STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RANDY ZIELINSKI AND PRIORITY ONE NETWORKS LLC,	:	
Petitioners,	:	DOCKET NO. PR 12-160
To review under Section 101 of the New York Labor Law: Two Orders to Comply with Article 6 of the Labor Law, and an Order under Article 6 of the Labor Law, all dated August 29, 2012,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Randy Zielinski, petitioner pro se, and for Priority One Networks LLC.

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

WITNESSES

Randy Zielinski, for petitioners.

Jackie Berry, Brittany Ann Hainer and Lori Roberts, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On October 18, 2012, petitioners filed with the Industrial Board of Appeals (Board) a petition for review of three orders issued against them by respondent Commissioner of Labor on August 29, 2012. Respondent filed his answer on August 7, 2013. Upon notice to the parties, a hearing was held in Albany, New York, on April 15, 2014, before Wendell P. Russell, Jr., the designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order to comply with Article 6 (wage order) directs payment of wages in the form of an unpaid commission in the amount of $475.00 due and owing to Jackie Berry (claimant) from September 16, 2010 to June 8, 2011, $93.28 in interest at 16% calculated to the date of the order, $118.75 in liquidated damages, and $475.00 in civil penalties, for a total due of $1,162.03.

The second order to comply with Article 6 (supplemental wage order) directs payment of $3,246.15 in supplemental wages to claimant for accrued paid time off and a car allowance from September 16, 2010 to June 8, 2011, $594.80 in interest at 16% calculated to the date of the order, $811.54 in liquidated damages, and $3,246.15 in civil penalties, for a total due of $7,898.64.

The order under Article 6 (penalty order) assesses a civil penalty of $500.00 for violating Labor Law § 195 (4) by failing to establish, maintain and preserve payroll records from March 1, 2011 through March 31, 2011.

The petition asserts that petitioners do not owe claimant wages or supplemental wages, that petitioners have "valid payroll records" and that claimant was on maternity leave during the claim period.

SUMMARY OF EVIDENCE

The Wage and Supplemental Wage Claims

On December 27, 2011, Jackie Berry filed a claim with respondent for unpaid wages in the amount of $475.00 for a commission she had earned for a service-contract sale to the Berkshire Regional Transit Authority (Berkshire) and a claim for unpaid wage supplements in the amount of $2,746.15 for 17 days of paid universal time off that was unused at the time of claimant's discharge, and $500.00 for one month's unpaid car allowance, during her work as a telephone-system sales representative from September 16, 2010 to June 8, 2011.

Testimony of Petitioner Randy Zielinski

Zielinski, who signed claimant's Notice and Proof of Claim for Disability Benefits as "President and CEO" of Priority One Networks, LLC, and signed the petition as "Manager," testified that claimant was an employee who was paid a salary, commissions and a car/cell phone allowance. He testified that she started work on September 20, 2010 and ended on June 3, 2011.

With regard to the payment of commissions, Zielinski testified that petitioners pay commissions after a contract is signed and only after the second billing; he also testified that petitioners do not pay commissions until they themselves are paid by a customer or client. If a customer "churns" or cancels a contract within the first year, it is company policy to recover the commission by charging it back against new commissions earned by the employee. Employees are paid their commissions once for the period of each contract, with the amount of the commission being equal to the recurring monthly service charge.

Zielinski testified that the commission amount for the Berkshire sale was $379.00, rather than the $475.00 sought in the order, and introduced into evidence the service agreement between a company for which petitioners were an agent—One Communications—and Berkshire showing a recurring monthly charge of $379.00. Claimant was not paid the Berkshire sale commission

because two clients she had brought in cancelled before their contracts were up, requiring that commissions totaling $380.65 be deducted from the amount of the Berkshire commission, leaving nothing owing. In support of this, he offered three unsigned "commission statements" in the form of Excel spreadsheets for claimant for January, May and November 2011, along with documents Zielinski called "churned cancels," purporting to show that two customers—Greylock Bowl and Empire State Association of Assisted Living—cancelled before the end of their contract, requiring that the commissions be charged back.

Zielinski testified that in accordance with the terms of claimant's "employment offer agreement," which he did not provide to respondent during their investigation or bring to the hearing, claimant was to be paid $500.00 a month for a car/cell phone allowance. He testified that claimant was not paid this allowance while on disability and would not have been eligible for it because she was not performing her customary sales work that would require the use of a car. He testified that the allowance was "to cover use—gas usage and car maintenance . . . plus cell phone." He also submitted a "ledger of what's paid out for car allowances," which were paid by separate check generally issued the third week of each month. The ledger, he testified, showed that claimant was always paid the allowance except for March and April 2011, which coincides with the time when she was on maternity leave, but he stated claimant attended a client meeting during this period.

Zielinski offered into evidence claimant's completed Notice and Proof of Claim for Disability Benefits signed by claimant and himself for her disability leave beginning March 7, 2011. He testified that other than receiving and responding to emails regarding contracts and installation details and handling an installation problem for one of her customers, claimant had not worked while she was on maternity leave; he testified that she had not been paid during her maternity leave, but had received disability pay from an insurer. He also testified that there was no employee handbook during claimant's employment, and no written policy concerning the non-payment of the car/cell phone allowance during periods of disability, but that he verbally informed claimant of this before she went, and while she was out on disability; he could not provide dates for, and had no written documentation of, having done so.

Regarding the claim for 17 days of paid time off, Zielinski testified that when claimant negotiated her employment terms, he agreed to 20 days of accrued paid time off. He testified that there was a "sixty-day grace period" after hiring, so that paid time off would not begin to accrue until after an employee had been employed for 60 days. He testified that there was no employee handbook that set out or documented company policy that would have made claimant aware of the policies and practices governing her employment. Zielinski testified that petitioners did not have payroll records showing claimant's accrual of paid time off, but did have a spreadsheet showing how accruals were paid, and that claimant earned 4.6 hours of paid time off for each two-week pay period. He offered into evidence a spreadsheet showing, for every employee, "the vacation time accrual being used," and allowing petitioners to track each employee's paid time off that had been accrued and used. This spreadsheet was used by staff and was not given to employees. Zielinski testified that claimant is only entitled to .51 hours of pay.

Testimony of Senior Labor Standards Investigator Lori Roberts

Senior Labor Standards Investigator Lori Roberts testified that her duties include the review and investigation of minimum-wage, overtime, unpaid-wage and unpaid-wage-supplement

cases, and, in that capacity, she investigated claimant's claims. She testified that respondent contacted petitioners three times between January and March 2012 by letter regarding the claim and the pending orders, and none of the letters were returned by the US Postal Service as undeliverable. In August 2012, Roberts recommended that an order to comply be issued by respondent against petitioners. Roberts testified that the first time petitioners contacted respondent was in September 2012 when Zielinski left a voicemail for another investigator.

With regard to respondent's determination of a 100% civil penalty in the orders, Roberts testified that she took into consideration the fact that petitioner never responded to their inquiries. She also testified that her recommendation of a $500.00 civil penalty, was based on the size of petitioners' firm, petitioners' lack of cooperation and good faith, the total due claimant, any history of past violations by petitioners—of which there were none—and the gravity of the violation.

Regarding the claim, Roberts testified that claimant submitted a payroll record for the pay period of November 15, 2010 to November 28, 2010 showing an accrual rate for unpaid time off of 4.62 hours every two weeks. She testified that at that accrual rate, claimant would earn 15 days of vacation for each year of service and from this, concluded that claimant's accrual rate had been incorrectly calculated by petitioners, given that they had agreed to 20 days a year of paid time off. She also testified that respondent's investigators are trained to look for a written policy that notifies the employee of the specifics of the policy, and that no such document was ever produced by petitioners. Finally, in this regard, she testified that the proper vacation accrual rate for an employee earning 20 days of paid time off annually would be approximately 6.1 hours for each two-week pay period.

With regard to payment of commissions, Roberts testified that respondent's labor standards investigators are trained to look for a "written commission agreement that spells out the specifics of the agreement" and employers must maintain "commission reports, reconciliation reports . . . show[ing] what the commission is, what the account is, what the percentage or commission agreement percentage [is], and, if there are any charge-backs, how they were computed, and how the commission was computed." She testified that petitioners supplied no such records. Finally, Roberts testified that a commission "should be paid no later than the end of the month after the month in which the commission was earned" as determined by "the commission agreement," which should "be in writing and given to" employees.

Testimony of Claimant Jackie Berry

Claimant Berry testified that she worked for petitioner from September 2010 to June 2011 selling telecommunication services and systems. She testified that after an interview with Zielinski, she received an email, which was submitted into evidence, with an offer outlining the terms of her employment, including base pay of $46,000.00 for a "ramp up period" and $42,000.00 a year thereafter; 20 days of paid universal time off, which she understood to be paid time off for vacation, sick time or personal leave and which was to begin upon her date of hire; a healthcare benefit; and a car/cell phone allowance of $500.00 a month. She testified that she did not receive any written employment policies or procedures from petitioners.

Claimant testified that she submitted her claim to respondent after months of email exchanges, also submitted into evidence, with Zielinski in which she sought payment of $475.00 for a commission earned for a sale she had made prior to her discharge, and of the car/cell phone allowance she was owed for the time she had been on maternity leave. She testified that prior to

September 2011, Zielinski told her that he had not gotten paid on the Berkshire account and that he would not pay her the commission she had earned for the Berkshire sale until he had been paid. This assertion was confirmed by an email from Zielinski to Berry. She also testified that she based her claimed commission amount for the Berkshire sale on her proposal, which included a monthly recurring charge of $475.00, and had never been informed, prior to the hearing, that the Berkshire monthly service charge had changed to $379.00.

Claimant testified that she worked during some part of her maternity leave and this was confirmed in an October 31, 2011 email to Zielinski in which she wrote that she had been texting him "about customers 5 hours after giving birth and continued to follow up accounts and email while I was supposed to be out resting on maternity leave."

Testimony of Brittany Ann Hainer

Hainer testified that she worked as a sales account executive for petitioners from October 2009 to December 2010, selling telecommunication services and systems. She testified that she earned 15 days of universal time, which she understood to be a combination of sick, vacation and personal time. She did not recall any kind of waiting period for her benefits to begin.

Hainer testified that she earned both salary and commissions. She was not aware that petitioners had a charge-back policy regarding commissions, but as none of her customer contracts had ended before the contract-end date, she had not had any commissions charged back. Hainer received monthly commission payments, and recalled receiving a monthly statement, but not a reconciliation statement of commissions. She testified that she did not receive an employee policy and procedures manual during her employment, and did not receive a car/cell phone allowance, but submitted expense reports for which she was reimbursed.

Finally, Hainer testified, with regard to the contract for the Association of Community Living submitted by Zielinski as a sample contract, that the exhibit was only part of the contract and was missing "terms and conditions" pages. She could not recall if petitioners had a penalty for cancellation of a contract, although "[m]ost telecommunication companies do have one written in the terms and conditions" and "[n]ormally, it's a certain percentage for the number of months left in the contract the customer would still owe." While she recalled explaining to clients the petitioners' cancellation policy, she could not recall the details of it.

GOVERNING LAW

Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner is valid and reasonable (Labor Law § 101 [1]). Any objection not raised in the petition shall be deemed waived (*Id.* § 101 [2]). The Labor Law also provides that an order of the Commissioner shall be presumed valid (*Id.* § 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 (*Id.* § 103 [3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101 [2]). Petitioners have the burden to prove by a preponderance of the

evidence that the orders are not valid or reasonable (*Matter of Ram Hotels*, Inc., PR 08-078, at 24; Board Rule 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is, therefore, petitioners' burden in this case to prove the allegations in the petition by a preponderance of the evidence, showing that claimant was not entitled to wages in the form of a commission for the Berkshire sale, or to supplemental wages in the form of a car/cell phone allowance and of 17 days of paid time off, and that petitioners maintained and provided to respondent accurate payroll records.

An Employer's Obligation to Maintain Adequate Records and Respondent's Calculation of Wages in the Absence of Same.

The law requires that employers maintain payroll records that include, among other things, employees' daily and weekly hours worked, wage rate and gross and net wages paid (Labor Law § 195). Employers are required to keep such records open to inspection by the Commissioner or a designated representative. The claimant in this case was paid on a salary and commission basis, and sales commissions are considered "wages" (Labor Law § 190 [1]).

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, the Commissioner must 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 the disputed wages were paid. (Labor Law § 196-a). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson, supra*, the Appellate Division in *Mid-Hudson Pam Corp., supra*, agreed that: "[t]he public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee . . . . Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

Requirements to Pay Commission Salespersons

Labor Law § 191 (1) (c) governing the frequency of payment of wages and commissions to "commission salespersons" requires employers to provide them with a statement of earnings paid or due and unpaid upon written request, and requires that their agreed terms of employment be provided in a written sales agreement:

> "Commission salespersons -- A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned; provided, however, that if the monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments, may be paid less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan. The employer shall furnish a commissioned 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 the employer and the commissioned salesperson, kept on file by the employer for a period 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. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included. Such writing shall also 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."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Wage order

Respondent found that petitioners violated Article 6 of the Labor by failing to pay $475.00 in unpaid commissions to claimant. Labor Law §§ 190 (1) and 191 (1) (c) state that commissions are wages and that a written agreement must be given to the commission salesperson with certain

information. Regarding the commission for the Berkshire sale which is the subject of the order under review, Hainer testified credibly that it was petitioners' practice to include the payment of commissions with bi-weekly paychecks and not to wait until contract payments were received by petitioners. Claimant also testified, and respondent entered into evidence supporting documentary evidence that Zielinski's reason for refusing to pay claimant the commission was because petitioners had not been paid by the customer. Zielinski testified that petitioners had no written commission policy or procedures manual. Zielinski also testified that no commission was owing because petitioners had a policy whereby a commission would be charged back when contracts were ended early, and such was the case for claimant. Since petitioners admitted that there was no written agreement as required by Labor Law § 191 (1) (c), we credit the testimony of respondent's witnesses and conclude that claimant is owed a commission.

Regarding the commission amount, however, we find that the wage order must be modified. Claimant wrote on her claim form that the amount was $475.00; however, Zielinski introduced into evidence the Berkshire service agreement showing that the recurring monthly service charge was $379.00, and respondent provided no documentary evidence to the contrary. As both Zielinski and claimant testified that the commission amount normally was the equivalent of one month's service charge, we find that the wage order must be modified to reflect the amount of the $379.00 recurring monthly service charge in the Berkshire service agreement.

Supplemental wage order

Respondent also found that petitioners violated Article 6 of the Labor by failing to pay $3,246.15 to claimant for accrued paid time off and a car allowance for one month. Under Article 6, the requirement to pay wages includes vacation and holiday pay and allowances if there is an agreement to provide such benefits (*see* Labor Law §§ 190 [1], 198-c [2]; *see also Ross v Specialty Insulation Mfg. Co.*, 96 Misc 2d 940, 942 [Sup Ct, Albany County 1978], *affd* 71 AD 2d 766, [3d Dept 1979]). There is no dispute that claimant had negotiated for 20 days per year of paid time off; both claimant and Zielinski so testified. Zielinski testified that the accrual of time was to have been delayed for 60 days from the date of hire, per petitioners' policy and practice, although petitioner also testified that there was no employee handbook or manual explaining this policy. Nothing in writing was offered into evidence to confirm Zielinski's testimony that claimant's accruals did not start until 60 days after she was hired. We credit claimant's testimony that she was not told that her universal time had to be earned or accrued, and we credit Hainer's and claimant's testimony that they received nothing in writing to that effect from petitioners. To the contrary, claimant's testimony and respondent's documentary evidence confirm that the written terms and conditions of employment as reduced to email made no reference to such 60-day waiting period requirement. Further, we credit Hainer's testimony that there was no delay in her benefits when she was hired. We find respondent's determination that claimant was not paid for all of the time she had accrued upon her separation from petitioners' employment is reasonable and valid.

Regarding the car/cell phone allowance, Zielinski testified that claimant was entitled to this allowance as all other salespersons were, but that she was not paid the one month in dispute because she was on maternity leave during which time she did not perform any work that required the use of a car or cell phone. Claimant testified, and petitioner confirmed, that she returned to work six weeks after the birth of her child and that during her maternity leave she had emailed Zielinski on work-related matters, had handled an installation problem for one of her customers, and in fact used the phone for work purposes. Petitioner himself testified that claimant attended a

client meeting with him in March. Considering all of this, and absent any documentary evidence from petitioners as to notifying claimant of any restrictions on receiving the agreed-upon benefits, we find petitioners failed to meet their burden of showing respondent's determination that the allowance was owed to be invalid or unreasonable.

Liquidated Damages

The wage order and the supplemental wage order include liquidated damages in the amount of 25% of the wages and supplemental wages owed. Labor Law § 198 (1-a) provides that unless an employer proves a good faith basis for believing its underpayment of wages was in compliance with the law, liquidated damages of up to 100% shall be assessed. Petitioners did not present any evidence at hearing to challenge the Commissioner's determination to assess liquidated damages of 25% in the wage and supplemental wage orders. Consequently, we affirm respondent's determination as valid and reasonable in all respects. The wage order is modified as to the total amount of wages owed and the liquidated damages shall be reduced proportionally only in the wage order.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages or supplemental wages are due, then the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioners did not present any evidence at hearing to challenge the interest assessed in the wage and supplemental wage orders. Consequently, we affirm the interest imposed by respondent in all respects. The wage order is modified as to the total amount of wages owed and the interest shall be reduced proportionally only in the wage order.

Civil Penalties for Failure to Pay Wages and Supplemental Wages and for Failure to Maintain and Furnish Required Payroll Records Are Affirmed

The orders assess civil penalties of 100%, for a total of $475.00 for the wage order and $3,246.15 for the supplemental wage order. The Commissioner must impose an "appropriate civil penalty" when he determines that a violation is not willful or egregious and there is no history of prior wage-and-hour violations (Labor Law § 218 [1]), and 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 . . . the failure to comply with recordkeeping or other non-wage requirements" (*id.*). We credit Roberts' testimony that respondent considered the necessary elements in connection with the imposition of civil penalties under the wage and supplemental wage orders, when she testified that respondent "looked at cooperation, whether records were submitted . . . and good faith of the employer." Petitioners did not present any evidence to challenge the civil penalties. Thus, we find that the 100% penalty amount in the wage order is reasonable and valid, provided that that amount be modified, for the reasons stated above, to $379.00, in line with the Berkshire contract's monthly service charge, and the 100% penalty amount in the supplemental wage order is reasonable and valid.

As petitioners also failed to show that they maintained and furnished required records for claimant for the claim period, we find the penalty order's civil penalty of $500.00 for failure to keep required payroll records to be reasonable and valid as issued by respondent.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, as modified for a total amount due and owing of $379.00, with the interest, liquidated damages, and civil penalty to be reduced consistent with our decision; and

2. The supplemental wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 25, 2016.

As petitioners also failed to show that they maintained and furnished required records for claimant for the claim period, we find the penalty order's civil penalty of $500.00 for failure to keep required payroll records to be reasonable and valid as issued by respondent.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, as modified for a total amount due and owing of $379.00, with the interest, liquidated damages, and civil penalty to be reduced consistent with our decision; and

2. The supplemental wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York, on
May 25, 2016.