STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KEITH WORONOFF and KATZ'S FURNITURE CORP. (T/A LA-Z-BOY), Petitioners, To Review Under Section 101 of the Labor Law: an Order to Comply with Article 6 and an Order Under Article 19 of the Labor Law, both dated June 17, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-208 RESOLUTION OF DECISION

APPEARANCES

Warren Greher, Esq., for Petitioner Keith Woronoff.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Keith Woronoff, for Petitioner;

Lori J. Roberts, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

On July 30, 2009, Katz's Furniture Corp. (Katz's Furniture) by its general manager, Keith Woronoff (Woronoff) 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), seeking review of an Order to Comply with Article 6 of the Labor Law (Wage Order) and an Order Under Article 19 of the Labor Law (Penalty Order) that the Commissioner of Labor (Commissioner, Respondent or DOL) issued on June 17, 2009. By letter dated September 30, 2009, Woronoff, in response to correspondence from the Board, requested that he also be included in the Petition in

stating: "I am not an 'Employer', but the office manager for Katz Furniture." Respondent filed an Answer to the Petition on October 26, 2009.

The Wage Order finds that Petitioners failed to pay earned commissions to Bonnie H. Leopoldo (Claimant) for the period May 11-September 1, 2008, and demands payment of $2,598.00 in wages; interest at the rate of 16%, calculated through the date of the Wage Order in the amount of $329.13; and a 100% civil penalty of $2,598.00, for a total amount due as of the Order's date of $5,525.13. The Penalty Order finds that Petitioners failed to keep and/or furnish true and accurate records for each employee for the period from on or about May 11-September 1, 2008, and demands payment of a $500.00 civil penalty.

A hearing was held on July 28, 2011 in White Plains, New York. 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.

STATEMENT OF FACTS

Katz's Furniture is a retail furniture store in Middletown, New York, trading as La-Z-Boy, employing about seven or eight employees. Woronoff, Katz's Furniture's general manager from 1999 to 2009, was not an owner, officer or board member of the corporation; did not sign paychecks or have authority to do so; and did not negotiate employee compensation. Martin Katz, Katz's Furniture's president and a stockholder, set employee compensation. Paychecks were signed by "Martin or David Katz."[1] Woronoff, who worked 40 hours per week on a variable schedule, was responsible for the day-to-day running of the business. His responsibilities as manager included making sure that salespeople were making sales, that the stores were clean, and that deliveries were sent out. Woronoff also simultaneously served as manager at a second furniture store owned by Katz also trading as La-Z-Boy. Katz did not visit either store on a daily basis.

Woronoff interviewed Claimant, who had previously worked for Katz's Furniture and rehired her at the end of 2007. During her previous employment with Katz Furniture, Claimant worked on the same terms as during her final period of employment.

Woronoff testified that Claimant's compensation was $100 per day as a draw against commission: if earned commissions exceeded $100 per day, she received the excess in addition to her draw, and if not, she received the $100. Although he testified that commissions were based on delivered business, Woronoff gave no testimony regarding a specific rate of commission or any other explanation of how Claimant's commission was calculated. He testified that he did not know if employees were given commission agreements. On a quarterly basis, either CPA Bill Heller or Woronoff himself would reconcile salespeople's earned commissions against their draws, so that a salesperson whose earned commissions exceeded previously paid draws could be paid an additional check. Salespeople received reports and if they had questions or problems with their commissions or compensation, sometimes would go over them with Woronoff.

[1] David Katz was not otherwise identified or referred to.

Senior Labor Standards Investigator Lori J. Roberts investigated this case for DOL. The November 2, 2008 claim asserted that Claimant was a salesperson at the Middletown, New York store from December 2007 to September 12, 2008, when she quit. Claimant listed her agreed rate of pay as $100 per day ($400 per week), listed her average weekly earnings, including salary, draw, and commissions as "$400 weekly draw + commission." A "Commission Salesperson Recapitulation Sheet," attached as part of the claim, listed the date of sale, name and address of customer, amount of sale, rate of commission, amount of commission due, date commission payable, and rate of draw for 24 specific sales made by Claimant during the period May 11 through September 1, 2008,[2] on which, at a 5% commission on the specific amount of each sale, she computed that she was owed a total of $2398.00, plus $200 for "fabric protection." Claimant listed Woronoff as La-Z-Boy's "responsible person."

In January 2009, the Department wrote to La-Z-Boy informing them of the Claim and requesting payment of $2598.00, or a statement of Petitioners' reasons for disagreeing with the Claim, with relevant documentation. CPA William Heller, responded, stating that all commissions to Claimant were fully paid; her "commission statement shows that she was entitled to sales booked under her name of $16547.12 and actually received from Katz Furniture $16560 as compensation for the period in question." As attachments to his letter, Heller enclosed a "Totals Page," headed "Page 4, Date: 01/21/09," which listed Claimant's total dollar sales and total dollar commissions for an unspecified period, and a page of an "Employee Y-T-D Register," apparently listing the total gross earnings and deductions for the year 2008 for Claimant and eight other employees and a weekly "Rate" (in Claimant's case, $500.00) for each. LSI Roberts testified that these enclosures were not helpful, since they gave no breakdown or information concerning individual commissions.

Claimant failed to appear or testify at the hearing.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is "valid and reasonable." (Labor Law § 101][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." (§ 101][2]). The Board is required to presume that an order of the Commissioner is valid (§ 103[1]). If the Board finds that the "order, or any part thereof, is invalid or unreasonable, it shall revoke, amend or modify the same" (Labor Law § 101[3]).

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306[1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

---

[2] The Claim stated that commissions used to be earned on the date of sale, but this was "changed to date of delivery in April."

FINDINGS AND CONCLUSIONS OF LAW

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

Woronoff was not an "employer"

On the record in this case, we find that Woronoff was not an employer. "Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual...." [Labor Law § 190[3]). Under Labor Law § 2[7] "employed" means "permitted or suffered to work." In this respect, the New York Labor Law is the same as under the federal Fair Labor Standards Act (FLSA). *See, e.g., Chu Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n.6 [SDNY 2003]. In *Herman v. RSR Security Services Ltd.*, 172 F3d 132, 139-141 [2d Cir. 1999], the Court declared that the "overarching concern" in deciding "whether a given individual is or is not an employer" for FLSA purposes is an "economic reality" test, for which four relevant factors are "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 139-141. The Board has followed a similar analysis. *See, e.g., Matter of David A. Fenske (T/A Amp Tech and Design, Inc.*, PR 07-031 [Dec. 14, 2011]. In the present case, it is undisputed that Woronoff was not an owner or officer, and more fundamentally, there is no clear evidence that he met any of the *Herman* factors.

Woronoff testified without contradiction that he was not an owner, officer or board member of Katz Furniture; did not sign employee checks; and did not negotiate or set employee compensation. With respect to hiring and firing, he testified that he interviewed job applicants, including Claimant, sometimes along with Katz, and that Claimant was accepted back to work without an extensive interview by anyone, based on her earlier experience working for Katz Furniture. There is no evidence Woronoff fired anyone. Woronoff also testified without contradiction, that an assistant manager generally supervised work schedules and that others maintained records. And most important in a case such as this, involving non-payment of wages, there is no evidence Woronoff determined the rate and method of payment. Woronoff's unrebutted testimony was that Katz, not Woronoff, set the compensation system; there is no proof Woronoff decided to change or depart from it. In the absence of evidence to support Woronoff's employer status, given his testimony that he was not an employer, the fact that Claimant, in her Claim, identified him as the "responsible person" is an insufficient basis to find such status. The Board previously so held in *Matter of Franbilt, Inc. and/or Thomas J. Barnes and/or Michael J. Burns*, PR 07-019 [July 30, 2008] (finding a claim's listing of Burns as a "responsible person" even coupled with certain hearsay evidence, insufficient).

The Wage Order

A "commission salesman" is defined by Labor Law § 190[6] as an "employee whose principal activity is the selling of any goods, wares, merchandise, services,... and whose earnings are based in whole or in part on commissions." Labor Law § 191[1][c] provides that a commission salesperson shall be paid wages, salary, drawing account and all other

monies earned in accordance with the agreed terms of employment, but not less frequently that once a month and no later than the last day of the month unless they are substantial. The employer shall furnish a commission salesperson, upon written request, a statement of earnings paid or due and unpaid. "The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. The agreement must contain a description of how wages and commissions are calculated. "Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included" and must provide details pertinent to payment of wages, salary, drawing account, commissions, and all other monies earned and payable in the case of termination of employment by either party. "The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment."[3]

Labor Law § 191[1][c], expressly requires that a commission salesman be paid "commissions and all other monies earned or payable in accordance with the agreed terms of employment" and that these terms "be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request."[4]

Pursuant to § 191[c], the "failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms."

In the present case, the DOL requested on several occasions during its investigation that Petitioners produce the written agreed terms of employment as Labor Law § 191[c] requires, and Petitioners failed to do so. Woronoff testified that he did not know whether such a document exists. Petitioners did not explain how Claimant's commissions were computed or list which commissions they believed she earned. While Woronoff testified that Claimant's commissions were based on delivered business, he did not specify what her commission rate was. The correspondence from Petitioners to the DOL, likewise, contains no specific rate of commission, nor any commission agreement, and the DOL's finding that Claimant earned a five percent commission rate is unrebutted. Indeed Petitioners never even explained how they calculated Claimant's total compensation or what, if anything, was wrong with her the specifics of her Claim. We find that the Claimant's recount of twenty four specific transactions at a five percent commission on delivered sales enumerated in the "Commission Salesperson Recapitulation Sheet" rather than Petitioner's vague generalizations and incomplete documentation (which gave no breakdown concerning individual commissions) to be the best available evidence of the wages owed to the Claimant. However, we reduce the wage order by $200.00 because there is no record

[3] The § 191[1][c] requirements concerning the terms of a commission salesperson's agreement were enacted in 2007 and were in effect throughout the period of the claim.

[4] The provisions of § 191[c] quoted above, expressly requiring that the specific terms of a commission agreement be reduced to writing, signed by both parties, maintained by the employer and made available to the Commissioner on request, were enacted in 2007 and took effect before Claimant was rehired by Katz Furniture, well before the period for which the Order found commissions due.

evidence with regard to the "fabric protection" listed in the claim. Accordingly, we affirm the Wage Order as modified against Petitioner Katz's Furniture.

CIVIL PENALTIES

The wage order assesses a 100% civil penalty, and the penalty order assesses a $500.00 penalty for failure to keep and/or furnish true and accurate payroll records. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amounts set forth in both orders are reasonable and valid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The orders are affirmed as modified and Keith Woronoff's name shall be removed;

2. The wage order is reduced to provide that Petitioner Katz' Furniture owes $2,398.00 in unpaid wages plus interest of 16% and the 100% penalty is reduced proportionally; and

3. The Petition is granted to the extent set forth above, and otherwise denied.

Absent
Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 14, 2012.