STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KENNETH AHREM, Petitioner, 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 August 24, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-302 RESOLUTION OF DECISION

APPEARANCES

Kenneth Ahrem, Petitioner *pro se*.

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

WITNESSES

Kenneth Ahrem, for Petitioner.

Amy Conte and Erin Gibbons, Labor Standards Investigator, for Respondent.

WHEREAS:

On September 24, 2010, Kenneth Ahrem (Petitioner) filed a Petition for review and on November 1, 2010, an Amended Petition for review, 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 New York State 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 against him and Richard Howard (Howard) on August 24, 2010. Howard did not appeal the Orders.

The Wage Order finds that Petitioner failed to pay wages to Amy Conte (Claimant) for the period September 1 to September 26, 2008, and demands payment of $2,200.00 in wages; interest at the rate of 16%, calculated through the date of the Order in the amount of $672.18; and a 100% civil penalty in the amount of $2,200.00 for a total amount due as of the Wage Order's date of $5,072.18. The Penalty Order finds that Petitioner violated Article 19 of the Labor Law by failing to keep and/or furnish true and accurate payroll records for each employee for the period from September 1, 2008 through September 26, 2008, and demands payment of $500.00 as a civil penalty.

The Amended Petition alleges that the Orders were unreasonable because the company was out of business by September 1, 2008; the Claimant was a former client seeking a loan modification through an affiliated company who had a personal relationship with Howard; and Howard, not Petitioner, was Claimant's employer. An Answer to the Amended Petition was filed on November 24, 2010.

Upon notice to the parties, a hearing was held on January 22, 2013, in Hicksville, New York before Jean Grumet, Esq., Member of the Board, and the designated Hearing Officer in this proceeding. 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 make closing arguments.

I. SUMMARY OF EVIDENCE

Testimony of Petitioner Kenneth Ahrem

Streamline Mortgage Corp. (Streamline or Streamline Mortgage), a mortgage broker, began doing business in 1992 and was incorporated in 1994. Petitioner was at relevant times its primary owner and chief executive officer who worked "10 hours a day, probably, if not longer" at its main office in Mount Sinai, New York. At its height, Streamline had 10-15 employees in 13 offices and 100-150 independent contractors serving as mortgage consultants or loan originators, but business dropped 80 percent from 2006 to 2007, "so we were on our way out of business." In 2006 eight loan originators worked in the Mount Sinai office but by 2008 only Howard, Joe Torrell (Torrell), and Steven Dennis (Dennis) remained. Petitioner's own last paycheck from Streamline was in November 2007. Around May 2008 he laid off "my last three people," employees in the Mount Sinai office who asked to be let go because they knew Petitioner could no longer afford to pay them. In September or October 2008, the Attorney General issued new industry guidelines and "that was pretty much it for us." Paperwork to start Streamline's corporate dissolution was filed in 2008 and the Department of State recorded the dissolution in January 2010.

Although the payroll service Paychex kept employment records for Streamline, Petitioner did not bring them to the hearing. He testified that after being maintained for three years, which he believes is the required period, many records were given to a shredding company, about a year and a half before the January 22, 2013 hearing.

Also operating out of the Mount Sinai office was Streamline Commercial Corporation (Commercial or Streamline Commercial), another corporation Petitioner owns

and of which he is CEO. During his testimony, Petitioner variously described Commercial as a "totally different entit[y]" from Streamline Mortgage, as "the division" that handled loan modifications, and as having been created to handle commercial loans whereas Streamline Mortgage was for residential loans. Commercial, which remains an active corporation but has little business, had no employees, only independent contractors.

In approximately July 2008 "people from our office" went to lunch at a restaurant where Claimant, whose mortgage Streamline had originated, was working. Claimant asked if her loan could be modified, came to the Streamline office on August 25, 2008, and signed a standard loan modification form. Petitioner introduced this one-page agreement into evidence. Signed by Claimant on a line for "Client Signature," Howard on a line for "Streamline Commercial Corporation Consultant Signature," and Petitioner below Howard's signature, it authorized Commercial "to help [Claimant] arrange for a loan modification" in consideration of a non-refundable $1,500.00 retainer plus a percentage of the loan amount. Claimant and Petitioner initialed a change in this percentage, from 1.5% in the printed form to 1%. Petitioner testified that when she signed the agreement with Commercial, Claimant had no money and her file was therefore "on hold" until September 2nd, when she made out a $500.00 check (labeled "for rate modification") to Howard. According to Petitioner, this check "was supposed to be made out to Streamline Commercial." Thereafter, Petitioner testified that he saw Claimant sporadically for a week or two at the Mount Sinai office; that Claimant drove Howard to Garden City "a couple of times for like a week or so;" that Howard "moved on;" and that Claimant asked Petitioner, Torrell and Dennis to try to get her money back from Howard. According to Petitioner, Claimant was never employed by Streamline.

Petitioner testified that Howard, whom he has not seen since September or October 2008, was "an independent contractor that came and went as he pleased," one of the "150 or so mortgage consultants coming and going." Howard was in the Mount Sinai office one or two days per week. Initially, Petitioner testified that Howard did business through Commercial, not Streamline Mortgage. On cross-examination, he testified that he was not sure whether Howard was a consultant to Streamline Mortgage as well as Commercial. In his closing statement, he stated that Howard never worked for Streamline Mortgage.

When cross-examining Claimant, Petitioner further asserted, in the course of asking questions, that when Claimant claimed that Howard owed her money, "[w]e reduced the contract[,] how much we were going to charge you[,] for that reason," and that Claimant asked Petitioner if she could do telemarketing for Commercial. Claimant responded that "I am pretty sure you reduced the fee because I became an employee" and that she "had already been telemarketing in the office," but not necessarily for Commercial. In his closing statement, Petitioner stated that any agreement Claimant had was with Howard, and that:

> "I was aware that she was asked to come in if she wanted to try working on modifications, and that would be for commission like the other people in the office, which was Joe Torrell, Stephen Dennis as well as Richard Howard, who all got paid commissions on files when they received money from the files and they closed."

Testimony of Claimant Amy Conte

Claimant obtained a mortgage through Streamline when buying her house in 2004. At that time she dealt with Mike Clinco, but saw Petitioner in the Mount Sinai office. Thereafter, Streamline employees, including Petitioner, came to the restaurant she worked in from time to time; Claimant left that job in February 2008. In late August of 2008, after her first day on a new job at a retail store, she went to Streamline's office to inquire about a loan modification, after having received a telephone call from Howard asking if she was interested in refinancing her mortgage. Howard stated that he was Streamline's branch manager. When Claimant said she was displeased with her first day of work, Howard offered her a job as his secretary, personal assistant, and to do telemarketing for loan modifications. Howard told her that she would be paid $100 per day for an eight-hour day with flexible hours. Petitioner was present during this conversation, and when Howard offered her the job, Claimant "sort of looked to [Petitioner] as an okay, if that was all right with both parties, and both of them agreed." Claimant quit her retail store job and started work at Streamline five or six days later.

Although Streamline had fewer employees than in 2004, not only Howard and Petitioner but also Torrell and Dennis were still working when Claimant was hired, along with a secretary/receptionist named Jean. Petitioner testified that Jean Chrisel was one of the employees he laid off "sometime around May of 2008." According to Petitioner, she was one of his last three remaining employees and all three worked for over ten years. These five, along with Claimant, "were in the office daily." After a first work week mainly spent organizing Howard's files, Claimant began telephoning people from a list to see if they were interested in a loan modification: the same work Torrell was doing. If there was a positive response, as happened about 25 times during her four weeks of work, Claimant patched the caller through to Howard, who was in an adjacent office. Howard also once asked Claimant to take him to Garden City, where Claimant waited while Howard talked with associates; she was told that the trip was related to Streamline's business. Claimant never saw anything that distinguished Howard from Streamline Mortgage, and never heard of Commercial. Claimant acknowledged signing the agreement with Commercial, but testified she did not recall seeing Commercial's name and "was under the impression it was Streamline Mortgage."

Claimant asked Howard weekly for her pay and he responded, "We will be closing on something soon. You should be paid within the week," or that "they paid their employees... when they closed cases." Claimant, who was new to the business, saw $1,500.00 retainer checks coming in and therefore expected Streamline would eventually be able to pay her. But after four weeks, she concluded that she was not being paid and Streamline was not even actually working on loan modifications, and wanted nothing more to do with them. She called a meeting with Petitioner, Howard and Dennis and "accused them of taking my money as well as other people I believed that they were scamming." Although she wrote a $500 check to Howard at his direction to start her own loan modification, her mortgage was never actually modified. After a lawyer who Streamline told her was working on her case turned out to be completely unfamiliar with it, Claimant came to believe no one was actually seeking a modification for her at all. Petitioner and Dennis said they would "try to help pay me for the work that I had done as well as give me

the money back for the loan modification that I had cut them a check for. But none of that ever happened..."

In response to Petitioner's question why, if she believed Streamline was supposed to be paying her every week, she did not "...come to me on Friday and say 'Ken, where is my paycheck?' "Claimant testified that Howard led her to believe that he and Petitioner were equals, and she was under the impression that she would be paid "once things went through" and that that was how mortgage companies worked.

Testimony of Labor Standards Investigator Erin Gibbons

Labor Standards Investigator Erin Gibbons testified that this case was investigated by Labor Standards Investigator Anne Marie Culberson. An Issuance of Order to Comply Cover Sheet prepared by Culberson was entered into the record as part of the DOL's investigative file. Culberson found that Petitioner was generally uncooperative because he failed to send records, denied that Claimant ever worked for him, and provided no further proof. She recommended a 100% civil penalty for non-payment of required wages and a $500.00 penalty for failure to have true and accurate records. Gibbons testified that the penalties recommended by Culberson and included in the orders were appropriate.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. 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). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103). 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]).

Pursuant to Board Rule 65.30 (12 NYCRR § 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 by a preponderance of the evidence that the Orders are invalid or unreasonable. (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30)

III. 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). For the reasons stated below, we find that the Petitioner did not meet his burden of proving that the Orders were invalid or unreasonable, and we affirm the Orders.

Petitioner Was An Employer Within the Meaning of the Labor Law

"Employer" as used in Article 6 of the Labor Law "includes any person, corporation or association employing any individual in any occupation, industry, trade, business or

service." (Labor Law § 190 [3]) "Employed" is defined as including "permitted or suffered to work" (Labor Law §2[7]). Under Labor Law § 2(6), the term "employer" is likewise not limited to the corporate employer, but "means the person employing" a worker, "whether the owner, proprietor, agent, superintendent, foreman or other subordinate."

Like the Labor Law, the federal Fair Labor Standards Act defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "employer" to include "any person acting directly or indirectly in the interest of the employer in relation to an employee" (§ 203 [d]). The "test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test... [used] for analyzing employer status under the Fair Labor Standards Act." (*Chu Chung v New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]). The U.S. Court of Appeals for the Second Circuit has summarized this test, when the question is an individual's personal employer status and liability:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question... with an eye to the 'economic reality' presented by the facts of each case.... Under the 'economic reality' test, the relevant factors include '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.'....

When applying this test, "no one of the four factors standing alone is dispositive." Instead, the economic reality test encompasses the totality of the circumstances, not one of which is exclusive. (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999] [citations omitted]).

We find that Petitioner exercised sufficient control over the Claimant to be liable as an employer under Articles 6 and 19 for the period covered by the Orders. Petitioner was the owner and CEO of both Streamline and Streamline Commercial: by 2008, they were small corporations with at most a handful of employees. Far from an absentee owner, Petitioner testified that he was in the Streamline office over ten hours a day. He had the power to hire and fire employees and ultimately determined the rate and method of payment: he testified, for example, that "I kept the women on who were working for me as long as I could until they finally said 'Just let us go, Kenny'" because they knew Petitioner could no longer afford to pay them. While by the time of the hearing, Streamline no longer had employment records, Petitioner apparently dealt with Paychex when payroll records were kept, and made the decision to shred them. Petitioner did not dispute that he was present when Claimant was hired, or that he knew Claimant accepted the offer and began work, even if, in Petitioner's view, for less time than her Claim reflects. Indeed in his closing statement, Petitioner stated that Claimant was asked to work on loan modifications on the same terms as Torrell, Dennis and Howard. While there is no direct evidence that Petitioner supervised work schedules and employment conditions, pursuant to *Herman* no one factor is dispositive standing alone; "the overarching concern" is whether in economic reality, a corporate owner/officer "possessed the power to control the workers." Petitioner possessed that power at Streamline and Streamline Commercial.

The Board has repeatedly held that an individual who has the power to control employees – even if that power is not continually exercised, and/or is shared with other individuals – can be liable as an employer, as long as he or she meets the statutory definition of an employer. "Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'" (*Herman v RSR Security Services Ltd.*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 [5th Cir 1982]; see also *Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified" is insufficient to place employment relationship outside statute]; *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence]). In *Matter of David Fenske (T/A Amp Tech and Design, Inc.)*, (Board Docket No. PR 07-031 [Dec. 14, 2011]), the Board found that a petitioner bore employer liability because he was a corporate employer's "owner and sole shareholder and officer... , the only signatory on the corporate bank accounts, signed paychecks, was responsible for financing, was aware... that the company did not have funds to make payroll, and had ultimate authority.... even if that authority was never exercised." In *Matter of Sam Hoffman*, (Board Docket No. (PR 08-115 [November 17, 2009]), the Board found employer liability for a company's founder, co-investor and co-manager, even though he may have delegated aspects of day to day supervision of a claimant's employment to a partner. Petitioner in the instant case, who was the CEO as well as the owner of the corporations for which both Howard and Claimant worked and the ultimate beneficiary of that work, is chargeable under this standard. We reject the argument that Claimant was Howard's personal employee.

Petitioner claimed that Howard personally was Claimant's employer. Yet there was no evidence that Claimant did any work other than in connection with loan modifications like the one she herself had come to Streamline for, and no evidence that Howard personally provided loan modifications or did other purely personal business out of Streamline's office and (with Petitioner watching) hired Claimant to help him do it. While Claimant paid her retainer to Howard – according to her, at his direction – Petitioner himself testified the check should have been made out to Commercial; Petitioner (not Howard) lowered the percentage fee charged Claimant; and Petitioner claimed that "[w]e," not Howard, reduced the fee because of Claimant's complaint. Claimant credibly testified that Petitioner reduced the fee "because I became an employee." Nor did any evidence support the allegation that Claimant "had a personal relationship with Mr. Howard" or Petitioner's insinuation that her main job was driving Howard to Garden City.

Petitioner also claimed that Howard was a consultant to Streamline Commercial, not to Streamline Mortgage. Yet Petitioner himself testified that (a) he was not sure whether Howard was a consultant to both corporations (b) Commercial was created for commercial loans, not residential loans like those handled by Streamline Mortgage and by Claimant under Howard's supervision, and (c) Commercial was "the division" handling loan modifications, suggesting the two corporations' business was intertwined. More fundamentally, while Petitioner would clearly not be liable for wages owed to someone employed by Howard personally, whether work done under Howard's supervision and with Petitioner's knowledge and approval was for Streamline Mortgage or for Streamline Commercial is not similarly significant. (*See Matter of Robert Lovinger, Miriam Lovinger,*

and Edge Solutions, Board Docket No. PR 08-059 [March 24, 2010]). The Orders do not run against either Streamline Mortgage or Streamline Commercial but against Petitioner, who owned and was chief executive officer of both. It makes little difference whether he employed Claimant as an owner/officer of Streamline Mortgage, of Streamline Commercial, or of both companies.

Finally, that it was Howard who offered Claimant a job working for Streamline or Commercial does not absolve Petitioner of liability. "An employer who has knowledge that an employee is working and who does not desire that work to be done has a duty to prevent its performance." (*Matter of Floral Park Community Church,* Board Docket No. PR 07-014 [April 25, 2008], *citing, Chao v Gotham Registry, Inc.,* 514 F3d 280, 287 [2d Cir 2008]).

> "A presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work."

(Id at 290.) In *Gotham Registry* the court found that the employer was liable for the unpaid wages, even though it lacked some control over the employees' work hours. "[T]he law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result...Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime." (*Id at 291.)* The Petitioner in the instant matter, who assented to Claimant's hire and was the beneficiary of her labor, did nothing to prevent Claimant from working, and suffered and permitted her to work.

Claimant's Testimony is Credited

To the extent they were in conflict about facts, we credit Claimant's testimony over Petitioner's. Though the Petition and Amended Petition allege that Streamline was out of business by September 1, 2008, Claimant and Petitioner agreed at the hearing that in September 2008 not only Claimant but also Petitioner, Howard and at least two other loan originators (Torrell and Dennis) still worked in the Streamline office. Claimant credibly testified that a secretary/receptionist was also still employed. While Petitioner recalled laying that person off "sometime around May of 2008" – and testified he "actually was texting one of the ladies" to try to confirm the date – he supplied no record or proof of any specific lay-off date. Petitioner testified that "we were on our way out of business" in 2007, but that it was not until the Attorney General issued industry guidelines in September or October 2008 that "that was pretty much it for us." He acknowledged that Streamline Mortgage was not actually dissolved until January 2010.

Without disputing that he approved Claimant's hiring and knew that she did both secretarial and telemarketing work in Streamline's office, Petitioner in his testimony and in earlier correspondence chose misleading locutions such as "Ms. Conte never worked *for this company*" (emphasis supplied) or others that avoided describing what actually happened and were apparently intended to convey a much broader denial than his limited factual testimony actually warranted. Actual divergence between Claimant's and Petitioner's testimony did not involve whether she worked in Streamline's office on Streamline loans with Petitioner's

knowledge, which was essentially undisputed. Rather, divergence was limited to: (1) whether she worked for Streamline, as she credibly testified she understood, or for Howard personally as Petitioner claimed, (2) whether she was promised a daily wage as she credibly testified, or commissions as Petitioner stated in his closing statement, and (3) the duration of her employment. On each point, Claimant's testimony was credible, internally consistent and consistent with her Claim, while Petitioner's was evasive, shifting and apparently tailored to try to minimize his responsibility.

Claimant Was Promised a Daily Wage, Not Commissions

In his closing statement, Petitioner for the first time claimed that while he "was aware that [Claimant] was asked... to try working on modifications,... that would be for commissions." No evidence supported this belated claim, which was not raised in the Petition and therefore, pursuant to Labor Law § 101, must be deemed waived. Even if the claim could be considered and was supported by credible evidence, Labor Law § 191 would still require its rejection. Labor Law § 191 [c] states with respect to commission salespersons:

> "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 of not less than three years and made available to the commissioner upon request. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated.... 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's November 28, 2008 letter to Streamline requested "a copy of any payroll record, policy, contract, etc. to substantiate your position," yet Petitioner failed to produce such written terms then or later. Nor did Petitioner ever even claim that a supposed commission agreement with Claimant was reduced to writing. Pursuant to § 191 [c], her testimony that the agreed terms of employment were that she would be paid $100 per day is therefore presumed correct. The credible evidence including her testimony also supports that conclusion.

Claimant Is Credited Concerning the Duration of Her Work

The Claim asserts that Claimant worked 22 days at $100.00 per day over a four-week period. At the hearing, Petitioner cross-examined Claimant concerning the duration of her work, but did not establish that the Claim was erroneous or inflated. While Petitioner claimed he saw Claimant only "sporadically," such testimony is plainly insufficient to overcome the credible Claim. Rather, Labor Law § 195 and the New York Code of Rules and Regulations (NYCRR) require employers to keep payroll records. Specifically, 12 NYCRR § 142-2.6 requires that employers establish, maintain and preserve for not less than six years weekly payroll records showing, among other things, each employee's name, address and social security number; wage rate; number of hours worked daily and weekly; and gross wages, deductions and net wages. In the present case, Streamline failed to keep

such records with respect to Claimant, who was not even asked to fill out paperwork when hired.

Furthermore, Petitioner testified that the records Streamline did have (which could have established, for example, the actual dates of the layoffs Petitioner claimed occurred "around May of 2008") were shredded after just three years (but well after Respondent's November 2008 request for a copy of any payroll record). An employer's failure to keep adequate records does not bar employees from filing wage complaints. Rather, where employee complaints demonstrate a violation of the Labor Law, DOL may credit a complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that required wages were paid. (Labor Law § 196-a; *Angello v National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]). Petitioner did not meet that burden.

CIVIL PENALTIES

The Wage Order assesses a 100% civil penalty and the Penalty Order assessed a $500.00 civil penalty for failing to keep and/or furnish true and accurate payroll records. The petition did not specifically challenge the imposition of the civil penalties in this case. Accordingly the civil penalties in both orders are affirmed (*see* Labor Law § 101 [any objection not raised in the petition shall be deemed waived]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Petition is denied;

2. The Orders are affirmed.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 20, 2013.