COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

TYMON NGUYEN AND SALEM NAIL BAR LTD. PARTNERSHIP D/B/A SALEM NAIL BAR, TYMON NGUYEN, AND KELLY TRUONG Petitioners	:	Docket No. LB-22-0441-0445
v.	:	
OFFICE OF ATTORNEY GENERAL, FAIR LABOR DIVISON Respondent	:	

Appearances

For Petitioners: Patrick Hanley, *Esq.*
For Respondent: Kate Watkins, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF TENTATIVE DECISION

The Fair Labor Division cited the Petitioners for various offenses.

The citations for failing to keep, and furnish, true and accurate records are affirmed. (LB-0443 and 0444). The company's owner admitted he did not provide accurate records upon request. The company then had to hire an accountant to reconstruct payroll records, further confirming that they previously did not have accurate records to capture employee time and payments.

The citation for failing to have a valid sick leave policy is affirmed (LB-0445). The company's owner submitted a questionnaire in which he acknowledged the company had no sick time policy during the period in question but was working on creating one.

The citations for failing to pay minimum and overtime wages are affirmed (LB-0441 and 0442). Even the company's own accountant calculated that some employees were owed those wages. However, the restitution and penalty amounts are remanded because the Fair Labor Division agrees it miscalculated what was owed and the penalties were based, in part, on those miscalculations.

INTRODUCTION

The Petitioners timely appealed several citations issued by the Office of the Attorney General's Fair Labor Division ("FLD"). I held an in-person hearing on October 2, 2024. Huong Phan, an investigator testified for the FLD; the Petitioners called Tymon Nguyen, the company's owner, Kiomy Pham, an employee, and Christine Barreira, the Petitioners' accountant. I entered exhibits 1-23 into evidence. The parties submitted post-hearing briefs on December 6, 2024. I held a further status hearing on December 19, 2024 in which I asked the parties to clarify some of their positions.[1] Following that hearing, I closed the administrative record.

FINDINGS OF FACT

Background

1. Mr. Nguyen is the owner of the Salem Nail Bar, Ltd. As its name suggests, the Salem Nail Bar is a nail salon in Salem. (Nguyen testimony.)
2. Salem Nail Bar compensates its employees through a combination of an hourly wage, tips, and commissions. Additionally, it pays employees with both payroll checks and cash. (General[2] testimony.)
3. The combination of payment through checks and cash, based in part on commissions, is a cultural characteristic of Vietnamese owned salons for a variety of reasons. (General testimony.)

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[1] I also addressed the Petitioners' motion to strike an exhibit attached to the FLD's post-hearing submission. For the reasons stated at the hearing, I did not enter the exhibit into evidence. I denied the motion to strike without prejudice, recognizing that the Petitioners' objection was premature. Because I remand the matter, the Petitioners may renew their objection, if necessary, after the FLD's remand response.

[2] There are some facts about which many witnesses testified, and are not in dispute, that I simply note as derived from "general testimony."

4. Commissions range anywhere between 40%-60% of the customer's bill, depending on the skill of the technician. Additionally, more skilled nail technicians tend to receive higher tips. (General testimony.)

5. Employees of the Salem Nail Bar did not typically have set schedules but rather set their own hours. However, they had general days they worked. Employees could leave the salon during business hours to attend to personal matters. They could also call out sick whenever needed. (Nguyen and Phan testimony.)

6. Salem Nail Bar was open from 9:30 a.m. – 7:00 p.m., Monday through Saturday, and from 10:00 a.m. – 5:00 p.m. on Sundays. (Nguyen testimony; ex. 22.) Thus, at most, it was open 64 hours a week.

Employee work hours

7. Salem Nail Bar did not do a good job of tracking its employees' schedules. For example, Salem Nail Bar has some paper records that tend to reflect which days an employee works. Because of the unique cash/check payment system, however, the records do not track hours worked, only income earned. Thus, there is some evidence of which days an employee worked but not evidence of how many hours the employee worked on a specific day. (Ex. 7.)

8. Salem Nail Bar uses a scheduling system called SetMore. SetMore is meant to keep track of an employee's schedule and their customers. (General testimony.)

9. However, it does not accurately capture these two data points. To the extent a customer books an appointment for a specific time, and that appointment is then assigned to an employee, those hours in SetMore are accurate. (General testimony.)

10. But there are a variety of circumstances in which an employee may have an appointment that is not reflected in SetMore; there are also circumstances in which an employee did not have a scheduled appointment, but SetMore indicated they did. These discrepancies occur when a customer walks in without an appointment, an appointment gets reassigned, or an appointment is cancelled. (General testimony.)

11. Because of the way Salem Nail Bar managed SetMore, it might even appear an employee had an appointment when the business was closed.[3] (Nguyen testimony.) However, I do not find that ever occurred. (Nguyen and Pham testimony.)

12. Since Mr. Nguyen allowed his employees flexibility to come and go, SetMore did not always capture when the employee left to attend to personal matters or even if they did not show up at all. (General testimony.)

13. What matters for purposes of this hearing is that SetMore provides some valuable information to help determine how many hours an employee worked. (Barreira testimony.)

14. Because of the lack of accurate records, investigator Phan attempted to calculate the employee hours worked. However, she now concedes her original calculations were inaccurate. (Phan testimony.)

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[3] When someone cancelled an appointment, Salem Nail Bar's practice was to move the record of the cancelled appointment in SetMore to the next available time slot, which sometimes would be after hours. The employee did not actually tend to that customer—the appointment was cancelled. But on SetMore, it appears they did because it is an "active" appointment after hours. (Nguyen and Pham testimony.) This may explain why the FLD's original calculations estimated employees worked more hours than the salon was open. After the citations issued, Salem Nail Bar changed this practice so that it no longer appears in SetMore that employees are working when the business is closed. (Nguyen testimony.)

15. For example, she noted some employees worked 80 hours a week, every week, for 30 weeks. This would mean employees worked before or even after Salem Nail was closed for the day. These calculations were also off because they did not reflect that an employee's revenue changed each week (meaning they worked different hours). (Barreira testimony.)

16. The estimates also duplicated some hours because they included an employee's American and Vietnamese names.[4] (Barreira testimony.)

17. The FLD never recalculated the hours themselves. Instead, they now accept many of Ms. Barreira's estimates. (Phan and Barriera testimony.)

18. Ms. Barreira is an experienced accountant who works with numerous nail salons including many Vietnamese ones. She was knowledgeable of accounting principles generally and had the most comprehensive understanding of the Petitioners' operation. Her explanation for the different ways she could have reconstructed the records in this case was based on accepted accounting practices. (Barriera testimony.)

19. She explained how an accountant typically goes about reconstructing records based on the available evidence. Here, she had available the store hours, the employees' earnings per day, and the appointment times from SetMore. (Barriera testimony.)

20. Despite herculean efforts, Ms. Barriera could not recreate the hours exactly. Nevertheless, her best estimate was the most favorable towards the employees. Still, she explained that her numbers likely overinflated the actual hours the employees worked. In

[4] Many Vietnamese workers use anglicized names, and the records sometimes reflect both their given name and American name. For example, Ms. Kiomy Pham also goes by "Jen." (Pham testimony.)

the end, she did agree some employees were owed minimum wage and overtime hours. (Barriera testimony.)

Failure to pay minimum wage and overtime (LB-22-0441 and 0442)

21. As noted, the FLD now admits it overestimated the actual hours worked for the employees and instead accepts the lower estimates provided by Ms. Barreira. In some cases, the FLD's new calculations are more generous than Ms. Barreira's. For example, it maxed out employee weekly hours at 50, so that it does not find that any employee worked more than 10 hours of overtime. It also attributes fewer minimum wage violations than Ms. Barreira suggests. (Phan and Barriera testimony; ex. 9.)

22. These miscalculations do not change the fact that the FLD found the Petitioners failed to pay minimum wage and overtime hours generally, which the Petitioners concede occurred.

23. What remains in dispute is which violations apply to which employees and how much money is owed.

24. The parties agree that an employer must pay a worker for overtime. Overtime applies to any hours beyond 40 hours in a week. It is paid at a rate of 1.5 times the employee's wage: it is the combination of the employee's straight time (their hourly wage) plus the premium (the extra .5 or "one-half portion" the employee receives for these hours). (Phan and Barriera testimony.)

25. An employee who earns an hourly rate is entitled to 1.5 times that rate for any overtime hour. If they were paid on commissions, and thus have no hourly rate, they are entitled to

a payment of 1.5 times the prevailing minimum wage in addition to their commission. (Phan and Barreira testimony.) *See Sullivan v. Sleepy's LLC*, 482 Mass. 227, 237 (2019).[5]

Failure to furnish true and accurate records (with specific intent) (LB-22-0443) and Failure to keep true and accurate records (without specific intent) (LB-22-0444)

26. After the FLD began its investigation, it requested the Petitioners provide it with certain documents, including payroll records, timesheets, paystubs, and proof of wage payments. (Phan testimony.)

27. The Petitioners provided time sheets that purported to calculate pay based on hours worked and tips earned. Mr. Nguyen admits they were not contemporaneous business records. (Nguyen testimony; ex. 3.)

28. Even without Mr. Nguyen's admission, on their face, these records are clearly incomplete and inaccurate. For example, although these "weekly timesheets" covered a period between January and April 2019, they were all signed in April 2019. No one worked more than 40 hours a week. And there were no records that captured the actual hours an employee worked (e.g. 9:00 a.m. – 5:00 p.m.). (Phan testimony; ex. 3.)

29. Mr. Nguyen explained his then accountant created the time sheets and asked the employees to sign them. Mr. Nguyen could not explain what his role was in this—whether he asked his accountant to do this, whether he spoke to his employees about it, or whether they came to him with questions. It is not clear whether he was saying that his

[5] Despite this understanding, the FLD did not use this formula originally. Instead, as counsel explained at the status hearing, it used commissions to cover the overtime hours because if it had not, the restitution would have been astronomical. Now, however, because the FLD agrees there are fewer overtime hours requiring restitution, it wants to calculate restitution without applying commissions to those hours, as the law requires. The Petitioners argue the FLD should be bound by its original formulation, i.e. counting commissions to cover overtime. They also argue that, in any event, commissions may be applied to the straight time portion of overtime. I address these arguments in the discussion below.

accountant acted alone. (Nguyen testimony.) Regardless, I find that Mr. Nguyen was aware his accountant was creating these records.

30. After he submitted these time sheets, Mr. Nguyen hired his present attorney and Ms. Barreira. Together they began to provide the FLD with true business records. For example, they transmitted bank records which showed cancelled checks to verify certain payments. (Ex. 4.)

31. They helped Mr. Nguyen produce an accurate list of cash payments he paid his employees. (Ex. 7.)

32. After Ms. Barreira reconstructed the records, the Petitioners also provided them to the FLD in response to their request. (Barriera testimony; exs. 16-19.)

Failure to have a sick leave policy (LB-22-0445)

33. The Petitioners never supplied the FLD with any evidence that they had a sick leave policy. Nor did they provide any records showing employees used sick days or were paid for days out sick. (Phan testimony.)

34. In fact, in response to the FLD's original payroll request, Salem Nail Bar submitted a basic questionnaire in which it said it did not have an earned sick leave policy and "one is in the process of being created." The form was signed in June 2019. (Ex. 1.)

35. The FLD's cited the Petitioners for failure to provide earned sick time between September 2016 and July 2019. (Ex. 20.)

DISCUSSION

1. I cannot declare the G.L. c. 149 unconstitutional

The Petitioners' first argument is that placing the burden of proof on an employer violates the employer's constitutional rights to due process. While I let the Petitioners raise the argument,

and make a record to support it, I am not empowered to declare statutes unconstitutional. "Administrative tribunals such as DALA are obligated to assume the constitutionality of the statutes on the Commonwealth's books." *Stanton v. State Bd. of Ret*., CR-18-399, 2021 WL 9697062 (Div. Admin. Law Appeals, Aug. 20, 2021), *citing Pepin v. Div. of Fisheries & Wildlife*, 467 Mass. 210, 214 (2014); *Doe v. Sex Offender Registry Bd*., 459 Mass. 603, 630 (2011); *Maher v. Justices of Quincy Div*., 67 Mass. App. Ct. 612, 619 (2006); *Baker v. Dir. of Div. of Unemployment Assistance*, 83 Mass. App. Ct. 1105 (2013) (unpublished memorandum opinion). Accordingly, while a person aggrieved by a citation from the Attorney General may appeal it, to prevail, they must still "demonstrate by a preponderance of evidence that the citation . . . was erroneously issued." G.L. c. 149, § 27C(b)(4). DALA may then remand or modify the citation as appropriate. *Ibid*. Otherwise, DALA must affirm the citation. *Ibid.*

2. Restitution is warranted even if no employees alleged any losses.

The Petitioners also argue that restitution is limited to economic losses; because no employees came forward to complain about a loss, and because the employee's commission covers whatever overtime they are owed, they submit there is nothing more to pay out. The Petitioners cite *Commonwealth v. McIntyre*, 436 Mass. 829 (2002) to support this proposition. *McIntyre*, however, is a criminal case and the restitution referenced there was governed by a different statute, G.L. c. 276, § 92, and different legal principles. In cases involving failure to pay employees, restitution is owed when the employer should have paid its employees a certain amount but failed to, regardless of whether the employee complained. *See generally Sullivan v. Sleepy's, LLC,* 482 Mass. 227 (2019).

Instead, in the context of unpaid overtime, the employer cannot rely on the fact that it paid its employees enough through commissions to cover what it should have paid for overtime.

> "[D]raws and commissions cannot be retroactively allocated as hourly and overtime wages and Sunday pay even if these draws and commissions equaled or exceeded the minimum wage for the employees' first forty hours of work and one and one-half times the minimum wage for all hours worked over forty hours or Sunday. Rather, the employees are entitled to *separate and additional* payments of one and one-half times the minimum wage for every hour the employees worked over forty hours or on Sunday."

Id. at 228 (emphasis added).

Here, the Petitioners did not present any evidence that they paid their employees a separate overtime rate in addition to the employees' commissions. Thus, they owe restitution to any employee who worked more than 40 hours in any given week.

3. The Petitioners failed to pay minimum and overtime wages.

As noted, the Petitioners admit they failed to pay some employees minimum and overtime wages. [6] They argue that since the FLD now concedes it miscalculated the number of employees and hours at issue, the citations were erroneously issued and should be vacated in their entirety. That is not quite right. The restitution amounts, and possibly the penalties, need to be recalculated and I am remanding the matter back to the FLD for that purpose. But the substance of the citation—the violations of the statutes—was not erroneously issued. DALA routinely affirms citations and recalculates restitution or remands for the FLD to recalculate restitution and/or penalties. *See e.g. Croteau, et al. v. OAG*, LB-16-174, 175, *48 (DALA Sep. 21, 2020); *Bryant & Drift House, LLC v. OAG*, LB-18-0584 & 585 (DALA May 10, 2019); DALA Standing Order 23-001.

[6] Mr. Nguyen testified that no one tended to work more than 40 hours. Mr. Pham also testified she worked only about 40 hours a week. I do not credit their testimony. They were both unable to answer fairly straightforward questions about how they tracked or reported time. Moreover, the available records and their own accountant's testimony belie this testimony.

The only thing left to decide is whether the FLD must (or even can) apply commission payments towards unpaid overtime. At the post-hearing status hearing, the Petitioners clarified their position: because the FLD at first applied commissions toward the unpaid overtime, it must do so now. While not clear as to why, it appears the Petitioners are arguing that is the "law of the case" or simply an equitable result (because it would result in lower restitution amounts). However, *Sleepy's,* 482 Mass. 227 and *Sutton v. Jordan's Furniture, Inc.*, 493 Mass. 728 (2024) make clear that overtime payments *must* be a separate and additional payment, beyond any commission. DALA has no power to grant equitable relief which contradicts that rule. *Banks v. St. Bd. of Ret.*, CR-24-0068, 2024 WL 3770229, at *2 (DALA July 3, 2024).

The Petitioners also argue that commissions can at least be applied to the "straight time" portion of the outstanding overtime wages, citing 454 Code Mass. Regs. 27.03 § 3. This argument, however, was rejected by the SJC in *Sleepy's* and *Sutton*: "[T]he plain language of the regulation [§ 27.03] prohibits crediting payments made on 'any . . . basis' against an employer's overtime obligations." *Sleepy's* at 236-37.

4. Failure to furnish records (with specific intent) or keep accurate records (without specific intent).

I find that Mr. Nguyen knowingly provided inaccurate payroll records when the FLD first made its records demand. And there is no dispute he did not keep accurate records, which is why Ms. Barreira had to go through so much trouble to reconstruct the hours based on what little information existed. The Petitioners make a cursory argument that these citations were issued in error but cannot overcome the clear factual record supporting the citations.

5. Failure to have a sick leave policy.

Lastly, the Petitioners argue that the FLD failed to develop any evidence that they did not have a sick leave policy. To be fair, the FLD did not ask the witnesses any questions about the

this. That may be because the Petitioners admitted in writing that they had no valid sick leave policy. That admission was part of an exhibit entered into evidence. A party's own admission is compelling evidence that an allegation is true. *C.f. Commonwealth v. Andrade,* 488 Mass. 522, 536–537 (2021) ("Where a party is confronted with an accusatory statement which, under the circumstances, a reasonable person would challenge, and the party remains silent or responds equivocally, the accusation and the reply may be admissible on the theory that the party's response amounts to an admission of the truth of the accusation."). Because the Petitioners have the burden of proving the citation was erroneously issued, they were the ones that needed to submit something to refute that admission. They could have asked witnesses about it but didn't. Absent any contrary evidence, the citation was correctly issued.[7]

6. The restitution and penalties for the minimum and overtime wage violations must be recalculated.

As noted, the FLD agrees it needs to recalculate the restitution amounts for these two citations. I am also remanded the penalties for these citations because they were based on an erroneous estimate of how many employees were impacted and how much restitution was owed. While the FLD has indicated what it believes the new restitution amounts should be, it will be given the opportunity to explicitly adopt those (or perhaps even adjust them more based on evidence adduced at the hearing).

CONCLUSION

Citations nos. 3-5 (LB-22-0443-0445) are affirmed.

[7] There was a lot of testimony at the hearing about Mr. Nguyen's generosity in allowing employees to take sick time off if needed and still get paid. (Pham testimony) While I credit that testimony, it does not change the fact that, at least for the period covered by the citation, there was no formal sick leave policy, and certainly no policy that conformed to what the law required.

Citations nos. 1-2 (LB-22-0441-0442) are remanded. *See* DALA Standing Order 23-001. The FLD shall consider my findings and issue new restitution amounts. It should also determine whether a penalty modification is warranted and explain why (or why not) it is modifying the penalties.

The FLD shall file a response with the new restitution amounts and new penalty amounts, if applicable, 30 days from receipt of this order. Once filed, the Petitioners shall have 30 days to file a reply and/or objections to the final recommended amount. If I conclude that a further hearing is necessary, I will take that up after both sides have submitted their pleadings. If not, I will issue a final decision affirming the citation and addressing the new restitution and penalty amounts.[8]

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

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Eric Tennen
Administrative Magistrate

[8] To be clear, this is a tentative decision. The decision I issue after the parties address the restitution and penalties will incorporate this decision and constitute the final decision subject to appeal pursuant to G.L. c. 30A.