**COMMONWEALTH OF MASSACHUSETTS**

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| Suffolk, ss. | **Division of Administrative Law Appeals** |
| **Farh Painting Co. and Mohamed Farh**,Petitioners v.**Office of the Attorney General –** **Fair Labor Division**, Respondent |  Docket No. LB-15-107 |

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| **Appearance for Petitioner**:Mohamed Farh, *pro se*245 Granite Ave.Milton, MA 02186 |
| **Appearance for Respondent:**Karla E. Zarbo. Esq.Office of the Attorney General-Fair Labor DivisionOne Ashburton PlaceBoston, Massachusetts 02108 |

**Administrative Magistrate**:

Bonney Cashin

**Summary of Decision**

Motion for Summary Decision is granted and civil citation issued by the Office of the Attorney General–Fair Labor Division is affirmed. The OAG-FLD demonstrated that no dispute of genuine material fact exists where Petitioners failed to pay employees overtime wages. The Petitioners owe $25,059.00 in restitution and must pay a $7,500.00 civil penalty.

**DECISION**

The Office of the Attorney General-Fair Labor Division issued a civil citation to Mohamed Farh individually and to Farh Painting Co. for violation of G.L. c. 151, § 1A. The OAG-FLD sought a civil penalty and restitution to 16 employees. Mr. Farh appealed pursuant to G.L. c. 149, § 27C(b)(4).

Following a prehearing conference and the parties’ attempt to negotiate a resolution to this matter, the OAG-FLD filed a motion for summary decision that I denied without prejudice. The OAG-FLD renewed its motion on February 17, 2016, supported by the affidavit of Yolanda Kruczkowski (Exhibit 1), an inspector with the FLD, and seven exhibits referenced in the affidavit (Exhibits A-G). The Petitioners did not respond to the motion.

**UNDISPUTED FACTS**

 Based on the documents in the record, the following facts are not in dispute.

1. Mohamed Farh has owned Farh Painting Co. for over 30 years. (Ex. 1 (Kruczkowski Aff.), Ex. B).
2. Following the receipt of a complaint from a Farh Painting employee, the OAG-FLD initiated an investigation. (Ex. 1).
3. On June 18, 2014 and October 2, 2014, the OAG-FLD issued demand letters to the Petitioners for payroll records. (Ex. 1).
4. The Petitioners responded on July 14 and 21, 2014, and on October 20, 2014, with Excel spreadsheets showing the hours worked by employees and cash wages paid to them. (Ex. 1, Ex. B).
5. The Petitioners did not produce any other payroll records. (Ex. 1).
6. The OAG-FLD prepared an audit based on the payroll records that the Petitioners provided to it. (Ex. 1, Ex. C).
7. The Petitioners paid the complainant and 15 additional employees straight time for work done in excess of 40 hours during a given week. (Ex. 1, Ex. C).
8. The audit shows the amount owed to each of the 16 employees. The Petitioners owe them a total of $25,059.00 in unpaid overtime wages. (Ex. 1, Ex. C, Ex. F).[[1]](#footnote-1)
9. Mr. Farh admitted to the OAG-FLD that he did not factor overtime costs into the price he quoted for his company’s work and that he did not pay his employees overtime wages. (Ex. 1, Ex. D).
10. Effective December 12, 2014, the Petitioners entered into a tolling agreement with the OAG-FLD. (Ex. 1, Ex. E).
11. On March 6, 2015, the OAG-FLD issued two citations to the Petitioners for failure to pay overtime wages and failure to maintain true and accurate payroll records from January 2013 through October 2014. The Petitioners did not appeal the citation for the records violation. The citation for failure to pay overtime wages ordered payment of a $7,500.00 civil penalty and $25,059.00 in restitution to the 16 employees. (Ex. 1, Ex. F).
12. The Petitioners’ failure to pay overtime wages was willful, or “with specific intent,” as referenced in the citation. (Ex. 1, Ex. F).
13. In the citation concerning the failure to pay overtime, the OAG-FLD assessed a $7,500.00 civil penalty, based on its consideration of the Petitioners’ intent to violate the law (admission of failure to pay overtime), the number of employees affected by the violation (between four and six employees worked for the Petitioners at any given time), the monetary extent of the violations ($25,059.00 owed in restitution), and the Petitioners’ previous violation (unappealed citation issued in 2009 for failure to pay wages). (Ex. 1, Ex. A).
14. On March 17, 2015, by hand delivery, the Petitioners appealed Citation No. 14-05-29813-002. (Appeal).

**DISCUSSION**

 An employer must compensate an employee at a rate not less than one and one half the regular rate for hours worked in excess of forty in a given work week, unless the employee’s job duties fall within one of the enumerated statutory exceptions, none of which are applicable here. G.L. c. 151, § 1A. An employer who pays less than the required overtime rate violates G.L. c. 151, § 1A and is subject to a civil citation issued under G.L. c. 149, § 27C. G.L. c. 151, § 1B.

 A civil citation may require an employer to rectify the infraction, to make restitution to an aggrieved party, or to pay a civil penalty of not more than $25,000 for each violation. G.L. c. 149, § 27C(b)(1). For a first offense, that is, when an employer has not previously been either criminally convicted or issued a civil citation, the maximum penalty is $15,000 for each violation, unless the OAG-FLD determines that the employer “lacked specific intent” to violate the provisions of c. 149 or c. 151, in which instance the maximum penalty is $7,500. G.L. c. 149, § 27C(b)(2).

 In this case, the OAG-FLD issued the Petitioners a civil citation in 2009 that was not appealed and is, thus, final. The OAG-FLD noted on the 2015 citation form that the Petitioners’ failure to pay overtime wages was a second or subsequent offense. The maximum penalty that the Petitioners may be assessed is, therefore, $25,000 for each violation. Each 40 hour work week in which an employee was not paid overtime is a separate violation.

As the appealing parties, the Petitioners have the burden of showing that the citation was erroneously issued. G.L. c. 149, § 27C(b)(4).

 The OAG-FLD filed a motion for summary decision pursuant to 801 CMR 1.01(7)(h), which provides that:

[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

801 CMR 1.01(7)(h).

 A motion for summary decision may be granted when there is no genuine issue of material fact regarding the claims presented and a party is entitled to prevail as a matter of law because, under such circumstances, a hearing would serve no useful purpose. *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 846, 832 N.E. 2d 628, 636 (2005); *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Bd*., 9 Mass. App. Ct. 775, 785-86, 405 N.E.2d 151, 156 (1980). The language of 801 CMR 1.01(7)(h) borrows heavily from the standard for summary judgment in Mass. R. Civ. P. 56. *See Catlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992). It is well established that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c); *Community Nat’l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party may show the absence of a genuine issue of material fact by submitting affirmative evidence that negates an essential element of the opposing party’s claim. *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass.706, 715 (1991). A moving party without the burden of proof may submit evidence that the party opposing summary disposition has no reasonable expectation of proving an essential element of that party’s claim. *Id.* at 716. When a motion for summary judgment is adequately made and supported, a party opposing it must respond with specific facts showing that there is a genuine, triable issue. Mass. R. Civ. P. 56(e), *Community Nat’l Bank v. Dawes*, 369 Mass. at 553.

 When considering a motion for summary judgment, a judge does not pass on the credibility of witnesses, weigh the evidence, or make her own determination of the facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370 (1982). She only determines whether a genuine issue of material fact exists. *Id.*

 The OAG-FLD’s motion is adequately made and supported. Viewing the evidence in the light most favorable to the Petitioners, *Hub Assocs. v. Goode*, 357 Mass. 449, 451 (1970), the OAG-FLD has demonstrated that: the Petitioners failed to pay 16 employees for the hours they worked over forty in a given week between January 2013 through October 2014; restitution of a specific amount is owed to each employee based on an OAG-FLD audit using the Petitioners’ own records; and the OAG-FLD considered the statutory factors required by G.L. c. 149, § 27C(b)(2) when it assessed a $7,500.00 civil penalty. The assessed penalty is below the statutory maximum penalty amount of $25,000 per violation for second or subsequent violations. The Petitioners were obliged to respond to the motion with specific facts showing there was a genuine, triable issue in dispute. The Petitioners failed to do so; indeed they did not respond to the motion at all. The OAG-FLD also demonstrated that it should prevail as a matter of law.

**CONCLUSION**

 The OAG-FLD’s motion for summary decision is granted. The civil citation it issued to the Petitioners ordering restitution and payment of a civil penalty is affirmed.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Bonney Cashin

 Administrative Magistrate

DATED: July 12, 2016

1. The cover page to the audit identifies the total owed as $25,079.00. I take that to be a typographical error because the Kruczkowski Affidavit and the citation state the amount owed is $25,059.00. [↑](#footnote-ref-1)