STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RUSS D. GERSON AND THE GERSON GROUP, LLC.,	:	
Petitioners,	:	DOCKET NO. PR 10-361
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 6 of the Labor Law, both dated September 23, 2010,	:	MODIFIED AND REISSUED RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

The Abramson Law Group (Howard Winter of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Russ D. Gerson for petitioners.

Mark Levine, Maureen Brille, and Supervising Labor Standards Investigator Cloty Ortiz, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 22, 2010, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Russ D. Gerson and the Gerson Group, LLC. on September 23, 2010. The Commissioner filed his answer on February 16, 2011.

Upon notice to the parties a hearing was held in this matter on June 27 and 28, 2013, in New York, New York, before Anne P. Stevason, then Chairperson 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, make statements relevant to the issues, and file legal briefs.

The order to comply with Article 6 (wage order) under review directs compliance with Article 6 and payment to the Commissioner for wages due and owing to claimants Maureen Brille and Mark H. Levine in the amount of $367,194.23 for the time period from January 1, 2007 through December 31, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $102,544.59, and assesses a civil penalty in the amount of $183,597.11, for a total amount due of $653,335.93.

The order under Article 6 (penalty order) assesses a $1,000.00 civil penalty against the petitioners for violating Labor Law § 191 (d) by failing to pay clerical and other workers in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance during the period from on or about December 15, 2008 through December 31, 2008.

The petitioners allege in relevant part that the orders are invalid because the compensation covered by the wage order was incentive compensation, not wages. The respondent answered that the money claimed was commissions, which are wages under the Labor Law.

A resolution of decision in this matter dated November 5, 2014, was served on the parties on November 14, 2014. By letter dated November 24, 2014, the respondent sought reconsideration and modification of our November 14, 2014 decision because of a mistake in the decision caused by a mathematical error. The petitioners, by letter dated December 1, 2014, did not object to the modification requested by respondent, but requested the Board strike the civil penalties because the penalty could only be imposed if the violation was willful or egregious, or there had been a history of prior violations, and the record did not support such a determination. We grant the respondent's application for reconsideration and modification and the decision is hereby modified as set forth below. The petitioners' request to strike the civil penalty is denied as explained below.

I. SUMMARY OF EVIDENCE

Background

On or about March 18, 2009, claimants Mark H. Levine and Maureen Brille filed claims for unpaid wages and commission salesperson summary sheets with the New York State Department of Labor (DOL) alleging their former employer, petitioners Russ D. Gerson and the Gerson Group, LLC, an executive recruiting firm, failed to pay them wages and commissions earned in 2007. Levine alleged that the petitioners failed to pay him $14,978.03 in wages and $133,707.00 in commissions. Brille alleged that the petitioners failed to pay her $35,021.30 in wages and $183,487.00 in commissions. The claimants provided numerous documents to DOL in support of their claims, which were contested by the petitioners. Following a compliance conference, DOL issued the orders on review which find all monies claimed by the claimants are due and owing in the exact same amounts claimed. Senior Labor Standards Investigator Cloty

Ortiz testified that a 50% civil penalty was recommended, because the petitioners were generally cooperative and had no prior history of Labor Law violations.

Petitioner Russ D. Gerson and claimants Mark H. Levine and Maureen Brille worked together at A.T. Kearney Executive Search, an executive recruiting firm. In 2005, Petitioner and claimants left A.T. Kearney Executive Search to start the Gerson Group, LLC., an executive recruiting firm primarily working to place candidates into positions at financial institutions. Gerson testified that he was the CEO and majority shareholder of the Gerson Group and managed client activity. Gerson testified that both claimants started at the Gerson Group in fall 2005 when the company was founded. Brille was managing director, Levine was director. The claimants both worked to generate new business activity and to execute existing client activity. According to Gerson, the claimants were the most senior employees at the firm other than himself.

Terms of employment

Levine's offer letter, dated November 4, 2005, and signed by himself and Gerson, provides that he will receive a base annual salary of $125,000.00, and

> "In addition to your base salary, you will be eligible to receive discretionary incentive compensation based on your individual performance in this position, as well as the profitability of the Gerson Group. As a target indication only, assuming you meet all of the requirements and expectations of your position, and the firm meets its revenue targets, your anticipated discretionary incentive compensation for calendar year 2006 will be in the range of 25% to 50% of your base salary and shall be paid quarterly. As consideration for any bonus you might have received from A.T. Kearney Executive Search for 2005, you will receive $20,000, to be paid in January 2006, which, at your option, may be paid to you in cash or used to acquire stock in the The Gerson Group at a significant discount.
>
> "You may play a significant role in originating and/or executing assignments. On such assignments you may come to a mutual agreement to share fees with other members of the Gerson Group. You will be eligible for additional incentive compensation in an amount equal to your agreed upon share of the fees less your fully loaded costs of employment excluding discretionary incentive compensation. The calculation and payment of the additional incentive compensation will be consistent with other members of the Gerson Group as will be more fully described in The Gerson Group compensation plan."

Brille's offer letter, signed by herself and Gerson on November 22, 2005, provides that in addition to her base annual salary of $200,000.00, she "will be eligible to receive discretionary incentive compensation based on [her] individual performance . . . as well as the overall profitability of The Gerson Group."

Gerson testified that "everybody" was eligible to receive bonuses, but no bonuses were paid in 2008 for 2007. He explained that he determined that in light of the overall economy and financial condition of the Gerson Group and the anticipated business climate and desire to keep the firm solvent through the financial crisis, that the firm was not sufficiently profitable to pay bonuses for 2007. Gerson produced financial records prepared by an outside accountant showing negative equity for the Gerson Group in 2007, and testified that the firm's financial condition was so poor that he loaned $800,000.00 to the company in 2008 from his own funds. Gerson further testified that the Gerson Group did not meet its revenue target for 2007, which he believes was $5 million and was discussed at strategy meetings with the claimants, but he does not recall any written agreement describing such revenue target. Gerson testified that under the offer letters, the claimants were not eligible for incentive compensation for 2007. Both claimants testified that there was no difference between a bonus and incentive compensation commissions, and the terms appear to be used interchangeably throughout the record.

Levine testified that he had two ways of being paid for work he did at the Gerson Group. He explained that his agreement provided that for help he provided to Gerson, he would receive a bonus of 35% to 50% of his base salary depending on what he did, and he would be eligible for a "formulaic" payout for revenues he generated through business development. He further explained that when revenues came into the firm, 50% went to the company, 10% went to a pool which was awarded at Gerson's discretion, and 40% went to the specific team involved in the assignment that generated the revenue. Additionally, Levine testified that he was also eligible for discretionary compensation based on a percentage of his base salary. He never received or saw a copy of the Gerson Group compensation plan referred to in the offer letter. Levine and Brille both testified that this was the practice at their prior employer, A.T. Kearney Executive Search.

Levine testified that he believed the Gerson Group was profitable in 2007 and knew that he was generating a profit for the firm which was confirmed by the fee allocation sheets provided to him by the company that showed he was bringing in more revenue in 2007 than he cost in salary and benefits. Levine testified that "profitability" in the offer letter meant whether he was personally profitable. Levine understood that discretionary incentive compensation meant "the discretion was whether I would receive 25 per cent or 50 per cent, where within that range the discretion was discretionary" which is what "the agreement says." He further testified that he understood the "discretion" in awarding bonuses was in the 25% to 50% range and in the "10 per cent pool."

Brille testified that she had an oral agreement with the petitioners that she would receive 40% of the fees she generated, and that she generated "a lot" of revenue for petitioners in 2008, which was a very good year for the firm. She testified that despite high revenues for the firm and significant hiring activity in the financial industry into fall 2008, she was never paid her portion 40% for 2007. Brille testified that she never had a written offer letter from the Gerson Group. She claimed that as part of a presentation for potential investors in 2008, Bronwyn Kelly, Gerson Group's COO, discovered that no written agreement existed for Brille and prepared one that was signed and backdated by Brille. Gerson disputed this, testifying that Brille's offer letter was signed in November 2005, not created in 2008 and backdated.

Brille stated she has no reason to think the firm was not profitable in 2007 despite having no access to the firm's financial records. The firm provided her a fee allocation spreadsheet in

2008 that verified what she had earned and was "a very clear" promise to pay the amounts listed. Brille further testified that throughout 2008, Gerson agreed with the claimants that he owed them bonuses, commissions, and base salary for 2007. Additionally, Brille testified that materials prepared to show potential investors in 2008 specified that the firm owed approximately $710,000.00 in outstanding bonuses for 2007.

In addition to claims for unpaid bonuses, the claimants alleged they were owed unpaid promised wages. There is no dispute that the petitioners through a professional employer organization (PEO) outsourced its payroll functions and that the PEO paid wages to the Gerson Group's employees from fees paid by the Gerson Group for such purpose. In 2008, Levine and Brille executed compensation reduction forms for several pay periods agreeing to reduce their salary to minimum wage. Gerson testified that all employees had their compensation reduced to minimum wage due to the poor financial condition of the firm at the time. Levine's salary was reduced to minimum wage from November 1, 2008 to December 31, 2008. Brille's compensation was reduced effective October 16, 2008 until December 31, 2008. Levine testified that in return for his agreement to reduce his compensation to minimum wage he was to be repaid the difference between his salary and the amounts actually paid, which was confirmed by a letter from Gerson, dated November 20, 2008, in which Levine's base salary subsequent to December 1, 2008 was reduced from $150,000.00 to $100,000.00. Brille also testified that Gerson promised to pay her deferred salary.

II. ANALYSIS

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

Burden of proof

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).

Employer status

The individual petitioner, Russ D. Gerson alleges that he is not individually liable as an employer. We disagree. "Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the 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 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" (internal quotations and citations omitted).

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, no one of which is exclusive." (*Id.* [internal citations omitted]). We find that under the totality of the circumstances, Gerson was the claimants' employer as a matter of economic reality. He was the founder, CEO, and majority shareholder of the Gerson Group, he hired the claimants in so much as he prepared and signed their offer letters, he controlled their conditions of employment to the extent that he was the firm's "rain maker" and brought in business to the firm that the claimants were dependent upon, he had final authority on binding the Gerson Group to contracts, and he determined the rate and method of the claimants' compensation, including based on his own testimony, whether to pay them incentive compensation. Accordingly, the respondent's determination that Gerson, individually, was an employer under the Labor Law is affirmed.

Wage order

$317,194.00[1] of the wages found due and owing by the wage order is attributable to what the parties variously and interchangeably referred to throughout the hearing as bonuses, incentive compensation, incentive compensation commissions, and commissions, and which the claimants called commissions in the claim forms filed with the respondent. Levine testified that there is no difference between a bonus and incentive compensation commissions, and Brille opined that "any kind of incentive compensation could be called a bonus or commission whether it's formulaic or discretionary." In order for these funds to be properly found due and owing by the respondent, they must meet the statutory definition of "wages." The Labor Law defines "wages" as "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" (Labor Law § 190 [1]).

The claimants' offer letters describe the compensation at issue as "discretionary incentive compensation" based on their "individual performance" as well as the "profitability of the Gerson Group." Levine's offer letter also describes "additional incentive compensation" based on sharing fees generated on certain assignments as fully described in the "Gerson Group

[1] Corrected from $352,215.30. Our original decision mistakenly included $35,021.30 in wages due and owing to Brille based on the difference between her base salary and her reduced salary with the commissions amount that we struck from the order, which accounts for the mathematical errors in the original decision that are corrected herein.

compensation plan." Because the claimants received base salaries and the incentive compensation, as clearly described by the offer letters, was not solely based on their own personal productivity, but was contingent in part on the employer's financial success, we find the compensation claimed by the claimants as unpaid bonuses was not within the statutory definition of "wages" and revoke that portion of the wage order (*See Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220 [2000]; *See also Garber v Deutsche Bank Securities, Inc.*, 32 Misc 3d 1239 [A] [NY Cty Sup 2011]; *Quirk v American Management Systems, Inc.*, 2002 U.S. Dist. LEXIS 22678 *6-7 [SDNY 2002]; *But see Ryan v Kellogg Partners Institutional Svcs*, 19 NY3d 1 [2012] [bonus expressly linked to labor personally performed is wage]).

We do not credit respondent's efforts to go beyond the written offer letters to establish that the compensation was earned commissions rather than incentive compensation and therefore within the statute. The claimants' testimony that the agreements they signed were not the actual terms of their employment was not persuasive. They each testified that they believed they were entitled to incentive compensation for 2007 because they personally brought in more revenues than their salaries and benefits cost the firm. However, the offer letters do not contemplate the employees' personal profitability, but clearly state that incentive compensation is partly based on the overall profitability of the Gerson Group. The offer letters, although perhaps not drafted with the precision we would expect from professionals with the experience of Gerson and the claimants, is clear on this point, and find it telling that the claimants did not allege they were owed incentive compensation for 2006 or 2008, years during which they worked for the petitioners but for which they appear not to dispute the Gerson Group's lack of profitability. The record does not adequately explain why 2007 should have been treated differently and the claimants owed compensation for bonuses, incentive compensation, and commissions, except that they believed the firm had done well[2]. Nor do we credit Brille's testimony that she worked under an oral contract for 40% of the fees she generated. She testified that she signed and backdated her offer letter in 2008. Gerson denied this and credibly testified consistent with the actual writing on the letter that it was executed in 2005 around the same time as Levine's[3]. Moreover, Brille's testimony of how she had earned incentive compensation for 2007 due to her personal profitability and her belief that the firm had done well undermines her later testimony that she had no written contract and was orally promised 40 % commissions. With respect to Levine's allegation that he was eligible for additional incentive compensation pursuant to his agreement as described in the Gerson Group compensation plan, it is clear that such plan, although perhaps contemplated in 2005, was never implemented by the Gerson Group as evidenced by Levine's testimony that one never existed that he had ever seen. Moreover, we do not agree with the respondent that the fee allocation sheets provided to the claimants or the advanced payments allegedly made on their 2007 incentive compensation plans indicate that additional incentive compensation was earned, since, as discussed above, incentive compensation is not covered by the statute as wages. Finally, we find that the "Strategic Partner in Financial Services Advisory & Executive Search," which Brille testified had been prepared by the Gerson Group's COO as part of a presentation for prospective investors has little probative value as an admission because it is incomplete and unreliable.

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[2] The claimants may very well be correct that the firm did better in 2007 than what Gerson admits, but even had the Gerson Group had sufficient profitability in 2007, whatever that means, the incentive compensation would still not constitute "wages" and the claimants' remedy, if any, would lie elsewhere.

[3] Levine does not dispute that he signed his offer letter in 2005.

The remainder of the wage order consists of the difference between the claimants' base salaries and wages actually paid during the time period when their wages were reduced to minimum wage. The claimants credibly testified with supporting documents that Gerson promised to pay them in this way, and Gerson does not appear to dispute having made such promise. Accordingly, that portion of the wage order is affirmed.

Civil penalty

The wage order assesses a 50% civil penalty. The petitioners argued in their response to the Commissioner's application for reconsideration and modification that no civil penalty is warranted in this case because Labor Law § 218 (1) allows for a civil penalty only for an egregious or willful violation, or where there is a history of prior Labor Law violations. We disagree. Labor Law § 218 (1) requires the Commissioner to impose a 200% civil penalty in cases of willful or egregious violations, or where there is a prior history of Labor Law violations. The Commissioner did not make such a finding in this case, and, therefore imposed a civil penalty less than 200%. Where the violation is not willful or egregious, and there are no prior violations, the Commissioner must impose an "appropriate civil penalty" (Labor Law § 218 [1]). The Commissioner in assessing the civil penalty applicable in this case where the petitioners failed to pay "wages, benefits or wage supplements," must "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" (*Id.*). The Board finds based on the testimony of Senior Labor Standards Investigator Cloty Ortiz that the considerations required to be made by the Commissioner in connection with the imposition of a 50% civil penalty were consistent with Labor Law § 218, supported by the record, and reasonable in all respects.

Interest

Labor Law Section 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 14A sets the "maximum rate of interest at sixteen percent per centum per annum."

Penalty order

The penalty order assesses a $1,000.00 civil penalty against the petitioners for violating Labor Law § 191 (d) by failing to pay clerical and other workers[4] in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance during the period from on or about December 15, 2008 through December 31, 2008. As discussed above, we found that promised wages in the amount of $49,999.33[5] were unpaid. Accordingly, the petitioners failed to pay the claimants at least semi-monthly in accordance with

[4] The penalty order classifies the claimants as clerical and other workers (Labor Law § 191 [d]), not commission salesmen (Labor Law § 191 [c]) which further supports our conclusion above that the compensation sought by the claimants is not wages (commissions are wages) and calls into question respondent's argument at hearing that the claimants were commission salesmen.

[5] Corrected from $14,978.93. *See* FN 1, *Supra.*

the agreed terms of employment, which were to pay the difference between the claimants' base salaries and the wages actually paid during the periods when their compensation was reduced to minimum wage. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the amount due and owing to $49,999.33[6] plus statutory interest, and to reduce the civil penalty to $24,999.66[7].

2. The penalty order is affirmed.

3. This decision modifies our decision of November 5, 2014, which is revoked.

4. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

Absent
J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2014.

[6] *Id.*

[7] Corrected from $7,489.47 to reflect 50% of the corrected amount of wages due and owing.