

HEARING OFFICER ADMINISTRATIVE HEARING

OFFICE OF THE CONTROLLER

CITY AND COUNTY OF SAN FRANCISCO

IN THE MATTER OF:

CASE NO: MWO-97

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF LABOR STANDARDS
ENFORCEMENT (OLSE),

STATEMENT OF FINDINGS
OF HEARING OFFICER

and

HEARING: AUGUST 24, 2010

ALL DAY HOMECARE, INC. and RALEIGH
FAGAN.

INTRODUCTION

On December 13, 2005, the San Francisco Office of Labor Standards Enforcement (OLSE) received a complaint from Lumava Ahpoe, a former employee of All Day Homecare, alleging violations under the San Francisco Minimum Wage Ordinance (MWO) during the period October 8, 2004 through February 4, 2005. The claimant specifically alleged that during the relevant period, she was paid "\$100.00/day for 24 hours of live-in care."

The OLSE began an investigation in OLSE Case No. MWO-97, and as its investigation continued, the OLSE determined that Ms. Ahpoe's claims were credible and that All Day Homecare had violated the Minimum Wage Ordinance. The OLSE contends that total wages and interest in the sum of \$12,380.17 is owed to the claimant (\$8,486.48 wages + \$3,893.69 interest), and the department calculates that maximum penalties in the sum of \$171,900.00 are owed to the employee and the OLSE (\$85,950.00 in penalties owed to the employee and \$85,950.00 owed to the OLSE).

By letter dated June 15, 2010, Donna Levitt, Manager of the Office of Labor Standards Enforcement, requested that the Office of the Controller for the City and County of San Francisco appoint an impartial hearing officer to conduct a hearing under San Francisco Administrative Code Section 12R.7(b) in regard to possible violations of the San Francisco Minimum Wage

1 Ordinance by employer All Day Homecare and its owner, Raleigh Fagan. (Hearing Officer's
2 Exhibit 2)

3 By letter dated June 22, 2010, San Francisco Controller Ben Rosenfield informed All Day
4 Homecare owner Raleigh Fagan and Deputy City Attorney Jill Figg, counsel for the OLSE, that
5 the Controller's Office appointed the undersigned hearing officer to conduct a hearing regarding
6 alleged violations of the MWO. (Hearing Officer's Exhibit 1) The letter states in pertinent part:

7 "I hereby appoint Peter Kearns, Administrative Law Judge, as the Hearing
8 Officer in this matter. The Hearing Officer's role is to conduct a hearing
9 that affords employer All Day Home Care, Inc. due process regarding the
possible violations referenced in OLSE's June 15th letter. (Administrative
Code Section 12R.7(b).)

10 The Hearing Officer will promptly set a hearing date and notify the parties.
11 At the conclusion of the hearing, the Hearing Officer will provide written
12 Findings of Fact to OLSE and to All Day Home Care, Inc. OLSE will then
make a final determination and notify All Day Home Care, Inc."

13 By letter dated July 9, 2010, the undersigned hearing officer provided written notice to the
14 OLSE and Raleigh Fagan of All Day Homecare that a hearing would be conducted on Tuesday,
15 August 24, 2010, beginning at 9:30 AM. (Hearing Officer Exhibit 3) The letter was mailed to the
16 employer by first class mail, to the following address provided by the employer's counsel on July
17 1, 2009: 15466 Los Gatos Boulevard, Los Gatos, CA 95032. The letter was not returned as
18 undeliverable by the United States Post Office. The letter was also faxed to the employer at the
following fax number: 408-558-9702.

19 Pursuant to the July 9, 2010 letter, the OLSE was requested to submit a pre-hearing
20 statement on or before August 2, 2010, and All Day Home Care was requested to submit a pre-
21 hearing statement on or before August 13, 2010. The parties were each specifically requested to
22 submit a "detailed statement of issues presented to the Hearing Officer for Findings." On August
23 2, 2010, the OLSE submitted its pre-hearing statement, which included OLSE Exhibits 1-26. The
24 OLSE pre-hearing statement lists the following issues to be presented to the hearing officer:

25
26 (1) Did Raleigh Fagan/ADHC violate the MWO by failing to pay
27 minimum wage to Lumava Ahpoe? If so, how much do they owe
28 Ms. Ahpoe in back wages, interest, and administrative penalties?
How much do they owe the City in administrative penalties?

1 (2) Did Raleigh Fagan/ADHC violate the MWO by failing to produce
2 documents requested by the OLSE. If so, how much does Raleigh
3 Fagan/ADHC owe the City in administrative penalties?

4 Although the OLSE submitted a timely pre-hearing statement, All Day Homecare failed to
5 make any pre-hearing submission.

6 On August 12, 2010, the clerk for the undersigned hearing officer mailed and faxed
7 another Notice of Hearing to All Day Home Care and its owner Raleigh Fagan, which states that
8 the hearing in this matter would be held on August 24, 2010 at 9:30 AM in City Hall Room 479.
9 (Hearing Officer Exhibit 5) The notice was not returned as undeliverable by the Post Office.

10 The employer failed to appear for the August 24, 2010 hearing, and the hearing was
11 therefore conducted in the employer's absence. At the hearing, those present had full opportunity
12 to present relevant evidence and argument. Deputy City Attorney Jill Figg Dayal represented the
13 Office of Labor Standards Enforcement, and the following people testified under oath on behalf of
14 the OLSE: Lumava Ahpoe, claimant; and Richard Waller, OLSE Supervising Compliance Officer.
15 Hearing Officer's Exhibits 1 through 5 were entered into the record, as were OLSE Exhibits 1
16 through 27 (the original 26 exhibits submitted with the pre-hearing statement, plus one additional
17 document submitted at hearing). The record closed at the adjournment of the August 24, 2010
18 hearing.

19 SUMMARY OF LEGAL STANDARDS AND EVIDENCE

20 1. On February 23, 2004, San Francisco established a minimum hourly wage for
21 employees pursuant to Administrative Code Section 12R (the Minimum Wage Ordinance or
22 MWO). Under MWO Section 12R.4, San Francisco employers shall pay to employees no less
23 than the minimum wage for each hour worked in the geographic boundaries of the City. The local
24 minimum wage exceeds the amount of the State minimum wage, and it is adjusted each year
25 based on increases in the regional Consumer Price Index for urban wage earners and clerical
26 workers.

27 2. Pursuant to Section 12R.3(b) of the MWO, an employer is any person, as defined
28 in Section 18 of the California Labor Code, including corporate officers or executives, who directly
or indirectly or through an agent or another person, including through the services of a temporary

1 services or staffing agency or similar entity, employs or exercises control over the wages, hours
2 or working conditions of any employee.

3 3. Under Section 12R.3(a) of the MWO, an employee is any person who, in a
4 particular week, performs at least two (2) hours of work for an employer within the geographic
5 boundaries of the City, and qualifies as an employee entitled to payment of a minimum wage from
6 any employer under the California minimum wage law, as provided under Section 1197 of the
7 California Labor Code and wage orders published by the California Industrial Welfare
8 Commission, or is a participant in a Welfare-to-Work Program.

9 4. All Day Homecare, Inc. is a business that specializes in providing long term in-
10 home living assistance for elderly and ill individuals. (OLSE Exhibit 4) The business is owned by
11 Raleigh Fagan, and its headquarters is located at 15466 Los Gatos Boulevard, Los Gatos,
12 California 95032. All Day Homecare employs people throughout the San Francisco Bay Area,
13 including the City and County of San Francisco.

14 5. An All Day Homecare brochure submitted into evidence by the OLSE includes the
15 following statement:

16 "When 24-hour compassionate care is appropriate, a live-in caregiver
17 provides complete attention. Services include everything from assisting
with the activities of daily living, to light housekeeping."

18 (OLSE Exhibit 4) The brochure lists the following standard services: bathing, dressing, toileting,
19 transfers, monitoring skin integrity, meal preparation, light housekeeping/laundry, assistance with
20 shopping, companionship, assistance with exercise, and medical supervision.

21 6. All Day Homecare hired claimant Lumava Ahpoe to care for two separate elderly
22 and ill individuals in their San Francisco homes during the period October 8, 2004 through
23 February 4, 2005. Ms. Ahpoe credibly testified that she earned either \$100.00 per day for around-
24 the-clock care, or \$10.00 per hour for shifts lasting less than 24 hours.

25 7. Pursuant to Administrative Code Section 12R.4, with the exception of non-profit
26 corporations and small businesses with 10 or less employees, the San Francisco minimum wage
27
28

1 was \$8.50 in 2004 and \$8.62 in 2005. There is no evidence in this case that All Day Homecare is
2 a nonprofit corporation or a business with 10 employees or less.

3 8. The Industrial Welfare Commission (IWC) of the Department of Industrial Relations
4 promulgates Industrial Welfare Commission Orders, which govern wages, hours, and working
5 conditions in California. IWC Order No. 15-2001 (Wage Order 15) governs household
6 occupations, including personal attendants.¹ Pursuant to Wage Order 15, Section 1(B), personal
7 attendants, unlike most workers, are not eligible for overtime, meal breaks, or rest periods. The
8 only protections of the wage order that apply to personal attendants are the standards for
9 minimum wages, meal and lodging deductions, and penalties.

10 9. Under Wage Order 15, Section 10, meals or lodging may not be credited against
11 the minimum wage without a voluntary written agreement between the employer and the
12 employee. The claimant credibly testified that she never signed a meal and/or lodging agreement,
13 and there is no evidence of any such agreement.

14 10. Under Wage Order 15, Section 2(H), hours worked means the time during which
15 an employee is subject to the control of an employer, and includes all of the time the employee is
16 "suffered or permitted to work," whether or not required to do so. In the case at issue, the OLSE
17 argues that although the claimant was not engaged in work activities without interruption for 24
18 hours a day while assigned to provide around-the-clock care, she was required to work at any
19 given moment on an as-needed basis – including in the middle of the night – and she was
20 therefore suffered or permitted to work 24 hours a day.

21 11. Pursuant to Section 12R.7(b) of the Minimum Wage Ordinance, the Office of Labor
22 Standards Enforcement is authorized to take appropriate steps to enforce the MWO, and may
23 investigate any possible violations of the MWO by an employer. Pursuant to San Francisco
24 Administrative Code 2A.23, the Office of Labor Standards Enforcement may also enforce the

25 _____
26 ¹ "Personal attendant" under Wage Order 15 includes baby sitters and means any person employed by a
27 private householder or by any third party employer recognized in the health care industry to work in a private
28 household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental
deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other
than the foregoing is required.

1 provisions of the California Labor Code to the extent permitted by State Law. Additionally,
2 California Labor Code §2666 provides that state and county government entities have all of the
3 powers of an authorized representative of the Department of Industrial Relations in the
4 investigation of suspected Labor Code violations.

5 12. OLSE Supervising Compliance Officer Richard Waller investigated the wage claim
6 at issue. Mr. Waller testified that the OLSE only investigates the wage payment practices of a
7 business following an employee complaint, which is what precipitated the All Day Homecare
8 investigation.

9 13. On December 13, 2005, claimant Lumava Ahpoe filed a wage claim with the OLSE
10 with the assistance of the Women's Employment Rights Clinic at Golden Gate University School
11 of Law. (OLSE Exhibit 4) The claimant specifically alleged that she was paid "\$100.00/day for 24
12 hours of live-in care." The Women's Employment Rights Clinic also assisted Ms. Ahpoe with the
13 filing of a state wage claim with the Department of Labor Standards Enforcement (DLSE).
14 Claimant Ahpoe credibly testified about the history of her employment with All Day Homecare as
15 set forth below.

16 14. Ms. Ahpoe testified that on October 5, 2004 she found a "Help Wanted" posting in
17 the Penny Saver newspaper for a live-in personal assistant. She further testified she immediately
18 called the telephone number listed on the posting and spoke to Kay Schoolfield of All Day
19 Homecare. The claimant testified that Ms. Schoolfield asked her for personal information
20 including her address, weight, date of birth, and social security number. Ms. Ahpoe also testified
21 that Ms. Schoolfield informed her that the rate of pay was \$10.00 per hour, or \$100.00 per day for
22 around-the-clock care.

23 15. Ms. Ahpoe testified that on October 6, 2004, she communicated with both Raleigh
24 Fagan and Kay Schoolfield of All Day Homecare about a potential job, and on October 7, 2004,
25 Ms. Schoolfield brought her to the home of an elderly male client named Antonio, who required a
26 live-in personal assistant during the weekend when his regular caretaker took time off.

27 16. Ms. Ahpoe testified that Antonio was over 90 years old and had diabetes, as well as
28 memory loss issues. She further testified that although she did not feel entirely comfortable with

1 the prospect of caring for Antonio, she accepted the position on a part-time basis.

2 17. The claimant offered the following consistent and credible testimony regarding the
3 work performed while caring for Antonio:

4 (a) She worked a 24-hour shift caring for Antonio at his home in San Francisco beginning at
5 5:30 PM on Friday October 8, 2004 and ending at 5:30 PM on Saturday October 9, 2004,
6 and she worked a 48-hour shift from 5:30 PM on Thursday October 14, 2004 until 5:30 PM
7 on Saturday October 16, 2004.

8 (b) She did not receive any designated breaks or blocks of time designated for sleep while
9 providing around-the-clock assistance.

10 (c) She administered a shot for diabetes two times per day, once in the morning and once
11 in the evening.

12 (d) She was responsible for bathing and dressing Antonio.

13 (e) She assisted Antonio with toileting, including throughout the night.

14 (f) She was responsible for cooking and feeding Antonio, and she also did laundry and
15 other household chores.

16 (g) She took Antonio for a short walk once a day.

17 (h) She slept in a small bed directly adjacent to Antonio's bed so that she could provide
18 care for Antonio when he woke up in the middle of the night, which occurred at least five
19 times per night.

20 (i) She was paid a total of \$300.00 for the three 24-hour shifts she worked, and she did not
21 receive any food allowance. (OLSE Exhibit 4)

22 18. The OLSE argued that for the period the claimant worked as a live-in assistant for
23 Antonio, the claimant should have been paid the San Francisco minimum wage for 24 hours per
24 day under Wage Order 15, Section 2(H), because she was "suffered or permitted to work"
25 throughout the entire day without any regularly scheduled meal or sleep breaks. Based on that
26 argument, the OLSE calculates that the claimant should have been paid at least a minimum of
27 \$204.00 for each day of work performed caring for Anthony (24 hours X \$8.50/hr. min. wage =
28 \$204.00 per day).

1 19. On or around October 20, 2004, Kay Schoolfield of All Day Homecare informed the
2 claimant that a patient named Ruth at St. Mary's Hospital was being discharged the following day
3 and would require around-the-clock care at her San Francisco home. The claimant testified that
4 Ruth was 83 years old, and had been hospitalized at St. Mary's for a broken hip. She further
5 testified that while Ruth was hospitalized, she fell out of bed and broke her foot, and based on the
6 circumstances of the injury St. Mary's agreed to pay for around-the-clock care until Ruth's foot
7 healed and the cast was removed.

8 20. The claimant offered the following consistent and credible testimony regarding the
9 work performed while caring for Ruth:

10 (a) On October 21, 2004, she trained for two hours, and on October 22, 2004 she began as
11 Ruth's full time personal assistant in her San Francisco home.

12 (b) With the exception of four days off, she provided around-the-clock care for Ruth from
13 October 22, 2004 until January 14, 2005 – she had 2 days off beginning 5:00 PM
14 November 5, 2004, and she had two more days off beginning 10:00 AM December 5, 2004

15 (c) She was paid \$100.00 per day for each full day of work, and some weeks she received
16 a separate payment of \$50.00 for a weekly food allowance.

17 (d) She did not receive any designated breaks or blocks of time designated for sleep while
18 providing around-the-clock assistance.

19 (e) She worked 8 hours per day in Ruth's home for the period January 15, 2005 through
20 February 4, 2005. During that period, she was paid \$80.00 per day for 8 hours of work, and
21 she did not receive any food allowance.

22 (f) She was responsible for bathing and dressing Ruth, preparing and administering
23 medication, and helping Ruth in and out of the wheelchair.

24 (g) She assisted Ruth with toileting, including throughout the night.

25 (h) She was responsible for cooking and feeding Ruth, and she did laundry and other
26 household chores. Ruth's sister, who lived in the flat downstairs, did the grocery shopping
27 and also helped with the cooking.

28 (i) The only time she ever left Ruth's home was to take Ruth to the doctor or the hair salon.

1 (j) She slept on the living room couch adjacent to Ruth's bedroom, and Ruth called her for
2 assistance 4 or 5 times per night using a whistle.

3 21. The OLSE submitted a declaration from Ruth's daughter, Diane Robinson, which
4 states:

5 "I, DIANE ROBINSON, DECLARE AS FOLLOWS:

6 1. I have personal knowledge of the matters set forth in this
7 declaration. If called to testify under oath, I could do so truthfully and
8 competently.

9 2. I am the daughter of Ruth Newman, who was cared for by Lumava
10 Eva Ahpoe from October 2004 through early 2005 at her home in San
11 Francisco. My mother moved to Nevada in 2005, and passed away in
12 2007.

13 3. In the fall of 2004, my mother had been in the hospital at Saint
14 Mary's in San Francisco, and while she was there she fell out of bed and
15 broke her heel. Two nurses at the hospital privately expressed concern to
16 me regarding the care that she was given that resulted in her fall. After
17 my mother's fall, Saint Mary's Hospital agreed that once my mother was
18 ready for discharge; it would pay for a 24/7 live-in personal attendant as
19 long as my mother needed it. Saint Mary's recommended All Day Home
20 Care, a business which provides live-in personal attendants. When my
21 mother was released from the hospital, she was approximately 83 years
22 old, and was wearing a very heavy cast on her foot which went up to her
23 knee.

24 4. All Day Home Care assigned Ms. Ahpoe to take care of my
25 mother. Ms. Ahpoe provided fantastic care to my mother. Ms. Ahpoe lived
26 with my mother in her house, and took care of her every need. Ms. Ahpoe
27 was with my mother 24 hours a day, 7 days a week, and almost never left
28 the house. Ms. Ahpoe was very caring towards my mother, and would
attend to her day and night, taking care of my mother in whatever way
needed. I trusted her entirely. It saddens me to learn that she was not
paid the minimum wage required by law. She certainly deserved at least
the minimum wage for her around the clock care of my mother.

5. When Ms. Ahpoe was first assigned to care for my mother, I
remember meeting with a male agent for All Day Home Care in my
mother's house. The agent was there to ensure that the assignment was
working. I recall telling him that we were all very pleased with Ms. Ahpoe,
but I also recall expressing concern to the agent about who would pay for
meals for Ms. Ahpoe. I do not recall the agent's response, but I do know
that Ms. Ahpoe generally ate meals that were prepared by my aunt and
uncle (who were then in their 60's and 80's respectively) who lived in the
flat below my mother.

6. I am unable to testify in person in San Francisco because I live in
Arizona and work as a substitute teacher. Given my out of state

1 residency, and the fact that I need to be on standby as a substitute
2 teacher, I cannot personally attend the hearing. If I am not called to work
3 on August 24, 2010, I would be willing to be available to testify by
4 telephone.

5 I declare under penalty of perjury under the laws of the State of California
6 that the foregoing is true and correct. Executed this 28 day of July 2010,
7 in Sedona, Arizona."

8 (OLSE Exhibit 26)

9 22. During the OLSE investigation, All Day Homecare provided the department with
10 timesheets filled out by the claimant during the period she cared for Ruth. (OLSE Exhibits 9 & 14)
11 The time sheets show that during the period October 22, 2004 through January 14, 2005, the
12 claimant recorded 24 hours of work per day, with the exception of two days off in November and
13 two days off in December. On each timesheet, the claimant documented the work chores which
14 she performed during the day, including assistance with bathing, dressing, feeding, ambulation,
15 toileting, and medication supervision. She also documented the housekeeping chores she
16 performed for the day. The claimant worked 8 hours per day between January 15, 2005 and
17 February 4, 2005.

18 23. The OLSE argues that while the claimant provided around-the-clock assistance for
19 Ruth, she should have been paid the San Francisco minimum wage for 24 hours per day under
20 Wage Order 15, Section 2(H), because Ms. Ahpoe was "suffered or permitted to work" throughout
21 the entire day without any regularly scheduled meal breaks or sleep breaks. Accordingly, the OLSE
22 calculates that the claimant should have been paid a minimum amount of \$204.00 for each full day
23 of work performed caring for Ruth in 2004 (24 hours X \$8.50/hr. min. wage = \$204.00); and the
24 claimant should have been paid a minimum amount of \$206.88 for each full day of work in 2005
25 (24 hours X \$8.62/hr. min. wage = \$206.88). Instead, the claimant was paid \$100.00 per day for
26 each full day she cared for Ruth.

27 24. Based on records provided to OLSE by the employer, All Day Homecare charged
28 St. Mary's Hospital \$150.00 per day for around-the-clock care, and \$120.00 per day for 8 hours of
work. (OLSE Exhibit 14) The claimant testified that the assignment with Ruth ended on February 4,
2005 because the funding from St. Mary's ended.

1 25. The claimant testified that after her assignment ended with Ruth, All Day Homecare
2 offered her a new assignment beginning immediately. The claimant testified that when she
3 informed All Day Homecare that she needed a rest and could not begin immediately, she was
4 terminated.

5 26. The claimant testified that shortly after February 4, 2005, All Day Homecare sent her
6 a contract to sign that stated she was an independent contractor and not an employee while she
7 worked for All Day Homecare. The claimant did not sign the contract, and she demanded payment
8 for her last several weeks of work because it had not yet been paid.

9 27. The claimant testified that after making numerous requests to be paid, she finally
10 received her final paycheck from All Day Homecare on or around February 24, 2005.

11 28. It is undisputed that the claimant was paid above the minimum wage for all work
12 performed for the period January 15, 2005 through February 4, 2005 since she received \$10.00
13 per hour for each hour worked. Therefore, the claimant does not seek any unpaid wages after
14 January 15, 2005.

15 29. The OLSE submitted a detailed audit showing that the claimant worked the following
16 hours and was paid the following amounts between October 8, 2004 and January 15, 2005. (OLSE
17 Exhibit 1) The audit is supported by the documentary evidence in this case including the claimant's
18 contemporaneous calendar notes and copies of her paychecks, as well as timesheets and
19 payment records provided to the OLSE by All Day Homecare. (OLSE Exhibits 4 & 9) The audit is
20 based on a bi-monthly payment schedule and the amount paid column shows the amount received
21 during the particular period, and it does not include any food allowance since there is no evidence
22 of a written agreement to credit meals for wages paid.

PAY PERIOD	HOURS WORKED	AMOUNT PAID
10/1/04 to 10/15/04	54.5 hours	\$100.00
10/16/04 to 10/31/04	259.5 hours	\$200.00
11/1/04 to 11/15/04	313 hours	\$1,440.00
11/16/04 to 11/30/04	360 hours	\$1,400.00
12/1/04 to 12/15/04	322 hours	\$1,500.00
12/16/04 to 12/31/04	384 hours	\$1,300.00
1/1/05 to 1/15/05	329 hours	\$2,800.00

1 30. On February 1, 2006, Richard Waller of the OLSE sent a letter to Raleigh Fagan of
2 All Day Home Care requesting payroll records and other relevant employment documents for all
3 individuals performing work for compensation. (OLSE Exhibit 5) The letter does not specify the
4 scope of the request to San Francisco workers. The letter states, in relevant part:

5 "The Office of Labor Standards Enforcement (OLSE) received a
6 complaint alleging non-compliance with the San Francisco Administrative
7 Code Chapter 12R, Minimum Wage Ordinance (MWO). Under MWO
8 Section 12R.7(b), OLSE is granted authority to investigate any possible
9 violations and where it has reason to believe that a violation has
10 occurred, order temporary or interim relief to mitigate violations.

11 Pursuant to Section 12R.7(b) of the Code, please provide copies of
12 payroll records for the period February 23, 2004 to the present for All Day
13 Homecare, Inc and all divisions, subsidiaries and parent companies
14 operating within the geographic boundaries of the City of San Francisco.
15 The documents should include the following:

- 16 • Copies of original time cards, sign-in sheets, ledgers and any and
17 all payroll records which show the actual hours worked each day
18 for each person who performs or performed work for
19 compensation on behalf of the company for the period February
20 23, 2004 to the present.
- 21 • Absent the above, any documents that relate to pay, hours,
22 expenses, deductions, contracts or any other documents that
23 concern the relationship between All Day Homecare, Inc. and
24 persons who perform or performed work for compensation on
25 behalf of the company.
- 26 • Copies of the payroll check stub details and/or itemized pay stubs.
27 Those records, as per Labor Code Section 226, should include the
28 number of hours worked, the rate of pay, all deductions, net
wages earned, the payroll period, the name of the employee and
his/her social security number, and the name of the employer, for
each employee for the period February 23, 2004 to the present.
- A list, including addresses and telephone numbers, of all those
persons who perform or performed work for compensation on
behalf of the company for the period February 23, 2004 to the
present.

 Pursuant to MWO Chapter 12R.7(b), these records are to be provided
upon OLSE's request. The above requested documents are due in
OLSE's office no later than close business Friday February 17, 2006."

31. On the morning of February 4, 2006, Raleigh Fagan of All Day Homecare left seven
voicemail messages for Richard Waller of the OLSE wherein Mr. Fagan claims, amongst numerous

1 other contentions, that his business uses independent contractors and not employees. (OLSE
2 Exhibit 6)

3 32. California Civil Code §1812.5095 (Domestic Workers) provides that a domestic
4 worker referral agency is not an employer of a domestic worker if certain conditions are met,
5 including the existence of a signed agreement between the employment agency and the domestic
6 worker. The signed agreement must contain, at a minimum, provisions that specify all of the
7 following: (1) that the employment agency shall assist the domestic worker in securing work; (2)
8 how the employment agency's referral fee shall be paid; and (3) that the domestic worker is free
9 to sign an agreement with other employment agencies and to perform domestic work for persons
10 not referred by the employment agency. Civil Code §1812.5095 further provides that a domestic
11 worker assigned by a referral agency is free to renegotiate the rate of pay with the person hiring
12 the worker. The OLSE argued that in this case, there is no evidence of a signed agreement
13 between the parties, nor is there any evidence that the claimant was permitted to negotiate a
14 different fee than that negotiated by All Day Homecare.

15 33. On February 10, 2006, Richard Waller agreed in a telephone conversation with
16 Raleigh Fagan that the OLSE would limit the scope of its document request to documents
17 pertaining to claimant Lumava Ahpoe, and Mr. Waller also agreed to an extension through
18 February 24, 2006 to produce the requested records. (OLSE Exhibit 3)

19 34. On February 13, 2006, Richard Waller sent a letter to Raleigh Fagan, which states
20 in pertinent part:

21 "Pursuant to our telephone conversation of February 10, 2006 the Office
22 of Labor Standards (OLSE) has agreed to extend the date for submission
23 of a modified request for documents from close of business Friday,
24 February 17, 2006 to close of business Friday, February 24, 2006.

25 By letter dated February 1, 2006 OLSE advised All Day Homecare, Inc.
26 that OLSE had received a complaint alleging non-compliance with the
27 San Francisco Administrative Code Chapter 12R, Minimum Wage
28 Ordinance (MWO) and requested certain payroll records. Based on
information of business operations provided by you and review of the
California Industrial Welfare Commission order No. 15-2001 and the
California Civil Code Section 1812.2095, OLSE wishes to modify its
request for documents.

1 In order to fairly assess the specific complaint please provide copies of
2 any documents that relate to pay, placement, scheduling and report of
3 hours, expenses, deductions, contracts, invoicing of clients and/or other
4 documents that concern the relationship between All Day Homecare, Inc.
and Lumava Ahpoe for the period October 2004 through February 2005.
The documents should also include the standard policies, instructions
and/or rules provided to clients and caregivers."

(OLSE Exhibit 7)

5 35. All Day Homecare did not produce the requested records pertaining to the claimant
6 on or before February 24, 2005.

7 36. The Department of Labor Standards Enforcement scheduled a case conference with
8 the parties on March 8, 2006, at which time the claimant and Raleigh Fagan of All Day Homecare
9 appeared. The conference was not recorded, and no testimony was taken. Following the
10 conference, the DLSE dismissed the claimant's DLSE claim. (OLSE Exhibit 11) The DLSE Notice
11 of Investigation Completed states (misspellings/typos in original):

12 "We have completed our investigation of the complaint made by the
13 plaintiff shown above.

14 This is to advise you that no further action is contemplated by this office
15 and we are closing our file.

16 Both parties attended the Conference today. However, the Plaintiff has a
17 claim filed with the OLSE with the C&C of San Francisco for Minimum
18 Wage violation. She was paid \$100.00 per day and lived where she
worked caring exclusively for one person. Thereby being a personal
attendant and exempted from overtime. She should have been paid at
least 13 hours at the Minimum Wage.

19 This case is now closed, but there will be consideration to re-open the
20 case pending the out come of the Office of Labor Standards Enforcement
with the City and County of San Francisco."

21 37. The OLSE argues that the DLSE Notice of Investigation Completed supports the
22 claimant's contention that she was an employee and not an independent contractor. The OLSE
23 further argued that although the department does not know the reasoning behind the DLSE
24 determination that the claimant should have been paid for at least 13 hours per day, that
25 determination is not in conflict with the contention that the claimant should have been paid for 24
26 hours of work for each around-the-clock shift.

27 38. By letter dated March 9, 2006, Richard Waller again requested documents from All
28

1 Day Homecare pertaining to the claimant. (OLSE Exhibit 8) The letter states, in pertinent part:

2 "If the requested payroll records are not received by the close of business
3 March 15, 2006 this matter will be referred for formal hearing after which
4 OLSE may order administrative penalties of \$100 for each day or portion
thereof a violation occurred or continued, pursuant to San Francisco
Administrative Code, Section 12R.7(b)."

5 39. On May 2, 2006, Richard Waller agreed in a telephone conversation with Kay
6 Schoolfield of All Day Homecare that the OLSE would accept the requested documents on or
7 before May 12, 2006. (OLSE Exhibit 3)

8 40. On May 12, 2006, Kay Schoolfield submitted the following documents to the OLSE
9 with a cover letter: (1) paychecks paid to the claimant; (2) timesheets completed by the claimant;
10 and (3) invoices to St. Mary's Hospital for services provided by Ms. Ahpoe. (OLSE Exhibit 9) The
11 cover letter states – without any supporting evidence or argument – that the claimant was an
12 independent contractor, and not an employee.

13 41. By Notice of Determination dated June 9, 2009, the OLSE informed All Day Home
14 Care that the department had determined that the company owed Lumava Ahpoe wages and
15 interest in the sum of \$10,903.77 for work performed for the period October 8, 2004 through
16 January 14, 2005. (OLSE Exhibit 13) The OLSE offered no explanation as to why more than 3
17 years elapsed between the receipt of the employer's documents on May 12, 2006 and the
18 issuance of the June 9, 2009 Notice of Determination.

19 42. The June 9, 2009 Notice of Determination also states, in pertinent part:

20 "If a request for hearing or restitution is not received by the close of
21 business on June 30, 2009 this matter will be referred for formal hearing
22 at which time OLSE may order administrative penalties of \$100 for each
23 day or portion thereof that a violation occurred or continued, pursuant to
24 San Francisco Administrative Code, Section 12R.7(b). Potential penalties
regarding violation of the MWO for the period October 1, 2004 to January
14, 2005 are currently calculated at \$120,000.00 and penalties accrue at
\$100 per day thereafter so long as the violation continues and back
wages are not paid."

25 The notice also informed the company of the right to request a due process hearing if it did not
26 agree with the determination. The notice further informed All Day Home Care that the OLSE was
27 expanding its investigation, and the notice includes a request that All Day Homecare provide

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1 employment records to the OLSE on or before July 2, 2009 for all employees who worked for the
2 company in San Francisco since February 23, 2004, the effective date of the Minimum Wage
3 Ordinance.

4 43. By letter dated June 29, 2009, an attorney representing All Day Homecare
5 requested a due process hearing to oppose the determination that the company owed Ms. Ahpoe
6 wages and interest in the sum of \$10,903.77. (OLSE Exhibit 14) Despite All Day Home Care's
7 assertion that the company is a referral agency and not an employer, the letter repeatedly refers to
8 Ms. Ahpoe as "the employee." The letter challenges the OLSE's determination of wages owed
9 based on the alleged period of employment, the alleged number of hours worked, the amount of
10 wages received by Ms. Ahpoe, and the OLSE's failure to credit housing and meals.

11 44. Richard Waller testified that on June 30, 2009, he received the June 29, 2009 letter
12 from All Day Homecare's attorney, and he also spoke to the attorney on the telephone that day and
13 granted an extension to produce payroll records for all San Francisco workers by July 17, 2009.

14 45. The following day, on July 1, 2009, All Day Homecare's attorney sent an email to
15 Richard Waller stating:

16 "I am writing to advise you that this office is no longer representing All
17 Day Homecare, Inc. I have advised them that you have granted until July
18 17, 2009 for compliance with the records request."

19 (OLSE Exhibit 15) The email includes the following mailing address for Raleigh Fagan of All Day
20 Home Care: 15466 Los Gatos Boulevard, Los Gatos, CA 95032.

21 46. On July 20, 2009, the OLSE issued a Notice of Violation (NOV) to All Day
22 Homecare assessing penalties in the amount of \$500.00 under MWO Section 12R.5(c) for failure
23 to produce the payroll records for all San Francisco workers as requested on June 9, 2009. (OLSE
24 Exhibit 16) The notice states that All Day Home Care has 10 days to "establish that no violation
25 occurred, that you are not responsible for the violation, or that you intend to, and have, corrected
26 the violation described herein."

27 47. All Day Homecare did not respond to the July 20, 2009 NOV and on August 3, 2009,
28 the OLSE issued a Citation for \$500.00 pursuant to MWO Section 12R.16 for failure to allow the

1 OLSE to inspect payroll records as required under Section 12R.5(c). (OLSE Exhibit 17) The notice
2 includes information pursuant to Section 12R.21 of the right to appeal the citation within 15 days
3 from the date the citation is served. All Day Homecare did not appeal the August 3, 2009 Citation.
4 Under Section 12R.21(d), failure to appeal constitutes a failure to exhaust administrative remedies
5 Accordingly, the penalties in the amount of \$500.00 are owed to the OLSE pursuant to the August
6 9, 2009 Citation.

7 **Wage Claim Calculation**

8 48. The OLSE calculates that the claimant is owed wages in the amount of \$8,486.48
9 for work performed between October 8, 2004 and January 15, 2005. (OLSE Exhibit 1) The OLSE
10 calculates that Ms. Ahpoe should have been paid wages in the amount of \$17,226.48 for work
11 performed during that period, and she was instead paid \$8,740.00 ($\$17,226.48 - \$8,740.00 =$
12 $\$8,486.48$). The amount of wages owed was calculated by multiplying the minimum wage by 24
13 hours for each of the claimant's around-the-clock shifts. The OLSE submitted a detailed
14 breakdown of its calculations, which shows the following wages owed for the following periods:

Pay Period Ending	Wages Owed
10/15/04	\$363.25
10/31/04	\$2,005.75
11/15/04	\$1,220.50
11/30/04	\$1,660.00
12/15/04	\$1,237.00
12/31/04	\$1,964.00
1/15/05	\$35.98
TOTAL	\$8,486.48

20 All Day Homecare did not refute the OLSE's calculations.

21 **Interest Sought by the OLSE**

22 49. Section 12R.7(d) of the MWO provides that in any administrative action brought for
23 the nonpayment of wages under the MWO, interest shall be awarded on all due and unpaid wages
24 at the rate of interest specified in California Civil Code §3289(b). The section further provides that
25 interest shall accrue from the date the wages were due and payable to the date the wages are paid
26 in full. California Civil Code §3289(b) provides for simple interest at the rate of 10% per annum. In
27 this case, the OLSE seeks a determination as to the amount of interest owed to Ms. Ahpoe
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1 beginning on the first day she was underpaid, October 15, 2004 if the employer paid on a standard
2 bi-weekly schedule, through June 30, 2009, the day the OLSE received the employer's request for
3 hearing under MWO Section 12R.7. The OLSE calculates interest owing in the amount of
4 \$3,893.69, which amount was not refuted by All Day Homecare. (OLSE Exhibit 23)

5 **Penalties Sought by the OLSE on Behalf of the Claimants and the Department**

6 50. Section 12R.7(b) of the MWO provides that penalties may be assessed on behalf
7 of an employee when an employer fails to pay the minimum wage. Where the OLSE, after a
8 hearing that affords a suspected violator due process pursuant to Administrative Code Section
9 12R.7(b), determines that a violation has occurred, it may order any appropriate relief including,
10 but not limited to, reinstatement, the payment of any back wages unlawfully withheld, and the
11 payment of an additional sum as an administrative penalty in the amount of \$50.00 to each
12 employee or person whose rights under the MWO were violated for each day or portion thereof
13 that the violation occurred or continued. Pursuant to Section 12R.7(b), a violation for unlawfully
14 withholding wages shall be deemed to continue from the date immediately following the date that
15 the wages were due and payable to the date preceding the date the wages are paid in full.

16 Section 12R.7(b) further provides that the OLSE may also order a violating employer or person to
17 pay to the OLSE a sum of not more than \$50.00 for each day or portion thereof and for each
18 employee or person as to whom the violation occurred or continued (\$50.00 per day multiplied by
19 the number of underpaid employees). Payments to the OLSE are "to compensate the City for the
20 costs of investigating and remedying the violation."

21 51. In this case, the OLSE requests a determination of penalties owing in the amount
22 \$85,950.00 to claimant Ahpoe for the period the violations continued from October 15, 2004, the
23 first date that unpaid wages were due to the claimant, through June 20, 2009, the day the OLSE
24 received the employer's request for a due process hearing (\$50.00/day X 1719 days =
25 \$85,950.00). The OLSE seeks the same amount of penalties for payment to the department. All
26 Day Homecare did not refute the amount of penalties sought in this case.

HEARING OFFICER'S FINDINGS

1
2 1. The undersigned hearing officer shall make written findings on the following
3 issues:

4 (1) Did Raleigh Fagan/ADHC violate the MWO by failing to pay minimum wage
5 to Lumava Ahpoe? If so, how much do they owe Ms. Ahpoe in back wages,
6 interest, and administrative penalties? How much do they owe the City in
7 administrative penalties?

8 (2) Did Raleigh Fagan/ADHC violate the MWO by failing to produce documents
9 requested by the OLSE. If so, how much does Raleigh Fagan/ADHC owe the
10 City in administrative penalties?

11 2. The threshold question in this case is whether All Day Homecare employed
12 claimant Lumava Ahpoe, or whether Ms. Ahpoe was an independent contractor. Based on all of
13 the evidence, the undersigned hearing officer finds that All Day Homecare employed Ms. Ahpoe
14 during the between October 8, 2004 and February 4, 2005. This determination is supported by
15 the time sheets submitted by the claimant, the lack of a signed agency agreement pursuant to
16 Civil Code §1812.5095, and the DLSE determination that the claimant was owed minimum wages
17 as a domestic worker. Moreover, personal attendants are deemed employees under Wage Order
18 15.

19 3. Based on the foregoing, it is determined that All Day Homecare is covered by the
20 San Francisco Minimum Wage Ordinance (MWO) for the work performed by the claimant in San
21 Francisco. [Administrative Code Section 12R.4] During the period at issue – October 8, 2004
22 through February 4, 2005 – the San Francisco minimum wage was \$8.50 in 2004 and \$8.62 in
23 2005.

24 4. After a hearing that affords a suspected violator of the MWO due process, and
25 upon determination that a violation has occurred, the OLSE may order appropriate relief
26 including, but not limited to, reinstatement, the payment of any back wages unlawfully withheld,
27 and an administrative penalty in the amount of \$50.00 to each employee whose rights were
28 violated for each day or portion thereof that the violation occurred or continued. [Administrative

1 Code Section 12R.7(b)] Pursuant to Section 12R.7(b), a violation for unlawfully withholding
2 wages shall be deemed to continue from the date immediately following the date that the wages
3 were due and payable to the date preceding the date the wages are paid in full. In this case, the
4 OLSE seeks a determination as to the amount of penalties owed to Ms. Ahpoe from October 15,
5 2004, the first day the claimant was underpaid, through June 30, 2009, the day the OLSE
6 received the employer's request for a due process hearing.

7 5. Section 12R.7(d) of the MWO provides that in any administrative action brought for
8 the nonpayment of wages under the MWO, interest shall be awarded on all due and unpaid
9 wages, at the rate of interest specified in California Civil Code §3289(b). The section further
10 provides that interest shall accrue from the date the wages were due and payable to the date the
11 wages are paid in full. California Civil Code §3289(b) provides for interest at the rate of 10% per
12 annum. In this case, the OLSE seeks a determination as to the amount of interest owed to Ms.
13 Ahpoe beginning on the first day she was underpaid (October 15, 2004) through the day the
14 OLSE received the employer's request for a due process hearing (June 30, 2009).

15 **Issue #1: Did Raleigh Fagan/ADHC violate the MWO by failing to pay minimum wage to**
16 **Lumava Ahpoe? If so, how much do they owe Ms. Ahpoe in back wages, interest, and**
17 **administrative penalties? How much do they owe the City in administrative penalties?**

18 6. Based on the evidence in this case, the undersigned hearing officer finds that
19 claimant Lumava worked as a personal attendant as defined under Wage Order 15, and she was
20 therefore not entitled to any overtime pay while working for All Day Homecare, nor was she entitled
21 to any rest or meal breaks. [Wage Order 15, Section 1(B)] It is further determined that since there
22 is no written agreement pertaining to wage credits for meals or lodging, no such credits are
23 appropriate in this case. [Wage Order 15, Section 10]

24 7. Additionally, it is determined that for each around-the-clock shift worked by the
25 claimant, the claimant is entitled to 24-hours of pay at the minimum wage. This determination is
26 supported by the claimant's credible testimony that she was required to be available to work at any
27 given moment without any designated breaks or "off" periods. Accordingly, pursuant to Wage
28 Order 15, Section 2(H), the claimant was "suffered or permitted to work" every hour in the day. She

1 is therefore entitled to 24 hours of pay per day even though she was not required to work each and
2 every hour in the day. [Wage Order 15, Section 2(H)] Based on the foregoing, the claimant should
3 have been paid a minimum amount of \$204.00 for each full day of work performed in 2004 (24
4 hours X \$8.50/hr. min. wage = \$204.00); and the claimant should have been paid a minimum
5 amount of \$206.88 for each full day of work in 2005 (24 hours X \$8.62/hr. min. wage = \$206.88).
6 Instead, the claimant was paid \$100.00 per day for each full day of work.

7 8. The undersigned hearing officer finds that the OLSE submitted sufficient evidence
8 to establish that claimant Lumava Ahpoe is owed wages in the amount of \$8,486.48 for work
9 performed between October 8, 2004 and January 15, 2005. The OLSE properly calculated that
10 Ms. Ahpoe should have been paid wages in the amount of \$17,226.48 for work performed during
11 that period, and she was instead paid \$8,740.00 ($\$17,226.48 - \$8,740.00 = \$8,486.48$). This
12 determination is supported by the credible testimony of the claimant, as well as the documentary
13 evidence in this case including the employment documents provided by All Day Homecare to the
14 OLSE during its investigation.

15 9. Pursuant to MWO Section 12R.7(d), simple interest at the rate of 10% per annum
16 may also be awarded to claimant Ahpoe for unpaid wages. The OLSE seeks interest in the
17 amount of \$3,893.69 for wages owed for the period October 15, 2004 (the first pay period where
18 the claimant was underpaid) through January 15, 2005 (the last pay period with under payments).

19 However, based on the prolonged (and unexplained) period of the OLSE's investigation,
20 the undersigned hearing officer finds that the amount of interest owed to the claimant should be
21 calculated based on wages owed in the amount of \$8,486.48 beginning on June 9, 2009, the date
22 the Notice of Determination was issued, through August 24, 2010, the date of the hearing. It is
23 therefore determined that interest in the amount of \$1,025.35 is owed to the claimant for wages
24 owed in the amount of \$8,486.48 for the period June 9, 2009 through August 24, 2010. This
25 determination is supported by the following: (1) the OLSE investigation took over three years to
26 complete; and (2) the June 9, 2009 Notice of Determination clearly states that interest is owed on
27 all unpaid wages pursuant to the MWO. No determination is made regarding any additional
28 interest that may be owed to the claimant for any period after August 24, 2010.

1 10. Under the MWO, the OLSE may order a violating employer or person to pay to the
2 employee a sum of not more than \$50.00 per day for each day the violation occurred or
3 continued. [Administrative Code Section 12R.7(b)] The undersigned Administrative Law Judge
4 finds that an assessment of penalties is appropriate in the case based on the following factors: (1)
5 the employer resisted cooperation with the OLSE in its investigation; (2) the employer denies
6 employing the claimant, and instead alleges that she was an independent contractor, even
7 though that contention is not supported by the evidence; and (3) the ongoing nature of the
8 violation.

9 Based on the facts of this particular case, the undersigned hearing officer finds that it is
10 appropriate for the OLSE to order All Day Homecare, Inc./Raleigh Fagan to pay penalties in the
11 amount of \$22,050.00 to claimant Ahpoe, which amount is calculated by multiplying \$50.00 per
12 day for each day that the violation continued, beginning on June 9, 2009 (the date Notice of
13 Determination was issued) and continuing through August 24, 2010 (the date of the hearing)
14 (\$50.00/day X 441 days = \$22,050.00). Although the OLSE seeks penalties dating back to
15 October 15, 2004, the undersigned hearing officer finds that penalties should be calculated
16 beginning on the date the Notice of Determination issued because the OLSE investigation took
17 over three years to complete and the June 9, 2009 Notice of Determination clearly sets forth that
18 penalties may be imposed pursuant to the MWO.

19 No determination is made regarding any additional penalties that may be owed for any
20 period after August 24, 2010.

21 11. Under the MWO, the OLSE may order a violating employer or person to pay to the
22 OLSE a sum of not more than \$50.00 per day for each employee as to whom the violation
23 occurred or continued. [Administrative Code Section 12R.7(b)] In this case, the undersigned
24 hearing officer has determined that maximum penalties in the amount of \$22,050.00 may be
25 appropriately assessed for payment to claimant Ahpoe based on a penalty of \$50.00 per day
26 beginning June 9, 2009, the date the Notice of Determination was issued, and continuing up to
27 August 24, 2010, the date of the hearing (\$50.00/day X 441 days = \$22,050.00). Therefore, it is
28 determined that a maximum penalty in the amount of \$22,050.00 should also be assessed on

1 behalf of the OLSE for the same time period. No determination is made regarding any additional
2 penalties that may be owed to the OLSE for any period after August 24, 2010.

3 12. Under Section 12R.7(b) of the MWO, any penalty assessed on behalf of the OLSE
4 is intended "to compensate the City for the costs of investigating and remedying the violation."
5 Accordingly, the undersigned hearing officer finds that the OLSE may appropriately order the
6 employer in this case to pay an administrative penalty in the amount equal to the OLSE's costs of
7 investigating and remedying the violation at issue, which amount may not exceed \$22,050.00
8 (through 8/24/10). Because no evidence was submitted regarding the actual costs incurred to
9 investigate and remedy the violation, no determination is made herein regarding the actual costs
10 incurred or the amount of the penalty to be assessed.

11 **Issue #2: Did Raleigh Fagan/ADHC violate the MWO by failing to produce documents**
12 **requested by the OLSE? If so, how much does the Raleigh Fagan/ADHC owe the City in**
administrative penalties?

13 13. Before administrative penalties may be assessed for the failure to retain records or
14 the failure to allow for the inspection of records, the OLSE is required to follow the administrative
15 guidelines outlined in Sections 12R.18 through 12R.20 of the MWO. According to the guidelines,
16 the OLSE must first issue a Notice of Violation (NOV) followed by the issuance of an
17 Administrative Citation for failure to correct the NOV. An employer who wishes to appeal the
18 issuance of an Administrative Citation may seek an administrative hearing within 15 days under a
19 hearing process that is separate from the hearing process pertaining to wage claims.

20 [Administrative Code Section 12R.21]

21 14. In this case, the OLSE presented evidence that it issued a Notice of Violation on
22 July 20, 2009 based on the employer's failure to provide payroll records for all San Francisco
23 workers, and a Citation was subsequently issued on August 3, 2009. The employer did not

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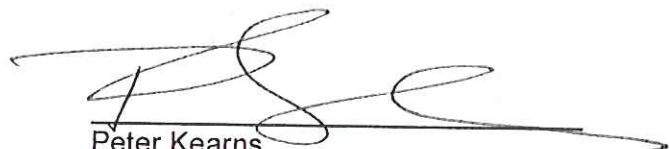
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1 appeal the Citation within 15 days pursuant to Section 12R.21, which constitutes a failure to
2 exhaust its administrative remedy for appeal. [MWO Section 12R.21(d)] Therefore, the August 3,
3 2009 Citation is final and penalties of \$500.00 are also owed to the OLSE pursuant to the
4 Citation.

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6 Dated: September 21, 2010



Peter Kearns
Hearing Officer

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