



THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER
AND WORKER PROTECTION,

Petitioner,

-against-

557 BURGER CORP. and HARUN
RASHEED,

Respondents.

OATH Index No. 2384/19

Final Agency Decision

On April 21, 2023, Administrative Law Judge Astrid B. Gloade of the Office of Administrative Trials and Hearings (“OATH”) issued a Report and Recommendation in the above-captioned matter. OATH recommended that Respondents be directed to pay \$83,000 in civil penalties to the Department of Consumer and Worker Protection (“Department”) and \$43,500 (\$41,500 in employee relief and \$2,000 in schedule change premiums) to the complainant Nyeshia Live (“Live”) for violations of the Fair Workweek Law. On June 21, 2023, the Department received written arguments from both parties.

The Department now issues this Final Agency Decision pursuant to section 2203(h)(l) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York (“RCNY”). Following review of the record, the Department adopts OATH’s Report and Recommendation subject to the modifications explained below.

DISCUSSION

The Department modifies OATH’s Report and Recommendation to include three violations, and the associated penalties and relief, for Respondents’ failure to pay schedule change premiums under section 20-1222 of the New York City Administrative Code (“NYC Code”).

In count 5, Petitioner alleged 95 occasions on which Respondents cancelled, shortened, rescheduled, or added hours or shifts to Live’s schedule and failed to pay required schedule change premiums. In the Report and Recommendation, OATH recommended that 72 of the 95 alleged violations be sustained and that Respondents pay \$21,600 in employee relief, \$1,800 in schedule change premium payments, and \$36,000 in civil penalties. OATH Dec. at 24-26 (April

21, 2023). OATH erred in not sustaining three violations, which occurred on January 9, 2018, January 23, 2018, and February 19, 2018.¹

Pursuant to NYC Code section 20-1222(a)(3), each change to a work schedule in which additional hours or shifts are added, or the date or start or end time of a shift is changed, is subject to a \$15 premium payment. With respect to the three shifts identified above, Petitioner established that, with less than seven days' notice to Live, Respondents changed the start or end time of each shift with no loss of hours and thus met its burden of proof.

This showing shifted the burden to Respondents to show that they paid Live a premium for each shift pursuant to NYC Code section 20-1222(b) or that an exception provided in NYC Code section 20-1222(c) applied. The Report and Recommendation misapplied the burden of proof, stating “Petitioner bears the burden of proving that these shifts were rescheduled, not shifts where Live started work late and worked later so that her actual working hours were largely unchanged.” OATH Dec. at 17. In fact, the law provides for an exception to paying schedule change premiums if the “employee requested in writing a change in schedule.” NYC Code § 20-1222(c)(2). The burden is not on Petitioner to prove an absence of such a request. Here, Respondents submitted no evidence that such a request was made by Live, that it was made in writing, or that Respondents retained a copy of the written request.²

These shifts also did not meet the exception provided in title six, section 7-606(b) of the RCNY, because the total changes made to each shift exceeded 15 minutes.³ The Report and Recommendation erroneously found that, for each shift, “the time difference between the hours worked and the hours scheduled was less than 15 minutes.” OATH Dec. at 17. But section 20-1222(a)(3) provides that a schedule change premium payment is required even where a shift is “changed with no loss of hours.” And section 7-606(b) turns on whether “*total changes* made to one shift exceed 15 minutes.” Here, each of the three shifts—when adding together changes made to the start time and end time—changed by more than 15 minutes.

Thus, Respondents are liable for three additional violations of NYC Code section 20-1222, for a total of 75 violations under count 5, resulting in \$37,500 in civil penalties, \$22,500 in employee relief, and \$1,845 in schedule change premium payments.

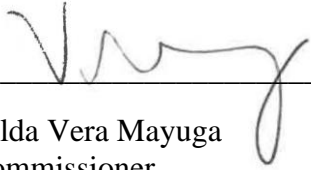
¹ The three shifts changed as follows: January 9, 2018, from 2:36 p.m. to 12:46 a.m.; January 23, 2018, from 2:18 p.m. to 12:05 a.m.; and February 19, 2018, from 2:02 p.m. to 12:16 a.m.

² Indeed, “[a]n employer’s failure to maintain, retain or produce a record or other information required to be maintained by this chapter and requested by the department in furtherance of an investigation conducted pursuant to this chapter that is relevant to a material fact alleged by the department in a notice of violation issued pursuant to this subchapter creates a rebuttable presumption that such fact is true.” NYC Code § 20-1206(b).

³ Effective June 23, 2022, section 7-606(b) was repealed and replaced with different language, codified in 6 RCNY section 7-607. This decision applies the now-repealed language of section 7-606(b) because the relevant conduct pre-dated the rule change.

CONCLUSION

OATH's Report and Recommendation is adopted subject to the modification explained above. Respondents are ordered to pay \$84,500 in civil penalties to the Department and \$44,445 (\$42,400 in employee relief and \$2,045 in schedule change premium payments) to Live. Respondents are also directed to comply with NYC Code sections 20-1205(b), 20-1221, 20-1231, and 20-1241.



Vilda Vera Mayuga
Commissioner
Department of Consumer and Worker Protection

Date: 08/25/2023