2017, and Sunday, July 16, 2017), Mr. Hrono would have worked the following ten weeks starting on Monday and ending on Sunday, from July 15, 2017 and ending on Sunday, September 24, 2017:

July 17-23, 2017	July 24-30, 2017	July 31-Aug. 6, 2017	Aug. 7-13, 2017
Aug. 14-20, 2017	Aug. 21-27, 2017	Aug. 28-Sept. 3, 2017	Sept. 4-10, 2017
Sept. 11-17, 2017	September 18-24, 2017		

If he continued working for New York Fried Chicken from September 24, 2017 to October 8, 2017, his additional two work weeks would have been September 25-October 1, 2017, and October 2-8, 2017.

petitioners kept payroll records for New York Fried Chicken employees during the time in question. Mr. Hrono testified, without contradiction, that he was paid in cash when he was paid, and denied receiving an Internal Revenue Service Form W-2 showing wages earned in 2017 from Mr. Zada or the petitioners. There is no testimony or other evidence that Mr. Zada or the petitioners issued a W-2 form to Mr. Hrono for wages he earned in 2017. (Hrono cross-examination; Zada cross-examination.)

13. Mr. Zada kept a spiral-bound notebook in which he recorded New York Fried Chicken's daily receipts from cash and credit card sales; bill payments and bank deposits; and the number of food deliveries by the store to customers each week, from Monday through Sunday. The pages of this notebook that are in the record are for the period Monday July 10, 2017, through Sunday September 17, 2017. Based upon the pages of this notebook that the petitioners offered, which were marked in evidence as Petitioners' Exhibit 1, New York Fried Chicken began deliveries to customers on Monday, July 10, 2017. Fifteen deliveries were made on that date; the number of deliveries made during the during the next three days (Tuesday, July 11-Friday, July 14, 2016) were 10, 11, 13 and 16, respectively; and were 15 on Saturday, July 15, 2017, and 14 on Sunday, July 16, 2017. During the entire period shown by Mr. Zada's spiral-bound notebook (July 10-September 17, 2017), the number of daily deliveries ranged from a low of 7 to a high of 17, and were highest on Friday, Saturday, Sunday and Monday—between 14 and 17. Daily deliveries were generally lower on Tuesdays and Wednesdays—between 7 and 9. The number of Sunday deliveries was 14 on July 16, 2017, and was then 12 or 13 deliveries on every Sunday that followed, except for Sunday, September 17, 2017, when 10 deliveries were made. (Petitioner's Exh. 1.)

14. Mr. Zada's notebook does not state who made the deliveries it shows between July 10, 2017 and September 17, 2017. There is no testimony or other evidence that anyone other than Mr. Hrono made those deliveries, including the deliveries made on Sundays. (Petitioners' Exh. 1.)⁴

15. Mr. Zada directed Mr. Hrono to keep a daily record of the hours he worked each week, but he did not have a time sheet for Mr. Hrono to fill out. Instead, Mr. Hrono wrote the total number of hours he worked each day on the same type of slip that would be used to list what a customer ordered. There was one exception—for the week of September 18-24, 2017, Mr. Hrono wrote his daily time on a page from a small spiral-bound notebook. Sometimes Mr. Hrono would write his daily time on these slips, and sometimes Mr. Zada would do so after Mr. Hrono told him how many hours he had worked on a particular day. The week in question was recorded on some of these slips; others lack dates and simply show hours worked on "Monday," "Tuesday," and so forth. Mr. Zada would tape these slips to a wall in the restaurant. Mr. Hrono made copies of "some" of these slips—the six that are included in Exhibit 2—but he did not identify, by date, any of the slips he did not copy. (Exh. 2: copies of six slips showing hours worked by Mr. Hrono; Hrono direct testimony.)

16. The following table shows the daily work hours recorded on each of the six slips:

⁴/ Per Petitioner's Exh. 1, the number of deliveries that Mr. Hrono made on Sundays during this time period were: 14 on Sunday, July 16, 2017; 12 on Sunday, July 23, 2017; 13 on Sunday, July 30, 2017; 12 on Sunday, August 6, 2017; 13 on Sunday, Aug. 13, 2017; 12 on Sunday, August 20, 2017; 12 on Sunday, August 27, 2017; 12 on Sunday, September 3, 2017; 13 on Sunday, Sept. 10, 2017; and 10 on Sunday, September 17, 2017.

TABLE 1: Hours Worked by Mr. Hrono Per the Six Slips Included in Exhibit 2**Range of****Dates // Days of the Week and Number of Work Hours Recorded**

	M	T	W	Th	F	Sat	Sun	M	T	W	Th	F	Sat	Sun	Total Hours
Slip 1 - Undated	////	////	////	////	2.5	12.5	4.0	11.0	2.5 7.0 <i>See n.1</i>	////	////	////	////	////	39.5
Slip 2 - Undated	////	////	////	////	2.5	12.5	4.0	11.0	2.5 7.0 <i>See n.1</i>	3.5 4.5 <i>See n.1</i>	7.5	12.0	12.0	14.0	53.5 <i>See n.2</i>
Slip 3 - Undated	12.0	12.0	11.5	12.0	11.0	12.0	12.0	////	////	////	////	////	////	////	82.5 <i>See n.3</i>
Slip 4 - 08/28/17 - 09/03/17	13.0	12.0	12.0	12.0	12.0	////	////	////	////	////	////	////	////	////	61.0
Slip 5 - 09/04/17 - 09/10/17	12.0	12.0	11.0	11.0	13.0	11.0	11.0	////	////	////	////	////	////	////	81.0
Slip 6 - 09/18/17 - 09/24/17	14.0	11.0	13.0	11.0	11.0	11.0	11.0	////	////	////	////	////	////	////	82.0
//////////	////	////	////	////	////	////	////	////	////	////	////	////	////	////	399.5

Notes:

(1) Slips 1 and 2 each include data cells with two lines of hours worked. The first line shows hours worked during an earlier shift on that day; the lower line shows hours worked that day during a later shift.

(2) The first five time entries on Slip 2 (Friday through Tuesday) are in shaded cells because they repeat the five time entries totaling 39.5 hours shown on Slip 1. If counted despite the repetition, this would result in inflating the time shown on Slip 2 by 39.5 hours, to 93.0 hours. Instead, I have counted this time once, for Slip 1, and have not included it the total for Slip 2. As a result, the total for Slip 2 is 53.5 hours.

(3) Undated Slip 3 shows 82.5 hours for a seven-day work week, comparable with the time for a seven-day work week shown by dated Slip 5, for the period 09/04/17–09/10/17 (81.0 hours), and for a seven-day work week shown by dated Slip 6, for the period 09/18/17–09/24/17 (82.0 hours). I conclude below that Slip 3 shows hours that Mr. Hrono worked from 09/11/17–09/17/17, the seven-day work week between the other seven-day work weeks shown by dated Slips 5 and 6. (*See below at 29-30.*)

17. Generally, Mr. Hrono's daily time for one week, starting Monday and ending Sunday, was written on a single slip. Of the six slips included in Exhibit 2, the first three do not include calendar dates and, instead, show time on named days of the week. The last three slips show calendar dates (August 28-September 3, 2017 on the fourth slip; September 4-10, 2017 on the fifth slip; and September 18-24, 2017 on the sixth slip). (Exh. 2.)

18. The six slips show the following hours worked. I have numbered the slips in the order in which they were offered by the Division, as part of Exhibit 2:

(a) Undated slips 1, 2 and 3 (175.5 hours)

(I) Slip 1 shows daily hours worked during an undated 5-day period from "Friday" to the following "Tuesday." For that Tuesday, the slip shows two rows of hours worked. The top row shows 2.5 hours worked during the earlier shift that day, and the bottom line shows 7 hours worked during a later shift that day. Slip 1 shows a total of 39.5 hours worked during this 5-day period.

(ii) Slip 2 shows daily hours worked during an undated ten-day period, from "Friday" through the following "Friday," "Saturday" and "Sunday." The first five days of Slip 2 (the first "Friday" on the slip through the following "Tuesday") show precisely the same hours as slip 1 shows for these five days. I count this time once—for Slip 1, but not in totaling the time shown on Slip 2. Slip 2 shows, therefore, a total of 53.5 hours of work not shown on Slip 1.

(iii) Slip 3 shows daily hours worked during an undated seven-day period, from "Monday" through "Sunday." It shows a total of 82.5 hours worked during this period.

(iv) The total hours of work shown by Slips 1, 2 and 3 (the three undated slips in Exhibit 2), is 175.5.

(b) Dated slips (224 hours from August 28-September 24, 2017)

(i) Slip 4 shows 61 hours worked during a seven-day period, August 28-September 3, 2017.

(ii) Slip 5 shows 81 hours worked during the next seven-day period, September 4-10, 2017.

(iii) There is no dated slip for the following seven-day period, September 11-17, 2017.

(iv) Slip 6 shows 82 hours worked during the next seven-day period September 18-24, 2017.

(v) The total hours of work shown by Slips 4, 5 and 6 (the three dated slips in Exhibit 2) is 224.

(c) The total hours of work shown by all six slips, undated and dated, is 399.5. (Exh. 2.)

19. Due to what he described as “lack of business,” Mr. Zada began the process of closing the store beginning on or about September 15, 2017. He testified that he had Mr. Hrono stop making deliveries as of September 17, 2017, and that the store was closed by September 20, 2017. (Zada direct testimony.)

20. The six slips included in Exhibit 2 show that Mr. Hrono worked through September 24, 2017. Mr. Hrono testified that New York Fried Chicken had not closed while he was still working there, and the slips of paper show that he worked through Sunday September 24, 2017. He did not testify that he made food deliveries during the period September 21-24, 2017 for Caruso’s Pizza. (Hrono direct testimony.) Mr. Zada was not asked on direct or on cross-examination whether Mr. Hrono made deliveries for Caruso’s Pizza after September 24, 2017. Mr. Mahmoud did not testify.

21. According to Mr. Hrono, Mr. Zada “mostly” paid him on time, \$350-450 for each of the weeks he worked, except “at the end,” when, per his testimony, he was not paid at all. (Hrono

cross-examination.)

22. In an undated email that he sent to Inspector Kruczkowski following the Division's request to the petitioners for payroll records, Mr. Mahmoud stated that he reopened New York Fried Chicken on November 2, 2017, and that he used "help" from his other restaurant, Caruso's Pizza, for "delivery when needed." Division Inspector Yolanda Kruczkowski visited the store at some point in December 2017 and found that it was being cleaned but was closed. (Exh. 4: Undated response of Mr. Mahmoud to Inspector Kruczkowski's Nov. 20, 2017 email requesting that he respond to her prior demand (on November 7, 2017) for payroll records; Kruczkowski direct testimony.)

23. On October 1, 2017, Fair Labor Division Inspector Yolanda Kruczkowski received a complaint for unpaid wages from Mr. Hrono, who alleged that (a) he had worked for New York Fried Chicken in Lynn from July 15, 2017 until October 8, 2017; (b) he had worked at the minimum wage rate but was paid at the rate of five dollars per hour; and (c) he was owed \$9,310 of unpaid wages. On the non-payment of wages complaint form he completed for the Division, Mr. Hrono included the following statement:

He [meaning Mr. Zada] kept telling me it would take 6 to 8 weeks to get me on the payroll and would give me \$5 per hour to hold me till then and he would make up for minimum wage and overtime. The last 2 weeks I didn't get paid, he kept putting me off then finally fired me he owes me \$610 per week for 12 weeks plus \$1,990 for the last 2 weeks."

(Exh. 1: Office of the Attorney General Non-payment of Wage and Workplace Complaint Form dated Oct. 10, 2017.)

24. On November 7, 2017, Inspector Kruczkowski sent Mr. Mahmoud and SWAT a

request for payroll records (including payroll stubs, pay stub records, and time-keeping records) for all their employees beginning March 1, 2017, pursuant to M.G.L. c. 151, §§ 3 and 15. The deadline for producing these records was November 21, 2017. (Exh. 3; Kruckowski direct testimony.)

25. Inspector Kruckowski called Mr. Mahmoud on November 20, 2017, and emailed him on November 21, 2017, to remind him that a written response was due to the November 7, 2017 payroll records request. (Exh. 4: emails.)

26. Mr. Mahmoud and SWAT produced no payroll records in response to Inspector Kruckowski's request, and filed none before or during the hearing in this matter. The Inspector received an undated response from Mr. Mahmoud stating that (a) he had opened New York Fried Chicken on June 5, 2017; (b) he "had to close it in early July, and that "[t]he store remained closed for most of July, August, September (was open for couple of weeks in September and closed it for most of July, August and September, October;" (c) he opened New York Fried Chicken again on November 2 [2017]; and (d) he had another store (Caruso's Pizza) from which he "got some help from there for delivery when needed." (Exh. 4: undated response from Mr. Mahmoud) (parentheticals in original); Kruckowski direct testimony.)

27. Using the information Mr. Hrono gave her, and without any payroll records from Mr. Mahmoud or SWAT despite her request for them, Inspector Kruckowski prepared an audit, in chart form, showing the hours that Mr. Hrono worked from July 15, 2017 to October 8, 2017 (960.9), and the unpaid amount of wages he was owed (\$6,052.50). The audit includes a series of end-notes identifying the information on which Inspector Kruckowski relied in preparing it:

Hrono was paid \$5 per hour in cash, but was promised upon hire he would be paid

\$11.00.

Hrono estimated he worked 12 hours a day his first month of employment from 7/15/17 - 8/21/17.

Hrono estimates he worked 11 hours a day after his first month of employment.

Hrono did not receive any wages his last two weeks of employment 9/25/17 - 10/8/17.

Hrono would do half his day doing deliveries/taking orders and the other half he would be in the kitchen making food.

[The audit] reflects hours worked provided by Hrono.

Hrono estimated he only took 2-3 days off during his employment.

(Exh. 8: notes at bottom of second page, following the end of the chart showing the audit result; Kruczkowski direct testimony and cross-examination.)

28. The “hours worked provided by Hrono” included both work hours shown by the slips Mr. Hrono furnished to the Inspector Kruczkowski, as well as his own estimates of the hours he worked on dates not shown by the slips. Those hours are shown on the audit in data fields with a blue background. These include hours worked from September 28-October 8, 2017 that Mr. Hrono estimated as having totaled 97 hours, but for which he had no dated slips. The other hours worked were estimates by Inspector Kruczkowski. Of the 960.9 hours Mr. Hrono worked, 488 of those hours were Inspector Kruczkowski’s estimates, based upon hours worked on other days that Mr. Hrono estimated for her, or for which he had slips showing the hours he worked. Inspector Kruczkowski estimated Mr. Hrono’s hours as follows:

12 hours each day from July 15 to August 3, 2017 (for a total of 240 hours);

12 hours each day from August 3 to August 13, 2017 (for a total of 60 hours);

12 hours on Monday August 21, 2017 and 11 hours each day from August 21 to August 27, 2017 (for a total of 78 hours);

11 hours each day from September 11, 2017 to September 17, 2017 (for a total of 77 hours);

11 hours each day from September 25 to September 27, 2017 (for a total of 33 hours).

(Exh. 8; Kruckowski direct testimony and cross-examination.)

29. Inspector Kruckowski calculated the wages that Mr. Hrono was owed as follows:

(a) Hours Mr. Hrono worked from July 15, 2017 to October 8, 2017= 960.9

(b) Amount Mr. Hrono was paid at the rate of \$5/hour = \$4,154.50 (830.9 hours worked from July 15-September 24, 2017 x \$5/hour);⁵

(c) Amount Mr. Hrono was entitled to be paid at the minimum wage rate of \$11/hour = \$10,569.90 (960.9 hours x \$11/hour).

(d) Amount Mr. Hrono was owed = \$6,052.50, calculated thus:

\$10,569.90, the amount that Mr. Hrono should have been paid at \$11/hour for 960.9 hours (*960.9 hours x 11/hr = \$10,569.90*)

Minus \$4,154.50, the amount Mr. Hrono was paid at the \$5/hour rate for 830.9 hours worked from July 15, 2017 to September 24, 2017 (*830.9 hours x \$5 = 4,154.50*)

Minus an additional \$363 for three days Mr. Hrono took off (*3 days x 11 estimated hours per day, for a total of 33 hours at \$11/hour = \$363*)

Wages he is owed, \$6,052.50 (*\$10,569.90 (-) \$4,154.90 (-) \$363 = \$6,052.50*).

(Exh. 8; Kruckowski direct testimony and cross-examination).

⁵/ The figure should actually be ten cents less, or \$6,415.40. The audit chart shows this figure as ten cents more, \$6,415.50, probably due to rounding the figure to the nearest fifty cent value.

30. The following table (Table 2) compares the daily work hours that Mr. Hrono's *dated* slips show for the period August 28-September 24, 2017 October (Exh. 2, and table above at 12) with the daily work hours that Inspector Kruckowski's audit for this same range of dates (Exh. 8):

TABLE 2:

MR. HRONO'S HOURS WORKED FROM 08/28/17 TO 09/24/17 AS SHOWN ON HIS DATED SLIPS (WHITE DATA FIELDS) AND ON THE FAIR LABOR DIVISION'S AUDIT (GRAY DATA FIELDS):

Range of

Dates // Days of the Week and Number of Work Hours Recorded

	M	T	W	Th	F	Sat	Sun	M	T	W	Th	F	Sat	Sun	Total Hours
08/28/17 - 09/03/17															
SLIPS	13.0	12.0	12.0	12.0	12.0	-0-	-0-	////	////	////	////	////	////	////	61.0
AUDIT	13.0	12.0	12.0	12.0	12.0	11.0	11.0	////	////	////	////	////	////	////	83.0
09/04/17 - 09/10/17															
SLIPS	12.0	12.0	11.0	11.0	13.0	11.0	11.0	////	////	////	////	////	////	////	81.0
AUDIT	12.0	12.0	11.0	11.0	13.0	11.0	11.0	////	////	////	////	////	////	////	81.0
09/18/17 - 09/24/17															
SLIPS	14.0	11.0	13.0	11.0	11.0	11.0	11.0	////	////	////	////	////	////	////	82.0
AUDIT	14.0	11.0	13.0	11.0	11.0	11.0	11.0	////	////	////	////	////	////	////	82.0
TOTAL															
SLIPS	////	////	////	////	////	////	////	////	////	////	////	////	////	////	224.0
AUDIT	////	////	////	////	////	////	////	////	////	////	////	////	////	////	246.0

31. For the period August 28-September 24, 2017, the slips show that Mr. Hrono worked

224 hours, while Inspector Kruczkowski's audit shows that he worked 246 hours, a difference of 22 hours. The audit shows higher total hours worked for this time period because it credited Mr. Hrono with having worked 11 hours each on Saturday, September 2, 2017 and on Sunday, September 3, 201, while the slip for August 28-September 3, 2017 shows no hours worked on either of those dates. (Exhs. 2 and 8; and Chart at Finding 30 above comparing hours worked as shown by the slips and by the audit).

32. On January 3, 2018, the Fair Labor Division issued two citations against Mr. Mahmoud and SWAT:

(a) Citation No. 17-10-47378-001, for failure, without specific intent, to make timely payment of wages to Mr. Hrono from July 15, 2017 to October 8, 2017, in violation of M.G.L. c. 149, § 148. The Citation ordered the petitioners to pay \$6,052.50 in restitution and a \$3,000 civil penalty, for a total of \$9,052.50.

(b) Citation No. 17-10-47378-002, for failure, without specific intent, to furnish records for inspection by the Fair Labor Division on November 21, 2017 (pursuant to the prior payroll records request the Division mailed to the petitioners on November 7, 2017), in violation of M.G.L. c. 151, § 15. The Citation ordered the petitioner to pay a \$ 1,000 civil penalty for the alleged violation.

33. Mr. Mahmoud and SWAT timely appealed both citations to DALA.

34. The Fair Labor Division determined, subsequently, that it had incorrectly issued a single citation seeking restitution for unpaid wages on Mr. Hrono's behalf when it should have divided the restitution sought into two components, one for failure to pay wages timely to Mr.

Hhrono, and another for failure to pay him the state minimum wage. Therefore, on October 17, 2018, the Division issued:

(a) Amended Citation No. 17-10-47378-001, for failure, without specific intent, to make timely payment of wages to Mr. Hrono from July 15, 2017 to October 8, 2017, in violation of M.G.L. c. 149, § 148. The citation ordered the petitioners to pay \$1,430.00 in restitution and a \$700 civil penalty, for a total of \$2,130; and

(b) An additional citation, Citation No. 17-10-47378-003, for failure, without specific intent, to pay Mr. Hrono the state minimum wage from July 15, 2017 to September 24, 2017, in violation of M.G.L. c. 151, §. The amended citation ordered the petitioners to pay \$4,622.50 in restitution and a \$2,300 civil penalty, for a total of \$6,922.50.

The Division did not amend the citation for failure to produce payroll records, Citation No. 17-10-47378-002.

35. Mr. Mahmoud and SWAT timely appealed Amended Citation No. 17-10-47378-001 and the new citation, Citation No. 17-10-47378-003, to DALA.

Discussion

1. Applicable Law

a. Wage and Hour Laws Requirements

The Massachusetts Wage and Hour Laws require that employees be paid timely, no less than six days from the end of the pay period in which wages were earned. M.G.L c. 149, § 148. For purposes of the Wage and Hour Laws, an employer is deemed to be any president or treasurer of a corporation, and “any officers or agents having management of the corporation.” M.G.L. c. 148, § 150. With exceptions that do not apply here, private employers must pay their employees the

statutory minimum wage for all hours worked, which was eleven dollars per hour in 2017. *See* M.G.L. c. 151, § 1. An employee cannot agree to waive his statutory right to earned wages or to prompt wage payment. *Id.* Employers must keep true and accurate records of each employee's name, address, occupational classification, hours worked, wages paid, and "such other information . . . deem[ed] material and necessary" by the Attorney General or the Department of Labor Standards, and employers must furnish these records to the Attorney General's Fair Labor Division upon request. M.G.L. c. 151, § 15; *see also* M.G.L. c. 149, § 27B.

b. Proof Required on Appeal

i. Proof Required as to the Violations for Which Restitution is Sought

A person aggrieved by a citation issued by the Fair Labor Division may appeal it to DALA. M.G.L. c. 149, § 27C(b)(4). On appeal, DALA "may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order." *Id.*; *see also Briggs v. Fair Labor Div.*, Docket Nos. LB-09-1022, LB-09-1029, Decision at 26 (Mass. Div. of Admin. Law App., Feb. 26, 2013), *reconsideration denied* (Mass. Div. of Admin. Law App., Jun. 24, 2013), *citing Majowicz v. Fair Labor Div.*, Docket No. LB-11-163, Decision at 9-10 n. 2 (Mass. Div. of Admin. Law App., Sept. 11, 2012).

M.G.L. c. 149, § 27C does not define "erroneously issued" or specify the evidence needed to show that an appealed citation was, or was not, issued erroneously. Because the phrase does not appear to be a technical one, or one that has "acquired a peculiar and appropriate meaning in law," it

is “construed according to the common and approved usage of language” *See* M.G.L. c. 4, § 6, third para. Therefore, “erroneously issued” encompasses the issuance of a citation based upon a mistake as to what the operative facts are, or a failure to determine or consider the operative facts. *Briggs v. Fair Labor Div.*, Docket No. LB-09-1022/1074, Decision at 22-23 (Feb. 26, 2013); *see also Doyle v. Commonwealth*, 444 Mass. 686, 830 N.E.2d 1074 (2005) (phrases “erroneously issued” and “issued in error” treated as interchangeable in context of land title transfer). In an appeal challenging a citation seeking restitution and penalties for failure to pay wages timely or the applicable state minimum wage, the “operative facts” include when the employee worked, the hours the employee worked, and whether the employee was timely paid any part of the wages he was owed or was not paid anything.

As to each of the citations they appeal here, the petitioners needed to show, by a preponderance of the evidence, that each citation was “erroneously issued.” *See* M.G.L. c. 149, § 27C(4). As to the violations charged that relate to the restitution they owe to their former employee, the evidence the petitioners needed to meet their evidentiary burden relates to what they claimed on appeal and/or what theory they proposed based upon the evidence presented. Thus:

(1) The petitioners needed to show that they did not fail to make timely payment of wages to Mr. Hrono from July 15, 2017 to October 8, 2017, and that they did not fail to pay Mr. Hrono the applicable minimum wage of \$11 per hour for the hours he worked during that period. The petitioners conceded that Mr. Hrono was owed, and was employed at, the \$11 minimum wage rate but was not paid that rate in full. However, they argued that their failures were partial, because they paid Mr. Hrono \$5 per hour for the hours he worked from July 15 to September 24, 2017, and the

petitioners therefore owed restitution at the rate of \$6 per hour, the difference between the \$5 per hour they paid Mr. Hrono and the \$11 per hour minimum wage for those hours. They disagreed with the Fair Labor Division's computation of the hours Mr. Hrono worked, asserting that he worked fewer hours than the Division estimated through September 24, 2017, and none after that date because New York Fried Chicken had closed. This computation proved to be a disputed issue, and its resolution proved to be more difficult than it should have been if the petitioners had maintained and produced payroll records to show the hours Mr. Hrono worked or the days on which he worked them. As discussed below, recalculating Mr. Hrono's hours based upon the testimony and other evidence in the records (particularly Mr. Hrono's six slips) results in the computation of a lower restitution amount. Therefore, as far as the restitution amount is concerned, the two citations that demanded restitution were erroneous as issued. Because this does not result in the modification of any of the civil penalties the citations assessed, however, the citations were not issued erroneously as to the penalty amounts.

(2) The petitioners also needed to show that they did not fail to produce the payroll and other records that the Fair Labor Division requested. The petitioners claimed that they could not produce payroll records they did not have. More accurately, however, they did not produce payroll and other backup records they were required to maintain. They did not press the point much, and it is readily resolved—the petitioners failed to produce payroll records after the Fair Labor Division demanded them on November 7, 2017. The citation issued for failure to produce payroll records was not issued erroneously, therefore.

ii. Proof Required As to the Civil Penalties

The citations issued here each assessed a civil penalty for the unintentional violations it alleged—failure to pay Mr. Hrono his wages timely, failure to pay him at the required \$11 per hour minimum wage, and failure to produce payroll records for inspection upon request by the Fair Labor Division. M.G.L. c. 149, § 27C(b)(2) directs that in determining the amount of any civil penalty it assesses for the applicable Wage and Hour Laws violation, the Attorney General (and, thus, its Fair Labor Division) “shall take into consideration” previous violations of those provisions by the employer, the intent by such employer to violate them, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and (if the project in question was a public contract) the total monetary amount of the public contract or payroll involved.

At a minimum, the Division must consider the factors listed by the statute. The statute does not state how any of these factors are to be considered or what weight they should be given in deciding whether to issue a civil penalty and for what amount. The statute also does not state that the penalty factors listed at M.G.L. c. 149, § 27C(b)(2) are exclusive. Other potentially-relevant factors could also be considered in determining the amount of a civil penalty. Absent statutory language or caselaw to the contrary, an additional factor potentially relevant to the penalty amount might be the degree to which failure to keep and produce records of employee hours worked and wages paid hindered the Fair Labor Division’s enforcement of the Wage and Hour Laws generally, in particular the determination of unpaid wages owed to an employee.

As noted above, M.G.L. c. 149, § 27C(b)(4) directs DALA to “vacate or modify” an appealed

citation or order that was “erroneously issued.” One example of erroneous issuance is where the violation alleged by the citation occurred, but the amount of restitution due (for example, unpaid wages or overtime) proves to be less than what the Division determined. In that case, the appropriate disposition on appeal, per M.G.L. c. 149, § 27C(b)(4), may be to modify the citation rather than to vacate it. If the citation is to be modified, the DALA Administrative Magistrate must decide whether the appropriate modification is an adjustment of the restitution amount downward to conform to the evidence, without adjusting the penalty amount, or whether the penalty amount should also be adjusted downward.⁶

2. Determining the Hours Mr. Hrono Worked During the Applicable Time Period

a. The Approach

The petitioners are charged overall with failing to pay wages timely to Mr. Hrono from July 15, 2017 to October 8, 2017. They are also charged with failing to pay the applicable state minimum

⁶/ If the penalty is adjusted downward, the amount of the adjustment depends, in turn, upon whether the original penalty amount was related to the original restitution amount. If the Division calculated a penalty in proportion to the amount of restitution owed—for example, by computing a specific percentage of the restitution amount—and the restitution amount proves to be less than what the Division determined, DALA will attempt to recalculate the penalty relative to the lower restitution amount, based upon the same proportion the Division applied, if that is what the Division did. *See Hatfield v. Fair Labor Div.*, Docket Nos. LB-11-427, LB-11-428, Decision at 11 (Mass. Div. of Admin. Law App., Apr. 7, 2015); *see also Tavares v. Fair Labor Div.*, Docket No. LB-11-156, Decision at 12 (Mass. Div. of Admin. Law App., Feb. 7, 2012). However, the evidence may show that the Division did not assess a penalty in proportion to unpaid wages—for example, if the Division selected a penalty amount it viewed as reasonable in light of the violations the citation asserted. In that case, DALA will determine whether the penalty amount assessed for the applicable Wage and Hours Law violation is unreasonable or otherwise erroneous, and the evidence it considers on this point will include what it understands to be the Division’s penalty assessment policy or practice. *Hatfield*; Decision at 14.

wage of \$11 per hour to Mr. Hrono during this time—paying him \$5 per hour instead, for the hours he allegedly worked from July 15 to September 24, 2017; and with failing to pay him anything at all for the hours he allegedly worked from September 25 to October 8, 2017.

I determine first that Mr. Hrono started working at New York Fried Chicken on July 15, 2017. Next, I determine the disputed number of hours that he worked from that date through September 24, 2017 (the period during which he was paid \$5 per hour rather than the \$11 per hour minimum wage). The Fair Labor Division claimed that he worked 797.9 hours during this period (after allowing for three vacation days totaling 33 hours). Based upon Mr. Hrono's slips on which his hours were written showing 399.5 hours worked during six of the ten weeks and two days he worked through September 24, 2017, I compute the number of hours Mr. Hrono worked from July 15 to September 24, 2017 to have been 710.3 hours. Finally, I determine that Mr. Hrono did not work at New York Fried Chicken from September 25 to October 8, 2017.

b. Mr. Hrono's Starting Work Date

Mr. Hrono could not recall the date on which he started working at New York Fried Chicken precisely, but he told Inspector Kruckowski that he started on July 15, 2017. (Finding 12.) It is possible he may have been delivering orders for the restaurant as early as July 10, 2017, the first day of food order deliveries shown by the pages from Mr. Zada's spiral-bound notebook. (See Finding 13.) Neither party requested that I find an earlier start date, however. There was no testimony or other evidence that Mr. Hrono started on a later date, or that anyone other than Mr. Hrono was delivering food orders for the restaurant on July 15, 2017. I conclude that July 15, 2017 was the date

on which Mr. Hrono began working at New York Fried Chicken.

c. Mr. Hrono's Hours Worked From July 15-September 24, 2017

Mr. Hrono worked at New York Fried Chicken making deliveries of customers' food orders during the ten-week-and-two day period from July 15, to September 24, 2017. (Finding 12 n. 3.) It is not disputed that during this time, he was paid \$5 per hour rather than the \$11 per hour minimum wage. The number of hours that Mr. Hrono worked during this period is disputed, however.

The Fair Labor Division asserts that he worked a total of 797.9 hours during this period. That figure is an estimate; the petitioners kept and produced no payroll records, and Inspector Kruckowski estimated Mr. Hrono's daily hours based upon the information she received from Mr. Hrono, including the six slips on which he or Mr. Zada wrote his daily hours. Those slips tell a different story about Mr. Hrono's work hours during that time. After reviewing them and the work hours they show for six of the ten weeks and two days from July 15, to September 24, 2017. I compute an average number of daily hours that Mr. Hrono worked for each work day during the remaining four weeks. I split those weeks evenly as two six-day and two seven-day work weeks, based upon Mr. Hrono's testimony that he worked six and seven-day work weeks during that time, without stating more specifically whether, during that time, the number of six and seven-day work weeks was equal. As a result, I conclude that he worked 710.3 hours from July 15, to September 24, 2017, rather than 797.9 hours.

The slips show a total of 399.5 hours worked, and account for six of the ten weeks and two

days comprising the period July 15-September 24, 2019. (*See* Finding 16, Table 1.) Of those six weeks, three were work weeks of five days, and three were work weeks of seven days, and the total hours the slips show for each those weeks range from a low of 39.5 hours to a high of 81-82 hours per work week in September 2017. (*Id.*) Three of the slips are undated, making it difficult to determine when the hours they show were worked.

Upon reviewing Mr. Hrono's slips, I conclude that his hours worked between July 15 and September 24, 2017 can be determined more precisely.

Three of the slips (Slips 4, 5 and 6) are dated, and show hours worked during three seven-day workweeks— August 28-September 3, 2017; September 4-10, 2017, and September 18-24, 2017. (*See* Finding 16, Table 1.) They show a total of 224 hours worked during those weeks. Three of the slips (Slips 1, 2 and 3) are undated, and show a total of 175.5 hours worked. The total number of work hours shown by Mr. Hrono's six slips is 399.5. (Findings 16 and 18.) I must resolve, however, as best as the evidence shows, whether the hours shown on the undated slips were more likely than not worked before or after September 24, 2017. I conclude that they were.

One of Mr. Hrono's undated slips, Slip 3, shows 82.5 hours of work during a seven-day (Monday to Sunday) period. These figures are commensurate with the weekly hours shown by dated slips for two seven-day (Monday to Sunday) workweeks in September 2017—81 hours worked from September 4 to September 10, 2017, shown by Slip 5; and 82 hours worked from September 18 to September 24, 2017, shown by Slip 6. There is no dated slip for the seven-day period between those two weeks—September 11-17, 2017. However, Slip 3 shows hours over a seven-day work week that are commensurate with those for the seven-day work weeks shown by Slips 5 and 6. Absent

testimony or other evidence to the contrary, I conclude that Slip 3 shows the hours that Mr. Hrono worked between September 11 and 17, 2017.

Placed in their correct date order, Slips 3-6 show the following hours that Mr. Hrono worked during the four-week period August 28-September 24, 2017:

Slip 4 shows 61 hours worked between August 28 and September 3, 2017;

Slip 5 shows 81 hours worked between September 4 and 10, 2017;

Slip 3 shows 82.5 hours worked between September 11 and 17, 2017; and

Slip 6 shows 81 hours worked between September 18 and 24, 2017.

As a result, Slips 3, 4, 5 and 6 together show that Mr. Hrono worked 306.5 hours from August 28 to September 24, 2017

The two other undated slips (Slips 1 and 2) do not fit as precisely into a particular work week. Upon closer examination, however, they show hours that Mr. Hrono worked prior to August 28, 2017 rather than any hours he allegedly worked after September 24, 2017.

Slip 1 shows 39.5 hours worked during a five-day period (a Friday to the following Tuesday). Mr. Hrono's typical workweek at New York Fried Chicken began on a Monday and ended on a Sunday (Finding 17), and he testified that he worked 6-7 days per week starting in July 2017. (Finding 10.) One could conclude reasonably, therefore, that during the week shown by undated Slip 1, which included five work days, he took one or two days off.

Undated Slip 2 shows 93 hours worked over a ten-day period, which I reduce to 53.5 hours for a five-day work week shown by this slip. That is because the first five days for which hours are shown on undated Slip 2 (a Friday to the following Tuesday) duplicate the five days of work hours

shown on undated Slip 1. (See Finding 16, Table 1 and n. 2.) Having counted them as hours during whatever work week is shown by Slip 1, I do not count them again in adding the hours for whatever work week that Slip 2 shows. (See Finding 16, Table 1 n. 2). The last five days of work hours shown on undated Slip 2 are for a period running from a Wednesday to the following Sunday. The slip shows 53.5 hours worked during this five-day period. As was true for undated Slip 1, one could conclude reasonably that during the week shown by undated Slip 2, which included five work days rather than seven, Mr. Hrono took two days off.⁷

With no further explanation, Mr. Hrono's testimony that he worked six or seven-day work weeks beginning in July 2017 (Finding 10) can be interpreted reasonably as meaning that he worked six-day work weeks as frequently as he did seven-day work weeks. At that rate, he would have worked five six-day work weeks and five seven-day work weeks during the ten weeks he worked at New York Fried Chicken between July 15 and September 24, 2017. That would have given him five

⁷/ There are other possible conclusions one could reach because Slip 2 shows five, rather than seven, work days. One is that the Slip shows time worked during an earlier part of his employment at New York Fried Chicken when Mr. Hrono worked a five day work week without taking any time off. There was no testimony or evidence that made this possibility any more likely than that Mr. Hrono took two days off during the time shown by Slip 2. In the end, all that matters is that, per his own testimony and his Slips, Mr. Hrono did not work seven-day work weeks all the time; and therefore it is not reasonable to infer that he worked 11-12 hour work days seven days a week every week he worked. Bearing this in mind, I do not deduct for days off, as the Division did (and it guesstimated three days or eleven potential work hours each that it deducted from the work hours it computed for him). Instead, based upon the Slips and Mr. Hrono's testimony, I computed hours based upon several work weeks during each of which Mr. Hrono worked seven days (during the period September 4-24, 2017, shown by Slips 3, 5 and 6), and several during which he worked less than 7 days a week, including the work weeks shown by undated Slips 1 and 2, the work week shown by Slip 4 (August 28-September 3, 2017), and earlier weeks after July 15, 2017, when Mr. Hrono worked an equal number of six and seven-day work weeks. Stated another way, I compute hours actually worked based upon Mr. Hrono's slips and testimony, and did not, instead, compute hours for all the days during the period in question and then deduct three estimated days (33 hours) off.

days off during that period (one day off during each of the five six-day work weeks). Slip 4, for August 28-September 3, 2017, shows five work days (one comprising 13 hours worked, and four days of 12 work hours each), with no hours entered for Saturday, September 2 or for Sunday, September 3, 2017. That would bring the total of days off through September 24, 2017 to six. Inspector Kruczkowski estimated that Mr. Hrono had taken three days off altogether between July 15, 2017 and October 8, 2017, and that he had otherwise worked seven days a week. The slips show that he worked fewer seven-day work weeks than the Inspector estimated he had. As a result, it may be inferred reasonably from these slips that Mr. Hrono took nearly twice as many days off, through September 24, 2017 as the Inspector estimated he had—or, stated another way, that he simply did not work for New York Fried Chicken on each of six days through September 24, 2017.

I conclude that undated Slips 1 and 2 show a total of 93 hours that Mr. Hrono worked during two work weeks that occurred some time between July 15 and September 24, 2017. This time period is readily narrowed down further. Four slips, three of them dated and one undated, show hours worked from August 28 to September 24, 2017. The 93 hours shown by undated Slips 1 and 2 were therefore worked between July 15, 2017 and August 27, 2017.

I add these 93 hours to the 306.5 hours that Mr. Hrono worked from August 28, 2017 to September 24, 2017, per Slips 3, 4, 5 and 6. The six slips show, thus, 399.5 hours that Mr. Hrono worked altogether during six of the ten weeks and two days between July 15 and September 24, 2017. Four of those six work weeks occurred between August 28 and September 24, 2017. The remaining two weeks of work shown by Mr. Hrono's undated slips were performed between July 15 and August 27, 2017.

The period July 15-August 27, 2017 comprised six weeks and two days. (*See* Finding 12 n. 3.) Two of the undated slips account for two of those weeks. Therefore, I must still determine Mr. Hrono's work hours during four weeks and two days of work hours prior to August 27, 2017. These hours must be estimated, because none of Mr. Hrono's slips show them. Making this estimate requires a figure for the average daily hours Mr. Hrono worked during that period, and that figure is calculated reasonably, in turn, based upon the average daily hours he worked during the six weeks covered by Mr. Hrono's Slips 1 through 6. Based upon those Slips, I estimate that Mr. Hrono worked 11.1 hours per day during four weeks and two days of work hours prior to August 27, 2017. Table 3 below shows the computation of the total average hours per day worked as shown by Mr. Hrono's six slips:

TABLE 3: Average Hours Worked by Mr. Hrono Per the Six Slips Included in Exhibit 2

SLIPS	Dates	Number of Days Worked	Total Hours	Average Hours Per Day Worked
Slip 1	Between July 15-27, 2017	5	39.50	7.90
Slip 2	Between July 15-27, 2017	5	53.50	10.70
Slip 4	08/28/17 - 09/03/17	5	61.00	12.20
Slip 5	09/04/17 - 09/10/17	7	81.00	11.57
Slip 3	09/11/17 - 09/17/17	7	82.50	11.79
Slip 6	09/18/17 - 09/24/17	7	82.00	11.71
Totals	//////////	36	399.50	11.10 (see n. 1)

Note 1/ Total hours worked shown by the six slips (399.50) divided by total number of days worked as shown by these slips (36) = 11.097, rounded to 11.10 average hours per day worked.

The estimated daily average of 11.1 hours worked is less than the 12 hours per day that

Inspector Kruczkowski estimated Mr. Hrono worked between July 15 and August 27, 2017. (*See* Finding 29.) It is not clear to what extent the Inspector used the hours shown by Mr. Hrono's six slips to compute her estimate. However, I note that her estimate of 12 hours worked daily exceeds all but one of the average daily hours per day that Mr. Hrono worked according to his six slips. (*See* Table 3 right-hand column, above.) The average I have computed here reflects those hours, and falls within the range of 7.90 –12 hours worked per day that the slips show for six of the ten work weeks between July 15 and September 24, 2017.

For these reasons, I apply the average daily work hours computed above (11.1 hours per day) rather than the Inspector's average daily hours of 12 hours per day. I use the 11.1 hours per day figure in order to estimate Mr. Hrono's time worked during a period of four weeks and two days from July 15 to August 27, 2017, the period for which there are no slips showing hours actually worked.

To make that computation, I again use an even split of two six-day work weeks and two seven-day work weeks based on Mr. Hrono's testimony that he worked six-and-seven-day work weeks starting in July 2017, without stating how many weeks of each length he worked. To this, I add the preceding days on which Mr. Hrono worked (July 15 and 16, 2017). As a result, I add the following hours to obtain the number of hours Mr. Hrono worked from July 15 to August 27, 2017:

2 weeks of 6 days worked per week = 12 days, x 11.1 hours per day (estimated per Table 3 above) = 133.20 hours;

2 weeks of 7 days worked per week = 14 days, x 11.1 hours per day (estimated per Table 3 above) = 155.4 hours; and

2 days worked (July 15 and 16, 2017) x 11.1 hours per day (estimated per Table 3 above) =

22.2 hours.

This yields a total of 310.8 estimated hours that Mr. Hrono worked during the first two days and four weeks between July 15 and August 27, 2017, the time period for which there are no slips showing hours worked.

The record includes, as a result, reliable information regarding the total number of hours that Mr. Hrono worked from July 15, 2017 to September 24, 2017. To the 310.8 hours I have estimated he worked between July 15 and August 27, 2017, I add 399.5 work hours that the six slips show he worked between August 28, 2017 and September 24, 2017, which results in a total of 710.3 hours.

I deduct no estimated time off from this sum, because there was no assertion that Mr. Hrono was entitled to paid vacation days, and I have computed hours worked only on days when Mr. Hrono worked. He did not always work a seven-day work week at New York Fried Chicken. If one assumes an even split of six and seven-day work weeks between July 15 and September 24, 2017, then Mr. Hrono had at least one day off during each of five of this period's ten weeks, for a total of five days off. Per his slips, three of his work weeks actually included five work days, not six or seven, and so he had as many as eight days off through September 24, 2017. Whichever of these numbers one chooses, Mr. Hrono had, by September 24, 2017, more than the three days off that Inspector Kruczkowski estimated he took between July 15 and October 8, 2017.

My computation of his work hours takes into account Mr. Hrono's five and six-day weeks, and focuses on the actual hours he worked during most of his ten weeks of employment at New York Fried Chicken, and computes average daily hours for two weeks of that period that are based upon an assumption of an equal split of six and seven-day work weeks. In short, there is no reason to

deduct an additional 3 days off from the 710.3 hours that I have determined he worked between July 15 and September 24, 2019.

I conclude, therefore, that Mr. Hrono worked a total of 710.3 hours from July 15 to September 24, 2017. This is 87.6 fewer hours than Inspector Kruckowski estimated that he worked during this time (797.9 hours), after deducting 33 hours (3 days) of time off from her estimated grand total of 830.9 hours. (*See above at Finding 29.*) The 710.3 hours were all worked during a period when it is undisputed that Mr. Hrono was paid \$5 per hour, less than the \$11 per hour minimum wage that applied at the time.

d. Did Mr. Hrono Work Additional Hours After September 24, 2017?

Inspector Kruckowski estimated that Mr. Hrono worked 97 hours from September 25 to October 8, 2017. The estimate was based entirely upon the number of hours Mr. Hrono told her he estimated having worked daily during that time. (*See Finding 27.*)

There is insufficient reliable evidence that Mr. Hrono actually worked at the store during that time. Without question, the petitioners, and Mr. Zada, had no payroll records or time slips for the period September 25 to October 8, 2017. However, while their lack of required payroll information invites an adverse inference as to the hours Mr. Hrono worked when New York Fried Chicken was operating, no adverse inference arises from not producing payroll records for days on which the restaurant was no longer open.

Mr. Zada, New York Fried Chicken's manager, testified that the restaurant began closing on September 18, 2017 and was closed fully as of September 20, 2017. (*See Finding 19.*) Mr.

Mahmoud informed the Inspector that the store was reopened on November 2, 2017, and that he obtained help making food deliveries from his other store, Caruso's Pizza. (Finding 27.) Mr. Mahmoud also asserted that the restaurant was mostly closed in August and September 2017. That assertion, and Mr. Zada's testimony that the restaurant had closed by September 20, 2017, are rebutted competently by Mr. Hrono's six slips showing that he worked several hundred hours for New York Fried Chicken through September 24, 2017. (*See* Finding 16.) However, there are no slips showing any work that Mr. Hrono performed after September 24, 2017. (*Id.*; *see also* Finding 13, the pages from Mr. Zada's notebook showing deliveries made by New York Fried Chicken between July 10 and September 17, 2017, but not on any later date.)

Mr. Hrono did not testify that he made deliveries for Caruso's Pizza after that date. There is no evidence that New York Fried Chicken was open or making food deliveries after September 24, 2017. Mr. Hrono's testimony that New York Fried Chicken had not closed while he was still working there (Finding 20) was too ambiguous to be treated as reliable evidence that the restaurant was open after September 24, 2017, and that he was delivering food orders or otherwise actually working there from September 25 to October 8, 2017. Although it is true that there is no evidence of Mr. Hrono's formal discharge as an employee on or as of September 24, 2017, there is also no evidence that he was discharged formally on any later date, including October 8, 2017. In fact, the record reveals no circumstance showing it to have been more likely than not that Mr. Hrono's last day of work at New York Fried Chicken was on any date after September 24, 2017. There is evidence in the record that supports the earlier date—the six slips showing hours through September 24, 2017 (*see* Findings 15-16), and the pages from Mr. Zada's notebook showing deliveries made

by New York Fried Chicken between July 10 and September 17, 2017, but not on any later date. (See Finding 13.)

This evidence is imperfect—*possibly*, there were other time slips showing work hours after September 24, 2017 that Mr. Hrono was unable to copy; and *possibly*, Mr. Zada was selective in presenting only the pages from his notebook showing sales, expenses and deliveries made through September 24, 2017, and withheld others showing such activity after that date. However, there is no evidence that converts these possibilities into probabilities. However imperfect the evidence that New York Fried Chicken’s last day of business was September 24, 2017 may be, it still predominates, because the record contains no evidence that the restaurant actually remained open until October 8, 2017. Without that evidence, there is no basis for assuming that the petitioners were required to maintain payroll records through that date, or for presuming in their absence that Mr. Hrono worked at all during that time, let alone for 97 hours.

For these reasons, I do not credit Mr. Hrono with any of the 97 hours the Division alleged that he worked from September 25 to October 8, 2017. As a result there are, for that time period, no hours of unpaid time worked, or time not paid at the \$11 per hour minimum wage, to include in the computation of restitution that the petitioners owe Mr. Hrono.

2. Restitution Owed by the Petitioners

The total number of hours worked that factor into the computation of restitution Mr. Hrono is owed remains as I computed it above, therefore—710.3 hours between July 15 and September 24, 2017.

The petitioners did not deny their employment of Mr. Hrono, or that Mr. Zada, who hired him, did so as their agent, or that Mr. Mahmoud and SWAT were the owners and operators of New York Fried Chicken even though the restaurant's common victualer's license was issued to Mr. Mahmoud alone. SWAT was incorporated to operate a restaurant, and Mr. Mahmoud was its sole officer and director. For Wage and Hour Laws purposes, SWAT and Mr. Mahmoud are jointly and severally liable for Mr. Hrono's unpaid wages from July 15 to September 24, 2017.

The appealed citations demanded restitution of \$1,430 for failure to pay wages timely between July 15 and October 8, 2017, and \$4,622.50 in restitution for failure to pay Mr. Hrono the minimum wage for the hours he worked from July 15 to September 24, 2017. I have determined that the evidence does not show that Mr. Hrono worked at New York Fried Chicken after September 24, 2017. The remainder of the restitution claimed for failure to timely pay him his wages duplicates, as a result, the restitution amount claimed as the difference between the \$5 per hour Mr. Hrono was paid from July 15 to September 24, 2017 (which neither side disputes) and the \$11 per hour minimum wage to which he was entitled. That difference is \$6 per hour for the 710.3 hours I have computed that Mr. Hrono worked between July 15 and September 24, 2017. Multiplying 710.3 hours x \$6 per hour results in a restitution amount of \$4,261.80.

As a result, I have before me a single restitution amount for the untimely payment of the full minimum wage amount that Mr. Hrono should have been paid from July 15 to September 24, 2017. The statutory grounds for this single restitution remain as the two citations demanding restitution identified them—M.G.L. c. 149, § 148, as to failure to pay wages timely to Mr. Hrono (identified by Amended Citation No. 17-10-47378-001, which ordered the petitioners to pay restitution in the

amount of \$1,430), and M.G.L. c. 151, § 1, as to failure to pay Mr. Hrono the applicable minimum hourly wage (identified by Citation No. 17-10-47378-003, which ordered the petitioners to pay restitution in the amount of \$4,622.50). The total restitution sought by both Citations was \$6,250.50. The restitution I have computed as owed to Mr. Hrono for the hours he worked from July 15, 2017 to September 24, 2017 is \$4,261.80. This is the amount of wages at the required minimum wage rate (\$11 per hour) that he was not paid during that time period; hence, it is blend of wages not timely paid at the minimum wage rate. The Fair Labor Division originally issued one citation seeking one restitution amount on both grounds. Viewed as a single restitution amount yet again, I have reduced this amount by \$1,790.70 (\$6,052.50 restitution sought originally less \$4,261.80, the restitution amount I have calculated here).

3. Civil Penalty Amount

Despite the reduced restitution amount, I sustain, without downward adjustment, the total civil penalties the three citations assessed—\$700 for failure to make timely payment of wages, \$2,300 for failure to pay the state minimum wage, and \$1,000 for failure to furnish payroll records for inspection—for a total penalty amount of \$4,000. As I noted above (at 25), the penalty factors listed at M.G.L. c. 149, § 27C(b)(2) are not exclusive, and, absent statutory language or caselaw to the contrary, an additional factor potentially relevant to the penalty amount might be the degree to which failure to keep and produce records of employee hours worked and wages paid hindered the Fair Labor Division's enforcement of the Wage and Hour Laws generally, and significantly impeded the determination of unpaid wages owed to an employee, whether by the Division or by DALA on

appeal.

Here, the petitioners failed to keep any payroll records, as the Wage and Hour Laws required them to do, and for this reason they had no records to produce when the Fair Labor Division requested them. This hindered the Division's enforcement of the Wage and Hour Laws in this case. It did so by impeding, significantly, the Division's accurate computation of unpaid wages owed to Mr. Hrono. It also impeded DALA's determination, in this appeal, of the unpaid wages Mr. Hrono is owed. Performing this computation required the reconstruction of Mr. Hrono's hours from slips he kept, determining for several of them the work weeks with which the undated slips corresponded, and estimating his hours on remaining undated slips based upon the computation of an average daily hours figure from the slips and testimony.

The petitioners, who kept no payroll records, had no computation of their own to offer during their own appeal. What they offered, instead, was an invitation to this forum to reduce the restitution amount (to a figure they did not themselves calculate) and then maintain the original ratio of penalty amount to restitution that the citations appear to show. This proposal was unhelpful. In effect, it sought a benefit for perpetuating the confusion caused by the petitioners' own failure to keep required payroll records.

Not all calculations that must be done or checked in matters such as these hinder the accurate computation of unpaid wages owed to an employee, or warrant making no penalty adjustment even though the restitution amount is reduced. To a degree, "checking the math" is part of the work involved in making this determination. However, there are circumstances in which the computation is made significantly difficult—for example, because the party obliged to keep and produce payroll

records does not furnish the information on which the computation must be based, and offers nothing, or nothing helpful, to assist the computation.

Whether that has occurred in a particular case is *sui generis*. It occurred here. The computation of Mr. Hrono's days and hours worked was confusingly intricate, and required nearly a complete reconstruction of the information that payroll records are expected to contain, including the basics such as hours and days worked, from food order slips on which hours worked were recorded informally. Payroll records kept as required would have made this time-consuming effort unnecessary, and would have likely reduced substantially the delay in determining the wages Mr. Hrono was not paid accurately and finalizing the restitution amount he is owed.

For these reasons, I affirm the total amount of civil penalties the Division assessed against the petitioners without reducing the penalty amount. I do so based upon a factor that is not specified in, but is not inconsistent with, the non-exclusive penalty factors listed at M.G.L. c. 149, § 27C(b)(2), and that is relevant to the penalty amount—the significant degree to which failure to keep and produce records of employee hours worked and wages paid hindered the Fair Labor Division's enforcement of the Wage and Hour Laws, and impeded the determination of unpaid wages owed to an employee by both the Division and, on appeal, by DALA.

Disposition

For the reasons stated above:

(1) Two of the appealed citations are modified as to the restitution amounts they assessed.

The two modified citations are Amended Citation No.14-10-32076-001, issued to the petitioners for

failure to pay wages timely to former employee without specific intent, and Citation No. Citation No. 17-10-47378-003, issued to the petitioners for failure to pay the former employee the required minimum wage. As a result of this modification, a single restitution amount of \$4,261.80 is assessed against the petitioners for failure to timely pay Mr. Hrono, the former employee. This restitution amount is owed for both failure to pay him his wages timely, and failure to pay him the full minimum hourly wage. It is based upon the difference between the \$5 per hour rate at which he was paid, and the minimum wage rate at which he was employed and at which he was required to be paid (\$11 per hour), or \$6 per hour, multiplied by the 710.3 hours the former employee is found to have worked from July 15, 2017 to September 24, 2017. This reduces, by \$1,790.70, the total amount of restitution assessed by the two citations originally.

(2) The civil penalties assessed by the three appealed citations are sustained without reduction.

SO ORDERED.

Because the penalties are not reduced, this decision is not being issued tentatively. *See Hatfield v. Fair Labor Div.*, Docket Nos. LB-11-427, LB-11-428, Decision at 11 (Mass. Div. of Admin. Law App., Apr. 7, 2015).

This is a final decision. Each of the parties is hereby notified that:

(1) Any person aggrieved by this decision may, within 30 days of receiving notice of it, seek judicial review by filing an appeal with the Superior Court, pursuant to M.G.L. c. 30A, § 14; and

(2) Pursuant to 801 C.M.R. § 1.01(7)(l), any party may file with the DALA Docket Clerk, and serve upon the other party, a motion for reconsideration of this final decision before the

expiration of the time for filing an appeal with the Superior Court seeking judicial review. Per 801 C.M.R. § 1.01(7)(l), a motion for reconsideration “must identify a clerical or mechanical error in the decision or a significant factor the Agency or Presiding Officer may have overlooked in deciding the case.” Accordingly, a motion for reconsideration is not an opportunity to re-litigate matters that were raised earlier and addressed in the decision, or that could and should have been raised earlier but were not. A motion for reconsideration is also not an opportunity to offer testimony or other evidence that could have been offered earlier.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: November 25, 2019