

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
YORK FURNITURE CENTERS, INC. D/B/A	:
YORK FURNITURE GALLERY,	:
	:
Petitioner,	:
	:
	: DOCKET NO. PR 06-081
	:
	: <u>RESOLUTION OF DECISION</u>
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 and 19 of the	:
Labor Law, dated September 8, 2006,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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APPEARANCES

Holtzberg Law Firm, Richard H. Holtzberg, Esq. of Counsel, for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Lawrence Bell, Brenda Bell for Petitioner.

James Redman, Alice Littler, Mary Confer, Dennis Barrett, Nancy McCahill for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 30, 2006. The Answer was filed on January 17, 2007. Upon notice to the parties a hearing was held before Mark Perla, then Member of the Board on November 15, 2007 in Rochester, New York. The hearing continued on April 8, 2008 and July 18, 2008 before Mark Gaston Pearce, Member of the Board. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Commissioner issued an Order against Petitioner on September 8, 2006. The Order is based on a finding of the non-payment of wages due to two Claimants: Dennis Barrett (Barrett) and Nancy McCahill (McCahill), and demands payment of \$2,098.67 in wages, \$277.52 in interest and \$2,098.00 in civil penalties, for a total of \$4,474.19.

The Petition alleges that the Order is unreasonable and/or invalid because the Claimants have been paid all wages due to them according to their commission agreements, their draws exceeded their commissions, the Claimants were paid more than minimum wage, and the Department of Labor (DOL) never gave Petitioner the opportunity to present documentation showing that the Claimants had been properly paid.

SUMMARY OF EVIDENCE

Petitioner York Furniture Centers, Inc. d/b/a York Furniture Gallery (Petitioner or York) is a retail furniture store and a private employer doing business in New York State, as defined in Article 1 of the Labor Law and therefore, subject to the jurisdiction of the Commissioner of Labor (Commissioner). It is also an employer as defined in Labor Law § 651.6.

Claim of Barrett

York employed Barrett to sell furniture from April 8, 2004 until March 21, 2005. His initial compensation agreement provided that Barrett was to receive \$200 per week as a base salary, \$400 per week as a draw against commission and a 3% commission on delivered sales, which was to be paid if commissions exceeded his total draw. Barrett received \$600 per week for the first two weeks of his employment as a base salary. Commissions were to be paid on delivered sales and were payable once a month. Commissions were also payable on delivered sales which occurred within 60 days of termination of employment. The draws were to be charged against future commissions.

York produced payroll and commission reconciliation records for Barrett but did not maintain or furnish time records. The payroll records indicated that Barrett was paid the sum of the base plus draw as wages every week and taxes were withheld on the sum as a whole.

A schedule of hours to be worked by Barrett, as opposed to a record of actual hours worked, was also produced. Based on York's schedule of hours, Barrett worked between 34 and 46 hours per week. In February 2005, York unilaterally lowered Barrett's base salary from \$200 to \$100 per week. Barrett terminated his employment with York on March 21, 2005. Based on York's records Barrett received \$100 for the week ending March 18, 2005, in which he worked 44 hours and \$30 for the week of March 20, 2005, in which he worked 5 hours. He did not receive any draws for the last week plus one day that he worked.

On March 25, 2005, Barrett filed a claim for unpaid wages with DOL. His claim was for \$100 for the week in February that his base was lowered from \$200 to \$100 without notice; \$500 minus \$50 which he claimed that he was paid for the week ending March 19, 2005; and \$120.00 minus \$20 which Barrett claimed that he was paid for the week ending March 26, 2005 for a total claim of \$650.00. After consulting with DOL, Barrett's claim was

expanded to include payment for overtime hours. Barrett based his overtime claim on his estimate that he worked 48 hours per week, although he testified that on numerous occasions he worked longer than that. DOL recomputed his overtime claim to allow for meal breaks and based Barrett's hours on the work schedule produced by York. Based on the DOL audit and a recalculation of wages due, DOL determined that Barrett is due \$720.64 in overtime wages plus \$670.00 in unpaid wages for a total due to Barrett of \$1,390.64.

Lawrence Bell, vice-president and comptroller of York, testified that Barrett's draws over the period of his employment far exceeded his commissions and therefore, Barrett is not owed any wages. In fact, Bell testified that Barrett owes York \$5,232.14 since Barrett was advanced \$20,400.00 against commission but only earned \$15,167.86 in commission.

Claim of McCahill

McCahill was hired by York to work on a part-time basis from March 2005 until January 14, 2006. She was paid \$50 per week base salary and \$150 per week as a draw against commission and 5% commission on delivered sales, if the commission exceeded the total draws.

McCahill filed a claim for unpaid commissions against York with DOL on March 15, 2006. She listed eleven sales for which she claimed she was due commissions totaling \$708.03. In response to her claim, York wrote DOL on March 29, 2006 that McCahill was due only \$4.69 in unpaid wages. York also provided DOL with records of sales and commissions. DOL then reviewed the records and concluded that, based on draws and earned commissions, McCahill was owed \$617.38. In response, on May 27, 2006, York stated that McCahill was only due \$233.39. On May 31, 2006, at a DOL compliance conference York maintained that McCahill owed York approximately \$5.00, due to advances and draws exceeding commissions. Finally, at the hearing on May 15, 2007, York maintained that McCahill owed York \$84.75 due to the fact that McCahill was given two advances, one in October and one in December 2005, each for \$100 and that she also purchased a bowl for \$51.84 to be deducted from her commission and that she received an \$85.00 hair cut off of York's barter account. McCahill stated that she repaid the \$200 in advances, first stating that it was repaid by check and then testifying that she repaid the amount in cash, and that the hair cut was a gift from York's owner.

In summary, at hearing, York maintained that McCahill earned a total of \$6,906.69 in commissions during her term of employment, was paid \$6,654.60 in draws, received \$200 in advances, \$85.00 in barter for a haircut and a \$51.84 bowl which was to be deducted from commission. It then concluded that McCahill owed York \$84.75.

Based on its review of York's records, DOL maintained that McCahill earned \$6,917.38 in commissions and received \$6,300 in draws and is, therefore, due \$613.38. DOL did not credit either the advances or the purchases.

DISCUSSION

STANDARD OF REVIEW

In general, the Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for review. The Petition must specify the order “proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections ...not raised in the [Petition] shall be deemed waived.” [Labor Law § 101].

When reviewing an Order to comply issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

“Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter.”

Pursuant to Board Rule 65.30: “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable in the respects asserted in its Petition.

EMPLOYER’S OBLIGATION TO PAY WAGES

An employer’s obligation to pay the wages is found in various provisions of the Labor Law, at Article 6. Regarding the employer’s obligation to pay wages of commission salesman, § 191(1)(c) provides, in pertinent part:

“A commission salesman shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned; provided, however, that if monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments, may be paid less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan. The employer shall furnish a commission salesman, upon written request, a statement of earnings paid or due and unpaid.”

Section 191 (3) further provides:

“If employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred, as established in accordance with the provisions of this section.”

If the Commissioner determines that an employer has violated these provisions, the Commissioner is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages, benefits or wage supplements found to be due and owing.

CLAIM OF BARRETT

1. DRAWS AGAINST COMMISSIONS

When an employee is regularly paid a draw/advance against commissions it is generally held that the draw/advance constitutes the employee's minimum compensation and, absent an agreement to the contrary, does not need to be repaid to the employer, even if the employee's draws exceed the commissions earned. The draw can only be recouped against future commissions. In addition, a regularly paid draw is considered the employee's minimum compensation and must be paid for the entire period of the employee's employment.

“There is a long line of New York cases dealing with advances against agents' commissions. They hold uniformly that, in the absence of a specific agreement to the contrary, a commission salesman who receives advances on account of anticipated commissions is not personally liable for repayment of the advances. The advances are treated as prepaid compensation and are credited against commissions as they subsequently become payable.” [Citations omitted.]

In re Sherman, 627 F2d 594 (2nd Cir 1980), see also *Agnew v Cameron*, 247 CalApp2d 619, 622-23 (1967): “The majority rule in the United States is when the contract of employment provides for advances to the employee, which are to be deducted from commissions earned, as the same may accrue, the employer cannot recover excess advances from the employee in the absence of an express or implied agreement or promise to repay any excess of advances made over commissions earned.” [Citations omitted.]

In *Royal Distributors Co. v Friedman*, 141 NYS2d 786 (1955), the court held that, based on prior case law, an employee was not responsible for paying for “drawings of money beyond his percentage commissions earned.” The court cited with approval the cases of *Wolfsheimer v Frankel*, 115 NYS 958, 959 (1909), and *Denihan v Finn-Iffland & Co., Inc.*, 256 NYS 801, 803 (1932) which additionally held that “an agreement to pay an employee a specified sum per week, which sum is to be charged against future commissions, entitles him [the employee] to recover this drawing account during the entire term of the contract, regardless of commissions earned.” See also *Agnew v Cameron*, *supra* at 624: “[I]n the

absence of express stipulation or convincing circumstances indicating a contrary arrangement, advances to an employee will be presumed to constitute payment in lieu of salary and to fix the employee's minimum compensation."

In the instant case, Barrett was initially paid \$200 per week base salary and \$400 per week draw against commissions. This was later changed to \$100 per week base plus \$400 draw. Barrett received this amount every week that he worked at York, except for the last week plus one day that he worked there. On Barrett's paystub the \$200 was listed as base, \$400 as draw and combined they were characterized as wages and appropriate deductions were taken on the total as wages. There was no evidence presented that would indicate that there was an agreement, either express or implied, that Barrett would repay draws if they exceeded commissions earned. Therefore, even though Barrett's draw exceed his commission by over \$5000, Barrett is not required to repay this amount to York nor may this excess be deducted from draws owed for time worked. The employer's records indicate that Barrett's draw was reconciled against future commissions and constituted his minimum compensation. The characterization of the \$600 as wages on Barrett's paystubs is further substantiation of this conclusion. Therefore, the Board finds that Barrett is due his base plus draw for the last week plus one day that he worked. Barrett was due \$500 for the week plus \$100 for the day worked. Since he was paid a total of \$130 for this time, Barrett is still owed \$470 in wages. Contrary to York's argument that Barrett was always paid at least minimum wage, he was paid far less than minimum wage for this period.

2. REDUCTION OF WAGES WITHOUT ADVANCED NOTICE

Barrett's base salary was reduced in February 2005 from \$200 per week to \$100 per week. It remained \$100 per week thereafter. Barrett's claim includes a claim for \$100 for the week that his salary was reduced. The Board finds that York failed to give advanced notice of the reduction in the wage rate to Barrett, thereby depriving him of the opportunity to choose whether he was willing to accept the new terms before actually working the hours. Therefore, Barrett is owed \$100 for the first week of the wage reduction. *See Mercendetti v. Commissioner of Labor*, PR07-104 (June 18, 2009).

3. OVERTIME

The Minimum Wage Order for Miscellaneous Industries, 12 NYCRR 142-2.2, requires an employer to pay employees at a wage rate of 1 ½ times the employee's regular rate for all hours worked over 40 in a work week. 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 other 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."

There is a rebuttable presumption that salary does not include a premium for overtime hours. The burden is on the employer to prove that there is an express agreement that the salary provides a premium for overtime hours. *Cayuga Lumber, Inc. v Commissioner of Labor*, PR 05-009 (Decision on Reconsideration, dated September 26, 2007). Further, the employee's regular rate of pay is not presumed to be minimum wage unless there is evidence that that is the agreed rate of pay. The regular rate is calculated based on the compensation of the employee and the number of hours worked. *Id.*

In the instant case, DOL calculated the amount of hours of overtime worked by Barrett based on the schedule of hours, submitted by York. It determined the regular rate of pay each week by dividing the amount received – \$600 per week prior to February 2005 and \$500 per week thereafter – by the number of hours worked each week and then multiplied the number of hours over 40 by .5 x the regular rate to determine the premium due for the overtime hours. The Board find that this was a reasonable and valid determination and affirm the finding that Barrett is due \$720.64.

TOTAL DUE

The Board finds that Barrett is due a total of \$1,290.64 in unpaid wages: \$470 in unpaid draw, \$100 for reduction in wages without advance notice and \$720.64 in unpaid overtime.

CLAIM OF MCCA HILL

1. COMMISSIONS

Based on a review of the evidence, the Board finds that McCahill earned \$6,906.69 in commissions during her term of employment. The approximately \$10 difference between York's and DOL's calculations was due to a difference in how commissions for February 2006 were computed. We credit York's calculation of commissions earned.

The Board also finds that McCahill was paid a total of \$6,564.60 in draws and commissions. York's recap includes a \$90 draw for March 2005 which is not supported by its records.

The difference between commissions earned and draws equals \$342.09.

2. DEDUCTIONS FROM WAGES

Under the Labor Law § 193, an employer is prohibited from taking deductions from an employee's wages, except under limited circumstances. § 193 (1) provides, in pertinent part:

“...No employer shall make any deduction from the wages of an employee, except deductions which:

- a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
- b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.”

Commissions are “wages” for the purposes of the Labor Law. § 190 (1) provides:

“... ‘Wages’ means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term ‘wages’ also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.”

In *Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609 (2008) the Court of Appeals held that an employer and employee may agree on how commissions are calculated and the agreement may provide that the amount upon which commissions are based may be reduced by certain business costs. However, commissions are wages and once they are earned per the parties’ compensation agreement, illegal deductions may not be taken.

After reconciling draws against commissions earned, York deducted the following amounts from the commissions owed to McCahill: \$100 advance, \$100 advance, \$85.00 for a haircut and \$51.84 for the purchase of a bowl for a total of \$336.84. McCahill testified that she paid back the two \$100 advances and that the \$85.00 haircut was a gift from the owner’s wife.

All \$336.84 which York seeks to deduct from commission wages owed to McCahill constitute illegal deductions under Labor Law § 193 (1). None of the deductions are authorized in writing and none are of the kind listed in the section. See *Matter of Labor Ready, Inc.*, 7 NY3d 579 (2006).

TOTAL DUE

McCahill is due a total of \$342.09 in unpaid commissions. Added to the \$1,290.64 owed to Barrett, York owes a total of \$1,632.73 in unpaid wages.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order assesses civil penalties in the amount of 100% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

“In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer’s failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer’s business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.”

The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is reasonable and valid.

INTEREST

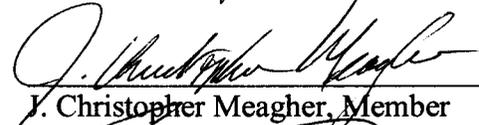
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

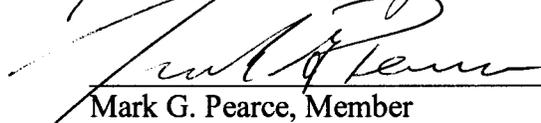
1. The Order to Comply is modified to provide that York owes \$1,632.73 in unpaid wages plus interest of 16%; and
2. The Order to Comply is further modified to assess a civil penalty in the amount of 100% of the wages or \$1,632.73;
3. The Order is affirmed in all other respects; and
4. The Petition is denied.



Anne P. Stevason, Chairman



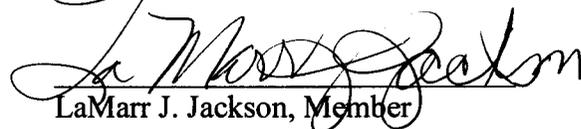
J. Christopher Meagher, Member



Mark G. Pearce, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
August 27, 2009.