

MEGA SOUND AND LIGHT, LLC

Docket No. PR 08-064

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

MEGA SOUND AND LIGHT LLC, :

Petitioner, :

DOCKET NO. PR 08-064

To Review Under Section 101 of the Labor Law: :
An Order to Comply with Article 6 of the Labor Law :
dated April 25, 2008, :

RESOLUTION OF DECISION

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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APPEARANCES

Gerald Hecht, Esq. for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Ran Artsi for the Petitioner; Labor Standards Investigator Neil Benjamin and Sherman L. Baldwin, Jr. for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 4, 2008. Upon notice to the parties a hearing was held on July 31, 2009 in White Plains, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding. Also present at the hearing was Board Member Jean Grumet. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The Order to Comply with Article 6 under review was issued by the Respondent Commissioner of Labor (Commissioner) on April 25, 2008 against Ran Artsi and Ron Nizan (T/A Mega Sound and Light, LLC, and Wexford Asset Management, LLC)¹. The Petition was filed on behalf of Mega Sound and Light, LLC (Mega Sound). The Order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Claimant Sherman L. Baldwin in the amount of \$15,088.39 for the time period from September 6, 2006² to December 15, 2006, interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$3,280.58, and assesses a civil penalty in the amount of \$15,088.00, for a total amount due of \$33,456.97.

SUMMARY OF EVIDENCE

Testimony of Ran Artsi

Ran Artsi is petitioner Mega Sound and Light, LLC's (Mega Sound) manager. Mega Sound produces and sells promotional and premium sound and light novelty products and at all times relevant to the petition was located in Brewster, New York.

Petitioner hired Claimant Sherman L. Baldwin, Jr. in 2005 as a commission salesperson working out of the Brewster office. Baldwin had worked for the petitioner in the past, and Artsi was happy to hire him back because he had been a good salesperson during his first stint working for the petitioner.

Artsi and Baldwin agreed that Baldwin's terms of employment were a base salary of \$30,000.00 plus 5% commission per sale. Commissions were earned when the customer paid the petitioner which could be anywhere from 30 to 60 days following the purchase order depending on the customer. Baldwin requested advance payments against future commissions, which Artsi consented to since "Sherman was a good salesman" and Artsi had no doubt that Baldwin would make sales. Baldwin was "always ahead" as a result of the advance payments which meant that at any point in time, the petitioner had paid Baldwin more in advances than Baldwin had earned in commissions.

The petitioner tracked the advance commission payments made to Baldwin in an accounting database. Although Baldwin or any other salesperson working for the petitioner could demand a print out of the database at any time, he never did. In addition to this database, Baldwin sent the petitioner a letter confirming receipt of each commission paid. Artsi attempted to find these letters to show to the Department of Labor (DOL) during its investigation, but was unable to locate them because the office had moved.

¹ Prior to hearing, the petitioner made a written motion dated April 17, 2009 to strike Mega Tech LLC, Ran Artsi, Ron Nizan and Wexford Asset Management LLC as respondents from the Order. The motion was denied by the Board by letter dated June 2, 2009, on the grounds that parties that were the subject of the motion were not parties to the appeal, and such relief in any event could not be granted absent an evidentiary hearing on the merits to determine whether such relief is appropriate.

² The Order actually lists the date as September 6, 2007, which was a typographical error corrected in the Respondent's answer to the petition.

In September 2006, Baldwin told Artsi he needed to move to Cape Cod, Massachusetts, for personal reasons, but still wanted to work for the petitioner. Artsi and Baldwin agreed that Baldwin could “still work for the company but under a different structure.” According to Artsi, the petitioner and Baldwin agreed to change the terms of employment to eliminate the \$30,000.00 annual salary with no change to the commission rate because Baldwin would no longer be in the office everyday and the petitioner would therefore be unable to monitor him. Artsi testified that the understanding between himself and Baldwin was “very clear [that Baldwin] would stop receiving salary and is going to stay on commission only.” This new agreement, like the prior agreement, was not in writing.

Baldwin moved to Cape Cod in September 2006 and continued to work as a commission salesperson for the petitioner and make sales, but came to the Brewster office only “from time to time,” maintaining contact with the petitioner “mostly” by phone. The petitioner stopped issuing salary checks to Baldwin effective September 6, 2006, but continued to pay advances against commissions and commissions. In December 2006, Baldwin stopped working for the petitioner and started to work for a competitor.

According to a balance sheet prepared by the petitioner’s bookkeeper on or about February 8, 2008 based on Baldwin’s sales, commission amounts earned and advance payments made, the petitioner owed no commissions to Baldwin. Although Artsi did not prepare this balance sheet or review it with Baldwin, he trusts that the numbers are accurate. According to Artsi’s review of the petitioner’s spreadsheets, between September 6, 2006 to December 15, 2006, the petitioner paid Baldwin more than the \$41,349.35 he earned in commissions, and therefore was owed nothing.

Artsi testified on cross-examination that the total sales of \$577,432.59 that Baldwin claimed that he made from September 6, 2006 to December 15, 2006 appeared “too large” but he could not “tell for sure,” conceding that other documentation was required to determine the correct numbers:

“Q: Sure. You would need to look at other documents to verify whether the information here is correct?”

“A: Yes. It looks like the amounts are, I would say, correct, but the dates are not necessarily correct.”

“Q: The same way if anyone would look at your spreadsheet, they would have to look at other documentation to know whether or not the information that your secretary or somebody else prepared, who you are not sure in the office, prepared, correct?”

“A: Yes.”

Artsi cooperated with DOL’s investigation and attempted to produce all of the documents requested, although some documents he could not locate. Artsi provided DOL with a spreadsheet of Baldwin’s sales and payment history, but did not produce Baldwin’s purchase orders and copies of the checks paid to Baldwin because DOL did not ask for them.

Petitioner requested and attended a DOL compliance conference in White Plains. Artsi was not present at the compliance conference, but his partner Ron Nizan did appear with counsel and provide proof to DOL that on September 29, 2006, the petitioner wired a commission payment to Baldwin in the amount of \$3,807.00. The petitioner also paid \$6,000.00 in American Express charges made on an account Baldwin opened in his own name using the petitioner's federal tax identification number and business address without the petitioner's permission. The petitioner paid \$8,750.00 to Baldwin constituting the salary portion of the agreement the parties reached at the compliance conference, but did not pay the balance of the agreement because it represented commissions which the petitioner believed were not owed to Baldwin.

Testimony of Sherman L. Baldwin Jr.

When Baldwin was hired in 2005, his terms of employment were \$30,000.00 annual salary, 5% commission rate and a \$50,000.00 guarantee. The petitioner paid Baldwin monthly advances in the amount of \$1,664.00 against future commissions. Baldwin knew, based on the records that he kept, that he was in "a positive monetary situation" after 90 days of work, meaning that his commissions earned exceeded the advances paid by the petitioner. However, Baldwin never knew exactly where he stood because despite making many requests to Artsi, the petitioner never provided an accounting of his commissions or rectified the advances against the commissions earned. Indeed, Baldwin testified that he ultimately stopped working for the petitioner in December 2006, retained an attorney to obtain his earned commissions, and joined a competitor because he was frustrated that the petitioner refused to provide an accounting.

Baldwin approached Artsi in 2006 to advise him that he needed to move to Cape Cod for personal reasons but wished to continue working for the petitioner long distance from Massachusetts. Baldwin proposed that he could open the Boston market for the petitioner's products if allowed to stay employed by the petitioner after relocating. Baldwin testified that Artsi agreed to his proposal and sent an email stating that the petitioner would no longer pay Baldwin an annual salary, but would increase his commission rate to 10%. This email became the basis for further discussions between Baldwin and Artsi and ultimately reflected the terms of Baldwin's new employment agreement. Baldwin agreed to the new terms because he believed that the higher commission rate would allow him to earn a considerable amount of money therefore eliminating his need for the security of an annual salary. Baldwin did not keep a copy of the email from Artsi, but insists that it was sent to him from Artsi's work email address.

From September 6 to December 15, 2006, Baldwin worked as a salesperson for the petitioner out of a home office that he set up in Cape Cod and also worked three days a week from the petitioner's office in Brewster. Baldwin continued to make sales and to receive commissions from the petitioner and continued to be paid commissions even after he stopped working for the petitioner in December.

Baldwin testified that he believes he is owed \$57,500.00 in commissions less payments received, and does not dispute that from September 6 to December 15, 2006, the petitioner paid him \$7,750.00 in commission checks plus a wire in the amount of \$3,087.00. Baldwin also agreed that the petitioner paid him \$8,750.00 after the compliance conference,

and that the petitioner paid off an AMEX account that he showed “poor judgment” in opening without first consulting Artsi.

Testimony of Labor Standards Investigator Neil Benjamin

In September 2007 DOL Labor Standards Investigator (LSI) Neil Benjamin was assigned to investigate Baldwin’s claim against the petitioner. LSI Benjamin’s investigation included visiting Artsi at the petitioner’s Brewster office to discuss Baldwin’s claim and to request that the petitioner to provide DOL with a commission agreement, sales records and other documents. According to LSI Benjamin, Artsi agreed to provide the requested documents within two weeks but failed to do so.

LSI Benjamin then prepared a recalculation sheet outlining the amount of money owed by the petitioner to the claimant and providing a payment date. LSI Benjamin mailed the recalculation sheet and a notice of Labor Law violation to the petitioner along with a cover letter advising that if the petitioner had any objections it could request a compliance conference. The petitioner responded by submitting documents that LSI Benjamin found irrelevant. Artsi promised after several subsequent phone conversations to submit certain documents to DOL but they were never produced.

A compliance conference was held at DOL’s White Plains office on January 17, 2008 before DOL Compliance Officer Donald Pembleton. The petitioner was represented by Artsi’s partner Ron Nizan and their attorney. At the compliance conference, Baldwin claimed that his commission rate after September 6, 2006 was raised to 10% and that the petitioner owed him unpaid commissions. The petitioner argued that the commission rate never changed and that all commissions were paid. The Compliance Officer determined that since there was no proof of a new agreement “it reverted back to the \$30,000.00 and the 5%.” The parties agreed that the petitioner would pay \$23,838.39 within 24 hours of the compliance conference to settle the dispute. That amount was derived from records provided by the petitioner and Baldwin and reflected 5% commissions on sales of \$577,432.59 less \$7,750 in commissions paid and \$6,033.24 in AMEX charges paid by the petitioner, plus \$8,750.00 in wages prorated based on an annual salary of \$30,000.00.

LSI Benjamin testified that the petitioner paid only \$8,750.00 of the amount due, and therefore the Order was issued against the petitioner in the amount agreed to at the compliance conference, less the amount paid, plus interest and civil penalties.

With respect to the civil penalty imposed, Benjamin testified that he originally recommended a 50% penalty based on the Petitioner’s cooperation with the investigation, the documentation provided, and the timeliness of the petitioner’s response, but a Senior Labor Standards Investigator “overruled his recommendation” and imposed a 100% civil penalty. Benjamin does not know why his recommendation was overruled.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

The parties dispute the amount of unpaid commissions, if any, due and owing to the claimant for sales he made from September 6 to December 15, 2006. Article 6 of the Labor Law includes commissions within the definition of wages (Labor Law § 190 [1]) and required during the relevant time period that:

“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 made 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.”

(former Labor Law § 191 [1] [c]).³ The petitioner bears the burden of proving that the Order is unreasonable or invalid (Labor Law § 103 [1]; 12 NYCRR 65.30). For the reasons set forth below, we find that the petitioner has failed to meet its burden.

The commission agreement effective September 6, 2006

Prior to September 6, 2006, the agreement between the petitioner and the claimant was \$30,000.00 salary plus 5% commission.⁴ This agreement was not reduced to writing, but the parties agree that this was the agreement. The parties likewise agree that the petitioner made regular advances against future commissions (draws against commission) to the claimant, although they dispute the total amount of advances paid. There is also no dispute that the agreement between the parties changed effective September 6, 2006 with both parties agreeing that effective that date, the petitioner would no longer pay an annual salary to the claimant.

The dispute, therefore, centers on the change, if any, to the commission rate. The petitioner contends that the commission rate remained unchanged whereas the claimant testified convincingly that he would not have accepted the loss of a salary without the increase in his commission rate from 5% to 10%, and that he agreed to the new terms of employment because he believed he would make substantial earnings and no longer require the security of an annual salary. The claimant also testified that independent salespeople working for the petitioner earned between 7% to 12% in commissions. We find the claimant's testimony

³ This section of the Labor Law was significantly rewritten in 2007.

⁴ There is also a dispute concerning whether the petitioner also guaranteed the claimant \$50,000.00 in minimum compensation, but that claim was not pursued by the claimant in this proceeding and was not a part of DOL's investigation.

compelling on this point, and in the absence of any writing to the contrary, find that effective September 6, 2006, the claimant's commission rate was 10%.

Owed commissions

Having found that the claimant's commission rate was 10% during the relevant time period, we next calculate the amount, if any, due and owing to the claimant to determine whether the Commissioner's finding that the claimant is owed \$15,088.39 is reasonable.

The petitioner provided no reliable documentation of the commissions earned by the claimant and monies paid to him. The only document produced was a spreadsheet created by one of the petitioner employee's who did not testify at hearing. The spreadsheet that the petitioner relied upon, even if accurate, is insufficient to meet the petitioner's burden of proof by a preponderance of evidence. Petitioner did not even provide detailed testimony as to how the spreadsheet was created or produce at least a representative sample of the documents upon which the spreadsheet was based. As presented, we are simply unable to test the document to determine whether it is reliable. Because the petitioner produced no other evidence of the commissions earned and amounts paid to the claimant during the relevant time period, we credit DOL's determination that the claimant made \$577,432.60 in sales during that time period which was based on the best evidence available to DOL -- the claimant's statements and records(see *Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009] [absent adequate records DOL is permitted to use the best available evidence to determine the amount of wages owed]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009] [same]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008] [same]; see also Labor Law § 196-a).

Therefore, we find that the petitioner owes the claimant \$38,156.26 in unpaid commissions calculated as follows:

10% of total sales of \$577,432.60 = \$57,743.26;
Less commissions proven paid \$7,750.00;
Less the wire transfer of \$3,087.00 which we find constitutes additional commissions paid;
Less \$8,750.00 paid after the compliance conference;
For a total amount paid of \$19,587.00 which leaves a balance due and owing of \$38,156.26⁵.

To the extent that this amount exceeds the amount the Commissioner determined is due and owing, we find the Order reasonable.

Civil Penalty

LSI Benjamin recommended a 50% civil penalty based on his weighing of the factors set forth at Labor Law § 218. His determination was ultimately changed by a superior at

⁵ We note that the agreement made at the compliance conference which formed the basis for the Order credited the petitioner with the \$6,033.24 that the petitioner paid to settle the claimant's Amex debt. We do not credit this payment in our calculation because it is unlawful for an employer to recover a debt from an employee's wages (see Labor Law § 193).

DOL without any explanation on this record, i.e., no official with knowledge of the reason for increasing the civil penalty testified at the hearing. Accordingly, we find that the imposition of a 100% civil penalty was not reasonable and reduce the civil penalty to 50% which is consistent with LSI Benjamin's testimony.⁶

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."

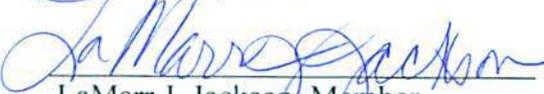
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law, dated April 25, 2008, under review herein, is modified to reduce the civil penalties to \$7,544.20, but is otherwise affirmed.
2. The Petition for Review be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairman

J. Christopher Meagher, 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
April 21, 2010.

⁶ We note the objection raised by the Commissioner in her post-hearing brief that the Petition did not allege that the penalties were unreasonable, but base our review on the testimony of LSI Benjamin in response to questions asked by DOL's counsel on direct examination.