New York State Department of Labor
David A. Paterson, *Governor*
Colleen Gardner, *Commissioner*

November 2, 2010

[redacted]

Re: Request for Opinion
Overtime
Medical/Dental Practices
RO-10-0011

Dear [redacted]e:

I have been asked to respond to your letters seeking an opinion relating to the methods of pay for employees of a general medical practice in Brooklyn, as well as a dental office in Queens. Your letters ask whether it is permissible to compensate two employees on a salary basis or if such employees are required to be paid hourly.

Both the Federal Fair Labor Standards Act (FLSA) and the regulations adopted pursuant to the New York State Minimum Wage Act require, with certain exceptions or exemptions, employees to be paid for overtime hours at a rate not less than one and one half times their regular rate of pay. However, as you may know, these requirements are independent of each other and operate to provide both the U.S. Department of Labor and this Department authority over the enforcement of their respective provisions. It is important to note that the FLSA does not prevent states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA (see 29 U.S.C. §218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002)).

Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to employees who are otherwise exempt from overtime under the FLSA. In order to reach a determination as to whether a job falls under a permitted overtime exemption, the Department may examine both the FLSA and the more stringent provisions of the State Minimum Wage law and orders. Where the criteria in a New York State exception mirror those for an exemption in the FLSA, this Department usually

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construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations by the U.S. Department of Labor. However, this Department is not bound by the decisions and interpretations of the U.S. Department of Labor, nor is that Department bound by this or other interpretations issued by this agency.

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." *(see,* Labor Law §651 *et seq.)* Section 651 (5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. *(see,* Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay subject to the exemptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime but at a rate not less than one and one half times the minimum wage. As alluded to above, this requirement is independent of the overtime requirements contained in the FLSA, which are <u>not</u> incorporated by reference; rather they operate as independent and concurrent requirements for the payment of overtime.

As a preliminary matter, please be advised that nothing restricts an employer's ability to pay its employees on a salary basis so long as such employees are paid in compliance with the applicable State and federal minimum wage and overtime laws. A recent decision of the New York State Industrial Board of Appeals is enclosed which discusses the permissibility of and requirements for paying employees a salary for working in excess of forty hours per workweek. (*In re Cayuga Lumber, Inc.*, PR-05-009 (September 26, 2007).) In that case, the Board held the State and Federal overtime provisions do not restrict who may be paid a salary but require that in the absence of an "explicit, mutual agreement that a salary provides for a premium 'stepped up' rate for overtime hours, the regular rate of pay for a nonexempt salaried employee is computed by dividing the weekly salary by the number of hours worked." (*Id.* at 4.) If, therefore the Department received a complaint from a non-exempt salaried employee that he or she was not being paid overtime and the employer failed to provide evidence of the explicit mutual agreement discussed above, such employee would be entitled to an additional payment equal to one half of the employee's regular rate of pay times the number of overtime hours worked. (*Id.*)

Your letter inquires as to the FLSA exemptions and the state exception from overtime for individuals employed in bona fide administrative or professional capacities. These exceptions/exemptions are discussed individually below in relation to both of the employees described in your letter.

Medical Practice Employee

The first of the employees in question works for the general medical practice. Your letters describe the employee's primary duties as including closing the practice's books every

day, printing daily reports, preparing and making bank deposits, ordering office supplies, reviewing supply and material orders upon arrival, entering payments into the computer and onto patient charts, handling billing and collection matters, filing insurance forms, submitting x-rays to insurance companies, following up with insurance companies, and dealing with equipment maintenance. In addition to her primary duties, the employee also writes and calls in prescriptions, pulls, files, and enters data into charts, types letters of treatment plans to patients, makes copies, answers telephones, schedules and confirms appointments, and sends faxes. Based on this, your letters assert that the employee in question works in a bona fide administrative capacity as defined by the Federal Fair Labor Standards Act and the New York Minimum Wage Orders.

To qualify for the administrative employee exemption under the FLSA, all of the following criteria must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Similarly, the definition of "employee" for the purposes of the New York Minimum Wage Act excludes individuals employed or permitted to work in a bona fide administrative capacity. (Labor Law §651(5)(e).) Regulation 12 NYCRR §142-2.l4(4)(ii) explains:

Work in a bona fide administrative capacity means work by an individual:

(a) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer;

(b) who customarily and regularly exercises discretion and independent judgment;

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; and

(d) who is paid for his services a salary of not less than: ***$543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

As previously noted, mere job descriptions are an insufficient basis upon which to evaluate whether the employees in question operate within a "bona fide administrative capacity" under both the FLSA and the State Minimum Wage Orders, since the applicability of such exemptions/exclusions must be determined on a case-by-case assessment of an individual employee's job duties.

With regard to the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA exception, which require the employee's primary duty to consist of office or non-manual field work directly related to management or general operations, the employee in question appears to work in a nonmanual capacity and/or perform office work relating to the employer's general operations. The U.S. Department of Labor has interpreted the term "primary duty" to mean ··the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." (FLSA Fact Sheet No. 17c.) Based on the information provided in your letter, the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA administrative exemption would likely be satisfied by individuals performing the work as described in your letter.

The second criterion in 12 NYCRR §142-2.l4(c)(4)(ii), which mirrors the third criteria for the FLSA exemption, is impossible to evaluate based on the information provided. Since no factual information was provided to make a determination in this regard, no opinion can be offered at this time. However, it is worth noting that most, if not all, of the duties identified appear to be routine duties that would be performed in accordance with specific instructions or protocols followed by the employee rather than duties performed by an employee who customarily and regularly exercises discretion and independent judgment.

The third criterion in 12 NYCRR §142-2.14(c)(4)(ii), which does not have a corresponding FLSA exemption, appears to have been satisfied since the employee's job duties can properly be described as administrative in nature, and she appears to regularly and directly assist the employer.

Finally, while the fourth criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the first in the FLSA exemption, both of which impose minimum salary requirements, appear to be satisfied based upon the salaries described, it is important to note that the fourth criterion in the state regulations requires that the employee be paid a *salary* for their work. In this regard, no opinion can be offered as to whether the employer has satisfied this criterion since you do not state the amount and method of the employees' compensation.

Accordingly, a definitive determination cannot be made in relation to the employee referred to in your letter as to the applicability of the administrative exclusion in the State Minimum Wage requirements and the administrative exemption from the FLSA. As mentioned

above, employees who do not satisfy the requirements for the FLSA exemption[1] must be paid for all overtime hours worked at a rate not less than one and one half times their regular rate of pay. Employees who satisfy only the requirements of the FLSA exemption but not those for the State exception must be paid for all overtime hours worked at a rate of not less than one and one half times the minimum wage rate. Employees who satisfy the requirements for both the FLSA exemption and the State exception are not required to be paid an increased rate of pay for overtime hours worked.

Dental Hygienist

The second of the employees in question is a dental hygienist working for the dental office. While your letters do not provide a description of the duties of the employee, your letters state that the duties of dental hygienists require "learning customarily acquired by a prolonged course of specialized intellectual instruction and study," due to New York State's educational and licensing requirements. Based upon this, you assert that the dental hygienist works in a bona fide professional capacity as defined by the Federal Fair Labor Standards Act and the New York Minimum Wage Orders. As you can see below, federal regulations provide additional guidance in the application of the FLSA "learned professional" exemption to dental hygienists so long as certain requirements are met. Therefore, the following applies the criteria for the FLSA and 12 NYCRR 142-2.2(c)(4)(iii) separately and independently so as to avoid confusion in that application.

FLSA Professional Exemption

To qualify for the professional employee exemption under the FLSA, the employee must meet either the requirements for a "learned professional" or a "creative professional." The requirements for a "learned professional" are as follows:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

[1] While it is not likely that an employee will be outside of the coverage of the State overtime requirements without being exempt under the FLSA, should such a situation arise, such employee would be entitled to the full protection of the FLSA since state laws cannot lower the protections afforded by that Act. (29 USC 218.)

In the alternative, the requirements for a "creative professional" for the professional employee exemption under the FLSA are as follows:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Since it is clear that the employee in question does not satisfy the requirements for "creative professionals" under the FLSA, the following analysis looks at whether "learned professional" requirements are met, along with the requirements for the State professional exclusion.

With regard to the first criterion, which requires the employees be paid a salary of not less than $455 per week, no opinion can be offered since you do not state the amount and method of the employees' compensation. With regard to the remaining criterion in the FLSA, federal regulation 29 CFR 541.301(c) provides that "[d]ental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption." Applying these criterion, through the clarification and simplification provided by regulation 29 CFR 541.301(c), it appears that the employee in question would satisfy the requirements of the FLSA "learned professional" exemption so long as the employee is paid a salary of not less than $455 per week and completed the sufficient educational requirements provided above.

NYS Bonafide Professional Capacity

While your letter does not provide any specific information upon which to evaluate the criteria for the professional exception/exemption, the licensing requirements for dental hygienists in New York State and the Department's general understanding of the nature of that profession provides some basis upon which to make a generalized evaluation. As you have noted in your letter, state licensing requirements reflect the need for all candidates for such license to present evidence of satisfactory completion of a program of education for dental hygienists registered by the state education department or accredited by an accrediting organization acceptable to the department.

New York State's Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR 142-2.2(c)(4)(iii), states that work in "a *bonafide professional capacity* means work by an individual":

a) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a

general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

b) whose work requires the consistent exercise of discretion and judgment in its performance; or

c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

The first criterion in 12 NYCRR 142-2.2(c)(4)(iii) could arguably be satisfied if, as you assert, the duties of the dental hygienist require "learning customarily acquired by a prolonged course of specialized instruction and study." However, in line with federal regulation 29 CFR 541.301(c), this Department interprets the term "prolonged course of study" to require the equivalent of four years of academic study at a NYS registered licensure qualifying or American Dental Association accredited dental hygiene program and it appears that a hygienist license may be granted in New York State after only two years of study as well as coursework or training relating to the identification and reporting of child abuse, and infection control and barrier precautions. Therefore, a specific conclusion as to satisfaction of this criterion cannot be made without additional information in this regard.

The second criterion in 12 NYCRR 142-2.2(c)(4)(iii) appears to be satisfied based on the independent and discretionary nature of the duties commonly performed by a dental hygienist. However, since no specific information was provided in this regard, no formal opinion can be offered in this regard.

The third criterion in 12 NYCRR 142-2.2(c)(4)(iii) requires that the work be predominantly intellectual and varied in character, and that the work cannot be standardized in relation to a given period of time. The work of a dental hygienist can properly be described as being predominantly intellectual[2] and varied in character, the requirement that the output or results cannot be standardized in relation to time appears to be met based on the standardized nature, in relation to time, of the activities of a hygienist. It is reasonable to believe that while some tasks performed by the hygienist may be standardized in terms of time (e.g. taking of x-rays, prepping for procedures), the time needed to perform other tasks (e.g. cleaning) will vary depending upon the nature and condition of the patient's teeth. Therefore, it is possible that

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2 Federal regulation 29 CFR 541.301(c) appears to conclude that the work of a dental hygienist is predominantly intellectual in nature. However, the requirement in 12 NYCRR 142-2.2(c)(4)(iii) involving the standardization of work or output does not have a corresponding requirement under the FLSA.

this criterion is also satisfied but formal opinion cannot be given without some breakdown of the amount of time the hygienist spends on activities standardized in time vs. those which are not.

This opinion is based exclusively on the facts and circumstances described in your letters, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you wish to provide additional information for purposes of obtaining a further opinion, please include a copy of this correspondence in your follow-up inquiry. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: Michael Paglialonga

Michael Paglialonga
Assistant Attorney I

Enclosure: *In re Cayuga Lumber*

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CAYUGA LUMBER, INC. Petitioner, To review under Section 101 of the Labor Law: An Order to Comply with Article 19 dated January 14, 2005 - against - THE COMMISSIONER OF LABOR. Respondent.	DOCKET NO. PR-05-009 MEMORANDUM OF DECISION

In review of an Order to Comply (Order) issued by Respondent Commissioner of Labor (Commissioner) on January 14, 2005, the Board issued a Resolution of Decision (Decision) in the above-captioned case on May 23, 2007, finding that the methodology used by the Commissioner to calculate the "regular rate of pay" of Claimant Edward Enders (Claimant) was unreasonable because such methodology would always result in finding an overtime violation. The Decision modified the Order in part and remanded the matter to the Commissioner to recalculate unpaid wages due the claimant in accordance with the Board's Decision.

On August 9, 2007 the Commissioner filed an Application for Reconsideration (Application) of the Decision, arguing that the Board's method of calculating the Claimant's regular rate of pay was error. Petitioner Cayuga Lumber, Inc. (Petitioner) opposes the Application.

The Board grants the Application, modifies its May 23, 2007 Decision, and affirms the Commissioner's January 14, 2005 Order to Comply in its entirety.

STATEMENT OF THE CASE

On January 14, 2005, the Commissioner issued an Order to Comply against Petitioner, finding a violation of Section 652(l) of Article 19 of the Labor Law (minimum wage underpayments) and 12 NYCRR Part 142. The Order directs the payment of wages to three Claimants including Enders, with interest, and assesses a civil penalty. The Commissioner's determination that the Petitioner failed to pay overtime wages to the Claimants was a basis for finding a violation of the minimum wage standards, which encompasses the requirement that premium wages be paid for overtime hours worked. 12 NYCRR 142-2.2.

Petitioner filed a Petition for review of the Commissioner's Order on February 18, 2005, and the Commissioner filed her Answer on May 6, 2005. A hearing was held on November 30, 2006. The Board's May 23, 2007 Decision affirmed the Commissioner's Order as to the Claimants other than Enders and modified the Order as to Enders, finding that the methodology used by the Commissioner to calculate his "regular rate of pay" was unreasonable because it would always result in finding an overtime violation. The Board held, at page 6 of the Decision, that:

> "[t]he correct formula to use in determining a failure to pay overtime, where an employment agreement exists for a fixed salary for a set number of hours in excess of 40, is to divide the fixed weekly salary by the sum of 40 times the hourly rate plus the set number of hours worked in excess of 40 times 1 ½ the hourly rate. This is the formula that the Respondent should have used in her investigation in the case under review herein."

The Commissioner's Application argues that the Board's holding was legal error. She urges that, in the absence of an express agreement and records to show that wages were computed to incorporate overtime, the proper method for determining an employee's regular rate of pay, and therefore, the premium pay due for overtime hours, is by dividing the total hours worked during a week into the employee's total earnings. In support, the Commissioner cites to the regulations found at 12 NYCRR 142-2.2 and 142-3.14. Opposing the Application, Petitioner argues that the Board's holding is in keeping with *Harper v. Fredonia Seed Co., Inc.*, 275 AD 244, 89 NYS2d 530 (4th Dept 1949), where the court utilized the same formula as the Board did here for determining the regular rate of pay. Accordingly, the issue on reconsideration is whether the Board erred in finding that the methodology used by the Commissioner to calculate the regular rate of pay for Enders was unreasonable.

FACTS

Petitioner's only witness at the Board's evidentiary hearing was its general manager who testified that the Claimants never received any overtime pay because they were considered exempt, salaried employees, even though at times they worked over 40 hours in a week. Petitioner did not dispute the audit of hours and payments prepared by the Department of Labor (DOL) based on review of Petitioner's time and payroll records. In our Decision, we held that the three Claimants were not exempt employees, that the two Claimants other than Enders were due the overtime wages assessed by DOL, and we affirmed the civil penalties assessed. We now re-affirm these findings.

According to the DOL audit, Mr. Enders worked from 25 to 52 hours per week and was paid the same salary each week without regard to the number of hours worked. Enders was the only

Claimant to testify at the hearing. Although we credited his testimony regarding the hours he typically worked each week, our Decision mistakenly found that he worked the same hours each week. We held that given the fact that Enders worked a standard week for a standard salary, Enders and the Petitioner were in agreement on the number of hours that his salary covered However, the DOL audit, based on Petitioner's time records, is more accurate as to the hours that Enders actually worked each week and establishes that he worked a fluctuating workweek and not a standard week as we earlier found.

THE STATUTORY SCHEME

The overtime provisions of New York Labor Law, which require that a covered employee be paid a premium rate for overtime hours, are found in the wage orders which are given full force and effect through the New York State Minimum Wage Act at Labor Law §652(2). The wage order applicable here provides, at 12 NYCRR 142-2.2:

> "An employer shall pay an employee for overtime at a wage rate of 1 ½ times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of...the Fair Labor Standards Act of 1938, as amended."

Therefore, the state overtime provisions are to be interpreted in accordance with standards of the Fair Labor Standards Act (FLSA).

The term "regular rate" is defined at 12 NYCRR 142-2.16:

> "The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings."

Likewise, the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. § 207 (a) (1)), requires that covered employees be paid "at a rate not less than one and one-half times the regular rate" for hours over 40 in a week. To calculate the regular rate of pay for a salaried, nonexempt employee, 29 C.F.R. § 778.113 provides:

> "If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate...."

The FLSA and the New York State Minimum Wage Act (Acts) are remedial legislation. A general rule of statutory construction is that remedial legislation is to be broadly construed.

> "The FLSA embodies a Congressional intent to 'give specific minimum protections to *individual* workers.' Its maximum hours provisions, 'like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner." [Citations omitted; emphasis in original.]

Giles v. City of New York, 41 F Supp 2d 308, 316 (SDNY 1999). The Acts do not forbid work hours of over 40 in a week but they provide that a worker must be compensated at a premium, "stepped-

up" rate of one and one-half times the employee's regular rate for these overtime hours. The imposition of this premium is the way in which overtime hours are discouraged.

Early on in its interpretation of the FLSA, the United States Supreme Court held that the FLSA was meant to address "the evil of overwork as well as underpay." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Discouraging overtime hours by requiring premium pay was viewed as a way of inducing worksharing and relieving unemployment as well as protecting workers from excessive hours. *Id.* at 577-78. In *Missel*, an employee received a set salary each week for working between 65 and 80 hours. The lower court held that as long as the salary met the minimum wage standards and overtime based on the minimum wage rate, then the employer complied with the FLSA. The Supreme Court overturned the lower court ruling and held that the "act was designed to require payment of overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum." *Id. at* 578. The Court went on to explain that where there is a fixed weekly wage for regular contract hours which are the actual hours worked, "Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours." *Id.* at n16. Where there is a fluctuating workweek, the regular rate will vary from week to week since it is determined by dividing the salary by the number of hours worked in a single week.

> "The Supreme Court instructs more generally that courts must construe the FLSA overtime provisions broadly; a finding that a salary included overtime, in the absence of an agreement so stating would be the sort of 'narrow, grudging' FLSA application that the Court rejected soon after enactment. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123 et al.*, 321 U.S. 590, 597, 64 S. Ct. 698, 88 L.Ed. 949 (1944)."

Giles v. City of New York, supra at 317. In *Giles*, the court also reviewed federal case law and its interpretation of what is included in a weekly salary:

> "Unless the contracting parties intend and understand the weekly salary to include overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime, but instead hold that the weekly salary covers only the first 40 hours. [Citations omitted.]"

Similarly, in *Doo Nam Yang v. ACBL Corp.*, 427 F Supp 2d 329 (SDNY 2005), the court found that the weekly salary was intended to cover a 50 hour workweek. However, the court did not impute a premium pay element to that salary. Rather, it computed the regular rate by dividing the salary by 50 and then awarded overtime wages in the amount of .5 times the regular rate for hours between 40 and 50 and 1.5 times the regular rate for all hours over 50.

In sum, based on the remedial purpose of labor standards legislation, the governing federal and state law require that in the absence of an explicit, mutual agreement that a salary provides for a premium "stepped-up" rate for overtime hours, the regular rate of pay for a nonexempt salaried employee is computed by dividing the weekly salary by the number of hours worked. The premium wage that is due for all overtime hours is then computed by multiplying the overtime hours by half of the regular rate. If there is an employment contract between the parties which complies with the overtime requirements by specifically providing that the salary includes a premium for overtime hours, the burden is on the employer to prove the contract and its terms.

DISCUSSION

Applying the governing law to the issue before us, we find that in the absence of proof of an employment agreement between Petitioner and Enders providing that Enders' salary included premium pay for overtime hours that he worked and in light of Petitioner's admission that overtime was not paid, the methodology that the Commissioner employed in issuing her Order was correct.

By this decision, we put to rest our previous reliance on *Harper v. Fredonia Seed Co., supra,* and distinguish our holding in *In the Matter of the Petition of David and Laura Guy,* PR 36-99, upheld by the Appellate Division of the New York Supreme Court for the Second Department in *McGowan v. Guy,* 304 AD2d 666 (2d Dept 2003), as limited to the specific facts of that case, as stated therein. There the Board found that there was a contract between the parties which provided for overtime. Although the Board used the *Harper* formula in calculating regular rate of pay and the court upheld its decision as a rational interpretation, the Board finds that in keeping with the remedial intent of the legislation which requires broad application, the federal and state regulations on calculating regular rate, and the numerous state and federal cases which hold that there is a rebuttable presumption that salary does not include a premium for overtime, the Board will no longer give credence to *Harper*. The formula in *Harper* incorrectly presumes that the overtime premium is included in the salary.

There is a rebuttable presumption that salary does not include a premium for overtime hours. "Unless the contracting parties intend and understand the weekly salary to include the overtime hours at the premium rate, courts do not deem weekly salaries to include the overtime premium for workers regularly logging overtime...". *Doo Nam Yang, supra* at n10 quoting *Giles v. City of New York*, 41 F.Supp.2d 308, 316-17 (SDNY 1999). There must be an explicit agreement between the parties that the salary compensates the employee for regular and overtime rates. "The important objective is assurance that the employees and employer are aware that overtime compensation in a specific amount is included in the contract. Unless both sides clearly understand this to be so, it cannot be said that the purposes of the law in requiring additional pay for overtime is being achieved." *Id.*

CONCLUSION

The Board grants the Commissioner's Application for Reconsideration and, in so granting, modifies its May 23, 2007 Resolution of Decision by affirming the Commissioner's Order of January 14, 2005 in its entirety.

Let a Resolution of Decision issue accordingly.

Anne P. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

ABSENT
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on September 26, 2007.