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STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

BUSINESS COMPUTER ANSWERS, INC.

Petitioner,

To review under Section 101 of the New York State  
Labor Law: An Order to Comply with  
Article 6 of the Labor Law, dated May 26, 2006

-against-

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PR-06-053

RESOLUTION OF DECISION

WHEREAS:

This proceeding was commenced on July 18, 2006, when Petitioner Business Computer Answers, Inc. (BCA) filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66). The Petitioner asks the Board to review an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against the Petitioner on May 26, 2006.

The Order finds that the Petitioner failed to pay wages to a named Complainant in violation of Labor Law § 191. It directs payment to the Commissioner of wages due in the amount of \$27,132.05 for the period from August 30, 2001 to November 1, 2004, continuing interest on the wages due at the rate of 16% calculated to the date of the Order in the amount of \$6,791.18, and a civil penalty in the amount of \$13,565.00, for a total amount due of \$47,488.23.

The Petition alleges that certain amounts the Commissioner determined to be unpaid were in fact paid to the Complainant; that commissions were paid to the Complainant consistent with the Petitioner's policy regarding commissions; that on several occasions, the Petitioner overpaid

commissions to the Complainant; and that the Complainant was paid commissions on the same terms and conditions as every other salesperson employed by the Petitioner and he was fully aware of such terms and conditions. The Commissioner filed an Answer on November 17, 2006, which denies the allegations of the Petition.

Upon notice to the parties, the Board held a hearing in Buffalo, New York on April 12, 2007 and June 6, 2007, before then Board Member Mark S. Perla, the designated hearing officer in this case. Petitioner was represented by Phillips Lytle LLP, by Michael R. Moravec of counsel, and the Respondent Commissioner was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Benjamin T. Garry of counsel. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, raise relevant arguments, and file post-hearing briefs.

## DISCUSSION

The Board is charged with reviewing whether an order issued by the Commissioner is valid and reasonable. The Board shall presume that an order of the Commissioner is valid (Labor Law § 103 [1]). 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).

Petitioner BCA is a small telecommunication services business owned by Nicholas and Annette Vertalino. During the time period relevant to the Order under review, Nicholas Vertalino was the corporate president and Annette Vertalino was the secretary and treasurer. A large portion of the Petitioner’s business includes the sale of AT&T telecommunications products for which AT&T pays the Petitioner a bonus for each sale with a percentage of each bonus then paid by the Petitioner to the employees who assisted with the sale. The Petitioner worked closely with employees of AT&T (subagents) to develop these sales.

The Petitioner hired the Complainant as a telecommunications salesperson on or about April 1, 2001 and terminated his employment on November 1, 2003. After his termination, the Complainant filed a claim with DOL for \$76,876.28 in allegedly unpaid commission-bonuses. DOL then initiated an investigation of the Petitioner and requested records related to the Complainant’s sales. The Petitioner provided various records related to sales made by the Complainant and bonuses paid to him. DOL then presented this information to the Complainant, who adjusted his claim based on the Petitioner’s record. The adjusted claim became the basis of the Order under review.

Because “an employee’s entitlement to a bonus is governed by the terms of the employer’s bonus plan” (*Hall v. United Parcel Service*, 76 NY2d 27, 37 [1990]), we must first determine the terms of the bonus agreement between the Petitioner and the Complainant. Those terms are set forth in a memorandum dated October 22, 2001, which describes the Complainant’s remuneration as<sup>1</sup>:

“Yearly base pay: \$36,400.00.”

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<sup>1</sup> There was a subsequent agreement to raise the Complainant’s bonus amounts and lower his base salary, but that agreement was never put into effect.

“Commissions:

All commissions are based on invoices being paid to [the Petitioner] by AT&T.

1.5% commissions for first 6 months.

1% thereafter.

Bonus of 20% of bonus paid to the [the Petitioner] by AT&T if [the Complainant] originates the customer.

If [the Complainant] develop[s] a deal with an AT&T [subagent], [the Complainant] will receive the difference between what the AT&T person receives and 20%.

If [the Complainant] develop[s] a deal with a BCA employee, [the Complainant] will split compensation with 60% going to the originating employee.”

Although the parties do not appear to dispute that the bonus payments at issue in this matter are “wages” under Labor Law § 190 (1), we note that the term “wages” means “the earnings of an employee for labor or services rendered regardless of whether the amount of earnings is determined on a . . . commission or other basis.” We further note that the percentage bonuses described in the memorandum, and which are variously described throughout the record as commissions, bonuses, and commission/bonuses, are commissions for purposes of Labor Law § 190 (1) (*Reilly v. Natwest Markets Group, Inc.* 181 F.3d 253, 265 [2d Cir. 1999]).

During the course of DOL’s investigation of this matter, the Complainant’s claim was reduced from the original claim of \$76,876.28 in unpaid commission-bonuses to \$27,132.05, the amount listed in the Order under review. Two DOL Senior Labor Standards Investigators assigned to the investigation and the Complainant testified that these amounts were reduced by the Complainant in response to documents provided by the Petitioner to DOL. Although the Complainant’s original claim was based on approximately 65 sales projects that he worked on, at hearing, counsel for DOL stated that only three main issues were in dispute: (1) whether the Petitioner’s then President, Nicholas Vertalino, was entitled to 60% of the commission-bonuses paid to the Complainant on sales for which Mr. Vertalino provided a lead; (2) whether the Complainant is entitled to commission-bonus payments for sales he completed prior to the termination of his employment but that were not paid by AT&T to the Petitioner until after such termination; and (3) the amount of commission-bonus due to the Complainant on a specific project, Colony Liquor. Notwithstanding the Commissioner’s suggestion that our review of the evidence should be narrowed to only three main issues, we have reviewed all of the evidence in the record, including the various spreadsheets prepared by the Complainant and the Petitioner detailing the Complainant’s sales history and bonuses paid along with the supporting documents, and concluded for the following reasons that the Complainant is owed only \$6,128.25 in unpaid commission-bonuses.

*Colony Liquor*

The Complainant completed two sales of AT&T technology to Colony Liquor & Wine Distributors on November 30, 2001 and December 1, 2001 respectively. There is credible evidence in the record that although the Complainant initiated the work on these projects, he was subsequently removed at the customer's request, and the sales were ultimately finalized by another BCA employee. AT&T paid the Petitioner a \$14,440.00 bonus for the first sale, and a \$5,754.26 bonus for the second sale. The Petitioner admits that it paid no bonus to any AT&T subagent for work on this sale.

According to the terms of the bonus agreement, the Petitioner should have paid the Complainant 60% of a 20% bonus on these sales, or 12%, because the sale was finalized by another BCA employee and no bonus was paid to any AT&T subagent. Accordingly, the Complainant should have been paid \$1,732.80 for the first sale, and \$690.51 for the second sale. He was in fact paid \$2,400.00 for the first sale<sup>2</sup>, and \$572.42 for the second. Therefore, the Petitioner owes nothing to the Complainant for the first sale, and owes \$118.09 on the second sale which is 12% of \$5,754.26 less the \$572.42 actually paid.

*Town and Country*

The Complainant completed a sale of AT&T technology to Town and Country on February 12, 2002 and AT&T paid a \$384.00 bonus to the Petitioner. Since there is no evidence that an AT&T subagent was involved in this sale, the Complainant should have received a commission-bonus of 20% of the AT&T bonus, or \$76.80. However, according to the records before the Board, the Complainant was only paid \$53.60 for this project. The Petitioner is liable for the difference of \$23.20.

*Sonwil*

The Petitioner admits that due to an oversight the Complainant was not paid for this project. He should have been paid \$57.50.

*Town of Grand Isle*

The Complainant sold an AT&T product to the Town of Grand Isle on August 12, 2003 and the Petitioner should have received an AT&T bonus of \$2,160.00 for this sale. The Complainant worked on this project, but was not paid a commission-bonus by the Petitioner. The record indicates that AT&T only paid a bonus of \$120.00 for this sale. The Complainant therefore should have been paid \$12.00, or 10% of the AT&T bonus, because an AT&T subagent was involved in the project.

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<sup>2</sup> We note that the Petitioner seeks an offset of any amounts overpaid to the Complainant from the amount due and owing under the Order, however Labor Law § 193 prohibits the deduction from an employee's wages for the recovery of earned commissions (*see e.g. Genes v. Yellow Book of New York*, 23 AD3d 520, 521 [2d Dep't 2005]; *Edlitz v. Nipkow & Kobelt, Inc.*, 264 AD2d 437 [2d Dep't 1999]; *Gebhardt v. Time Warner Entertainment-Advance/Newhouse*, 284 AD2d 978, 979 [4<sup>th</sup> Dep't 2001]).

*Avebe*

The Complainant made four sales of AT&T products to Avebe: one on September 22, 2003, one on September 23, 2003, and two on September 24, 2003. AT&T paid bonuses to the Petitioner on these sales in the amounts of \$6,390.00, \$899.99, \$966.24 and \$1,824.00 respectively. The Petitioner's business records and testimony indicate that BCA employee Bruce Williams completed these sales and that AT&T failed to pay the bonus amount of \$966.24 due on the first September 24 sale. The Complainant was not paid for the September 22 and 23 sales or for the first sale on September 24. Because Bruce Williams testified that he did not remember working on this particular sales project, we find that the Complainant is due the full 20% bonus for the September 22 and 23 sales and for the second September 24 sale for a total of \$1,278.00 for the September 22 sale and \$180.00 for the September 23 sale. The Complainant was properly paid for the second September 24 sale and is owed nothing for the first September 24 sale because according to the Petitioner, it was never paid by AT&T.

*Bonus Recoveries*

On two specific projects, Cenic and Future Galaxy, AT&T paid a bonus to the Petitioner that was subsequently recovered by AT&T because the customer failed to pay for the contracted services.

On November 2, 2002, the Petitioner completed two sales of AT&T products to Cenic. AT&T paid the Petitioner bonuses of \$13,192.20 and \$17,912.13 respectively. The Complainant worked on these sales with an AT&T subagent and was properly paid a bonus of \$1,319.20 for the first sale, and no bonus for the second sale because the customer cancelled. AT&T recovered the bonuses paid to the Petitioner for these sales. The Petitioner failed to recover the \$1,319.20 bonus it paid to the Complainant, but cannot now receive an offset against such payment because such an offset would violate Labor Law § 193<sup>3</sup>.

On July 10, 2002, the Petitioner completed two sales of AT&T services to Future Galaxy. AT&T paid the Petitioner a bonus of \$2,571.84 for the first sale, and \$34,800.00 for the second sale. It is undisputed that Paul Trainor, an AT&T subagent, worked on this project with the Complainant. The Complainant received a 10% bonus, or \$257.18 for the first sale, and a 10%, or \$3,480.00 bonus, on the second sale, however, the second bonus was recovered from the Complainant by the Petitioner because the customer cancelled the sale, and AT&T recovered its bonus payment from the Petitioner.

The written bonus agreement provides that a bonus is earned when the invoice is paid to the Petitioner by AT&T. There is nothing in the written agreement to indicate that once a bonus is earned and paid, it can be recovered by the Petitioner. We find that the Petitioner's recovery of a bonus already earned by, and paid to, the Complainant violated Labor Law § 193 (*see Gennes v. Yellow Book of New York, Inc.*, 23 AD3d 520, 521 [2d Dep't 2005] [deductions from an employee's earned commissions in order to compensate for a company's losses violates Labor Law § 193]). Accordingly, the Petitioner is liable for the \$3,480.00 illegally recovered from the Complainant.

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<sup>3</sup> See note 2, *supra*.

*Cancellations and Failures to Pay*

On several projects, the record shows that AT&T did not pay a bonus to the Petitioner because the customer failed to pay for the services or cancelled the contract.

AT&T failed to pay the following bonuses to the Petitioner:

\$2,400.00 for the P. Drescher project;  
\$1,440.00 for the PSC project;  
\$2,400.00 for the Classic Tube project; and  
\$300.00 for Arctic Fish.

The Complainant worked on all of these projects but is due no commission-bonuses because such payments are contingent on payment to the Petitioner by AT&T.

AT&T did not pay bonuses to the Petitioner on the following projects, because the contracts were either cancelled by the customers or the customers failed to pay AT&T:

\$3,623.00 for the Street & Co. project;  
\$1,263.00 for Saratoga Online;  
\$9,480.00 for Interface.

Although the Complainant worked on all of these projects, he is not owed any commission-bonus payments for them because such payments are contingent on payment to the Petitioner by AT&T.

*SPIFFS*

A "SPIFF" is a type of promotional bonus occasionally paid by AT&T to the Petitioner for the sale of certain products. The bonus agreement between the Petitioner and the Complainant does not specifically include SPIFFs, but does contemplate payment of a percentage of any bonus received from AT&T to the Complainant. Accordingly, although the Petitioner argues that there was no agreement to pay SPIFFs to the Complainant, we find that on the following sales, the Complainant should have been paid the following amount as a percentage of the SPIFF paid by AT&T to the Petitioner:

The Petitioner received a \$1,500.00 SPIFF from AT&T for the Classic Tube and Trimera sales which the Complainant worked on along with an AT&T subagent. Accordingly, the Petitioner owes the Complainant 10% of the SPIFFs from those projects, for a total of \$300.00. The Petitioner owes the Complainant an additional 20% bonus, or \$164.16, for the Concord Transportation sales which did not involve a subagent.

*Bonuses received after Petitioner's termination*

Absent an agreement to the contrary, commissions<sup>4</sup> are not forfeited by an employee's discharge or resignation (*see Matter of First Coinvestors, Inc. v. Carr*, 159 AD2d 209 [1<sup>st</sup> Dep't 1990]). The written bonus agreement between the Petitioner and the Complainant is silent on the subject of bonus payments after termination, and any ambiguities in the terms of the written agreement must be resolved against the party that drafted it, in this case the Petitioner (*see Jacobson v. Sassower*, 66 NY2d 991, 993 [1985]). Therefore, we find that the Complainant is entitled to bonus payments related to sales he finalized prior to his termination.

It is undisputed that the Petitioner terminated the Complainant's employment effective October 1, 2003, and that prior to that date, the Complainant finalized two sales – ACC Business and Conference Group. The Petitioner did not receive payment for these sales from AT&T until after the Complainant's last day of employment. Because the bonus agreement between the Petitioner and the Complainant does not specifically state that the Complainant forfeits the commission-bonuses he earned for sales finalized prior to his last day of work, we find that the Petitioner owes the Complainant \$584.64 in commission-bonuses for the ACC Business and Conference Group sales.

*60/40 sales split with Nicholas Vertalino*

The Petitioner asserts that its then President Nicholas Vertalino gave numerous sales leads to the Complainant and therefore is entitled to 6% of the bonuses paid to the Complainant on those sales. However, the Petitioner admits that it failed to collect those payments at the time the commission-bonuses in question were paid to the Complainant. While we have no doubt based on the evidence before us that Mr. Vertalino was instrumental in providing sales leads and other assistance to the Complainant, any share of the Complainant's bonuses that Mr. Vertalino may have been entitled to were forfeited when the Petitioner failed to collect them at the time of payment. Indeed, the course of dealing between the Petitioner and its employees, including the Complainant, establishes that Mr. Vertalino did not split bonuses with his employees (*see Mirchel v. RMJ Securities Corp.*, 205 AD2d 388, 390 [1<sup>st</sup> Dep't 1994] [an implied contractual relationship may be established by conduct of the parties]). Furthermore, to allow the Petitioner to recover bonuses already paid would run afoul of the Labor Law's prohibition against unauthorized deductions from wages (*see Labor Law* § 193; *see also Jacobs v. Macy's East, Inc.*, 262 AD2d 607 [2d Dep't 1999]).

*Civil Penalties*

The Order under review includes a 50% civil penalty against the Petitioner. However, based on the testimony of two DOL Senior Labor Standards Investigators, who explained that the Petitioner had no prior violations, was cooperative throughout the investigation, and produced all records requested, we find that the civil penalty imposed in this case was excessive particularly since the Petitioner's actual liability is only 8% of the original claim and 23% of the Order under review. Furthermore, we note that throughout the proceeding there has been no allegation by the Commissioner that the violations were willful or egregious (*see Labor Law*

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<sup>4</sup> The percentage bonuses in this case are commissions under Labor Law § 190 (1) (*Reilly v. Natwest Markets Group, Inc.* 181 F.3d 253, 265 [2d Cir. 1999]).

§ 218 [setting forth conditions under which Commissioner may impose a civil penalty]). Accordingly, the Order is modified to reflect a civil penalty of \$100.00 in this case.

*Interest*

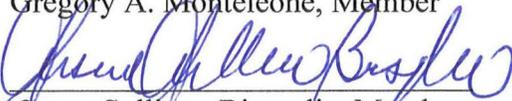
Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date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

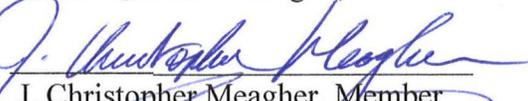
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

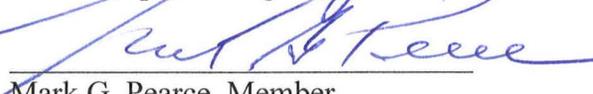
1. The Order to Comply with Article 6 of the Labor Law dated May 26, 2006 is modified to direct payment to Complainant of the sum of \$6,128.25 in unpaid wages, plus a civil penalty in the amount of \$100.00, together with interest at 16% calculated to the date of the Order; and
2. This matter is remanded to the Commissioner to issue an amended Order to Comply consistent with the findings of this Resolution of Decision.
3. The Petition for Review be, and the same hereby is, dismissed in all other respects.

  
Anne P. Stevason, Chairman

ABSENT  
Gregory A. Monteleone, Member

  
Susan Sullivan-Bisceglia, Member

  
J. Christopher Meagher, Member

  
Mark G. Pearce, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
April 23, 2008

Filed in the Office of the  
Industrial Board of Appeals  
at Albany, New York on  
April 25, 2008