STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JOHN J. KENNELLY (T/A ADVANCED LEGAL PROCESSING & ASSOCIATES) ALSO (T/A ADVANCED LEGAL PROCESSING), Petitioner, 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 19 of the Labor Law, both dated September 3, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-271 RESOLUTION OF DECISION

APPEARANCES

John J. Kennelly, petitioner pro se.

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

WITNESSES

Petitioner John J. Kennelly, Claimant Philip Frank Muller, and claimant Christopher M. Zagavino, for petitioner.

Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

On October 31, 2014, petitioner John J. Kennelly filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against John J. Kennelly (T/A Advanced Legal Processing & Associates) also (T/A Advanced Legal Processing) by respondent Commissioner of Labor (Commissioner) on September 3, 2014. The Commissioner answered on December 30, 2014.

Upon notice to the parties, a hearing was held on March 13, 2015 in Hicksville, New York, before Board Chairperson Vilda Vera Mayuga, the designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 6 (wage order) directs payment to the Commissioner of unpaid wages due and owing to claimants Philip Muller and Christopher Zagavino in the amount of $2,400.00 for the period from February 7, 2014 to March 13, 2014 and March 12, 2014, respectively, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $184.12, liquidated damages (25%) of $600.00, and civil penalty (100%) of $2,400.00, for a total amount due of $5,584.12.

The order under Article 19 (penalty order) assesses a $500.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep or furnish true and accurate payroll records for each employee for the period from February 7, 2014 through March 13, 2014.

Petitioner alleges that: (1) he was not claimant's employer because claimants were independent contractors; (2) claimants elected to be paid by commission; and (3) the Commissioner erred in her calculation of wages owed because claimants worked fewer hours than alleged in their claim forms and failed to faithfully perform their duties.

SUMMARY OF EVIDENCE

The Wage Claim

On March 26, 2014, DOL's Division of Labor Standards received claims for unpaid wages from Philip Frank Muller and Christopher M. Zagavino alleging that petitioner failed to pay them for work performed as telemarketers between February 7, 2014 and March 14, 2014. The claim forms allege that Muller and Zagavino had agreed to a base hourly rate of $10.00, worked 30 hours per week over five days, and were owed $1,200.00 each for four weeks of work performed. Claimants quit due to petitioner's failure to pay them. Both claim forms indicate that when claimants sought payment from petitioner on March 14, 2014, he informed them that they elected to be paid solely by way of commission, which Muller and Zagavino both deny.

Testimony of petitioner John J. Kennelly

Petitioner John J. Kennelly testified that during the relevant time period he sold loan disposition analysis reports. Claimants' duty was to find borrowers in need of loan disposition and analysis reports. Based on lists of borrowers, some of which Kennelly purchased and provided to claimants, they were to make telephone calls to borrowers to set up appointments for petitioner or his sales agent to meet with homeowners. Once at the appointment, if petitioner determined a report would benefit the borrower, petitioner would offer a report for purchase. For each appointment made, claimants were to make a certain percentage of the sale as a commission with a percentage going to the sales agent.

Claimants represented to Kennelly that they were telemarketers experienced in obtaining appointments with homeowners in financial distress. Based on their prior experience, Kennelly believed claimants had other "sources" from which they could find borrowers in need of petitioner's financial services. Although "[t]hey never actually came on board officially," claimants would report to Kennelly's place of business to perform their duties, and he had them fill out and sign W-9 tax forms. Both claimants "were in and out of the office for a couple of weeks" and worked several hours per day.

Other individuals worked for petitioner during the claim period, including a sales agent, and an administrator. While telemarketing accounts for approximately 30% of Kennelly's business, he testified that claimants' job of calling borrowers in need of financial services was not instrumental to his business in part because there were other avenues for Kennelly to obtain business.

Kennelly provided claimants with "personal loans" in the form of an advance on future earnings. To determine how much of an advance claimants were to receive, Kennelly asked them how much money they would need to "get by" until they started to generate commissions. This agreement was not reduced to writing, because "they were on a trial basis. If they did business then we would have signed contracts." At least initially, Kennelly gave them money on a week-to-week basis because they were making ostensible appointments that would have generated a commission. None of these appointments, however, came to fruition. Kennelly testified that had claimants faithfully performed their duties, they would have generated a profit for themselves because they would have received commissions.

Eventually, Kennelly realized that claimants were not performing their duties and ceased providing them with any advances on future business, stating: "They did not provide any services or work for me, or anything of . . . consequence in my opinion." Kennelly further testified that he received no profit from the totality of claimants' work nor did they generate any commissions.

Testimony of claimants Philip Muller and Christopher Zagavino

Claimants Philip Muller and Christopher Zagavino were hired by petitioner on the same day. Petitioner would provide Muller and Zagavino with a list of "leads," from which they would place telephone calls. Using a "sheet" provided by petitioner that set out a number of questions, and never deviating from it, Muller and Zagavino would fill in answers prospective clients provided in order to determine whether the borrower qualified for petitioner's services. The manager of telemarketers would then review Muller's and Zagavino's interview sheets before approving the sales appointment.

Muller and Zagavino testified that petitioner agreed to pay them each $300.00 per week, for which they were paid at the end of the week. They further testified that petitioner paid them for their first two weeks of work. At some point, petitioner conditioned Muller's and Zagavino's weekly payment upon making sales appointments; but neither made any commissions. Though Muller and Zagavino did not have a fixed work schedule, they worked five-to-six days per week, reported to work between 9:30 a.m. or 10:00 a.m. and worked until 4:30 p.m. or 5:30 p.m. and would work for several hours on the weekend. They were free to come and go as they pleased. Claimants worked on computers petitioner provided and never worked from home. They did not own their business or business cards, nor did they independently solicit business.

Zagavino testified that he had previously worked for his father doing similar telemarketing work, so he had some pre-existing knowledge regarding interest rates, mortgages, and the secondary mortgage market—but "nothing too in-depth."

Muller testified that he and Zagavino resigned from their positions because they had not received payment for their work. Claimants sought petitioner for payment for work performed, and petitioner informed them that he did not have the money to pay them.

Testimony of Senior Labor Standards Investigator Joseph Ryan

Joseph Ryan testified that he is a senior labor standards investigator, a position he has held since May 2013. He was assigned to investigate Muller's and Zagavino's claims. Based on information provided in their claim forms, Ryan sent collection letters to Advanced Legal Processing regarding Muller's and Zagavino's claims on April 1, 2014 and April 2, 2014, respectively. On April 26, 2014, petitioner sent DOL a fax reading in relevant part "These two individuals were hired as independent contractors. Chris Zagavino and Philip Muller were both given advances or draws vs. commissions earned." Included therein were copies of W-9 tax forms for each claimant. On April 20, 2014, Ryan sent a letter to petitioner requesting documentation that claimants were bona fide independent contractors. Having received no further documentation from petitioner, respondent issued orders to comply on September 3, 2014.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the order on review is claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*Id.* § 101 [2]).

The Labor Law provides that an order of the Commissioner is presumptively valid (*Id.* § 103 [1]). Should the Board find the order or any part thereof is invalid or unreasonable, the Board shall revoke, amend or modify the order (Labor Law § 101 [3]).

The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR 65.39). For reasons set out below, we modify the wage order and affirm the penalty order consistent with the findings below.

Claimants Were Petitioner's "Employees" and Not Independent Contractors

An "employer" is defined in Article 6 of the Labor Law as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (*Id.* § 2[7]). The Federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp2d 184, 189 [SDNY 2003]).

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for himself (*Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR 10-182, p. 5 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]). Accordingly, we must determine whether the claimants were "wearing the hat of an independent enterprise" (*Exceed Contracting, Id.*, PR 10-182, p. 5, quoting *Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]). To make this determination, we must consider several factors known as the "economic reality test." They include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and his investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]; *Matter of Maria Lasso and Exceed Contracting Corp.*, PR 10-182 at 5 [April 29, 2013] [citing *Brock* factors as test to determine independent contractor status under the Labor Law], *aff'd. sub nom, Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]).

The test is based on the totality of circumstances and no one factor is dispositive; "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Superior Care*, 840 F2d at 1059).

The existence and degree of each of these factors is a question of fact, and the legal conclusion to be drawn from these facts is a question of law (*Superior Care*, 840 F2d at 1059). In applying the factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy (citation omitted)" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

Applying this test to the present case, we find that claimants were petitioner's employees and not independent contractors as a matter of economic reality, and petitioner is responsible for wages owed. We address each of the *Superior Care* factors in reverse order.

Claimants are employees in part because their work was "part of the integrated unit of production" (*Rutherford Food Corp. v McComb*, 331 US 722, 729 [1947]). Petitioner's business sold mortgage products, and he hired claimants to place telephone calls to prospective clients to assess their eligibility for petitioner's services. Based on sales appointments made by claimants, petitioner or a sales agent would meet with the prospective client in order to further assess whether

the homeowner would benefit from purchasing a loan disposition analysis report. While petitioner contends that claimants were not instrumental to the business, in part because petitioner alleged there were other avenues for him to turn a profit, work can be integral to a business even if the work is just one component of the business or is performed by other workers (*see Matter of Melissa L. Dewey*, PR 14-099 at 8 [March 2, 2016] ["While petitioner's primary business may be building residential homes, the financial accounting necessary to operate that business for which claimant was hired to perform work was sufficiently integral to its operation as to be evidence of her status as an employee"). Petitioner's testimony that telemarketing of the type performed by claimants accounted for approximately 30% of his business belies his contention. We find claimants' duties are sufficiently integral as to be evidence of claimants' status as employees, not independent contractors (*see id.*).

As to the permanence or duration of the working relationship, we find that the short duration of the working relationship between petitioner and claimants was not related to claimants' independent business initiative. Petitioner contends that he retained claimants on a trial basis, and "if it had worked out," he would have offered claimants contracts. Petitioner offered W-9 tax forms signed by claimants, but, standing alone, these tax forms are of little probative value because "an employer's self-serving label of workers as independent contractors is not controlling" (*Superior Care*, 840 F2d at 1059). Petitioner offered no further evidence that the business relationship was on a project basis or otherwise limited in duration other than failure of the business relationship. Instead, the record evidence suggests potential indefiniteness to the business relationship. That the transience of the business relationship was not a function of "operational characteristics intrinsic to the industry" is further evidence of claimant's status as employees (*id.* at 1060–61).

The absence of claimants exercising independent business skills, judgment, and initiative point further in the direction of their economic dependence. Claimants' sole duty was to place telephone calls in the hope of locating homeowners in need of petitioner's services. To facilitate these duties, petitioner purchased lists of homeowners, which determined the calls claimants made. While petitioner contends that he would provide claimants with "some of the leads," he presented no further evidence to rebut claimants' testimony that they never found clients based on their independent business initiative nor did they possess indicia of persons in business for themselves, such as possessing business cards or working remotely. Moreover, claimants' testimony, which went unchallenged by petitioner, was that they, as telemarketers, worked from a pre-made interview protocol, from which they never deviated. Even if claimants exercised some minimal amount of skill or judgment in placing calls to borrowers, their work was reviewed by a manager whose duty it was to make the final determination on whether claimants could finalize a sales appointment, thus limiting claimants' use of independent business skills, judgment, and initiative. Petitioner alleges that claimants represented "certain claims of productivity and knowledge of the business and experience," but "the fact that workers are skilled is not itself indicative of independent contractor status" (*id.* at 1060). Even specialized, technical skills used to perform the work do not indicate that workers are in business for themselves (*see id.* [noting that for skills to be indicative of independent contractor status, they should be used in some independent way, such as demonstrating business-like initiative]). Claimants' work was in substantial part rote and thus further evidence of the economic dependence upon petitioner.

The nature and extent of the relative investments of petitioner and claimants in the business and their respective opportunity for profit or loss does not support petitioner's contention that claimants were independent contractors. Petitioner has put forth no evidence to suggest that

claimants made any material investment pursuant to claimants performing their duties that would suggest they are in business for themselves. Instead, petitioner provided the office space, computers, telephones, calls lists, and interview sheets that allowed claimants to perform their duties. Claimants' dearth of investment in the business and, as we discussed above, the rote nature of claimants' work sharply limits their ability to make decisions or use their managerial skills and initiative, if any, to affect their opportunity for profit or loss. Thus, we reject petitioner's argument that claimants would have been able to generate a profit for themselves by way of their commissions indicating they were economically independent. While claimants were free to work additional hours to increase their income, this does little to separate employees from independent contractors, both of whom are likely to earn more if they work more and if more work is available (*see, e.g., Scantland v Jeffry Knight, Inc.*, 721 F3d 1308, 1316-1317 [11th Cir 2013] ["Plaintiffs' opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee's ability to take on overtime work or an efficient piece-worker's ability to produce more pieces."]).

The record before us fails to show that claimants controlled meaningful aspects of their work such that it is possible to view them as persons conducting their own business. While all work claimants performed was done from petitioner's place of business, petitioner set no work schedule for claimants, allowing them to come and go as they pleased. Nonetheless, the fact that claimants could control the hours during which they worked is largely insignificant in determining their status (*see Superior Care*, 840 F2d at 1060 ["An employer does not need to look over his workers' shoulders every day in order to exercise control"]). In light of the discussion set out above, we find that petitioner has not met his burden of showing that claimants controlled meaningful aspects of their work sufficient to support their economic independence from petitioner.

Finally, while petitioner argues that he never derived any profit from claimants' work, petitioner nonetheless acknowledged that claimants performed work placing telephone calls in order to schedule appointments; his quarrel was over whether the applications resulted in business for petitioner. We find the record establishes that claimants were "permitted or suffered to work" by petitioner and they were thereby "employed." It is impermissible for an employer to withhold wages based on dissatisfaction over the quality of the work performed (Labor Law § 193; *Matter of Melissa Dewey*, PR 14-099 at 8; *Guepet v Intl. TAO Sys., Inc.*, 110 Misc 2d 940, 941 [Sup Ct, Nassau County 1981]).

Based on the totality of circumstances, we find that as a matter of economic reality claimants were dependent upon petitioner as their employer during the claim period and thereby petitioner is responsible for any back wages owed.

Petitioner Failed to Produce Written Evidence of an Agreement between Himself and Claimants as "Commission Salespersons" as Required by Law

The Commissioner is entitled to the presumption that the term of employment claimants presented—a base rate of $10.00 per hour—is, by operation of law, the agreed term of employment.

Labor Law § 190 (6) defines a "commission salesman" as any employee whose principal activity is the selling of "any goods, . . . services . . . or thing and whose earnings are based in

whole or in part on commissions." Labor Law § 191 (1) (c) governs the frequency of payment of wages and commissions to "commission salespersons" and requires employers to provide a statement of earnings paid or due and unpaid upon written request, and expressly requires that the agreed terms of employment be provided in a written sales agreement. "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" (*id.*).

It is uncontested that claimants' sole duties while employed by petitioner were working as telemarketers pursuant to petitioner's business of selling mortgage products to distressed borrowers. Petitioner admitted that he had not entered into a written sales agreement with claimants setting out the agreed terms of employment. While petitioner contends that he had hired claimants on a one-month provisional basis, upon completion of which he would enter into a written agreement with claimants, the plain language of Labor Law § 191 (1) (c) recognizes no such probationary period. We therefore find the Commissioner's reliance upon the base rate stated in Muller's and Zagavino's respective claim forms was reasonable (*id.*).

The Commissioner's Wage Calculations are Upheld

The Labor Law requires employers to maintain accurate payroll records that include, among other things, employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain the records for no less than six years (*id.*).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

Petitioner produced no payroll records establishing the hours that claimants worked and the wages they are owed during the claim period, instead explaining that as a general matter petitioner only retained records if the claimant opted to retain the individual on a permanent basis. The Appellate Division held in *Angello v National Finance Corp.*, however, that where the employer does not provide records required under the Labor Law, "regardless of the reason therefore," the presumption favoring the Commissioner's determination based on the employee's statements applies (1 AD3d 850, 854 [3d Dept 2003]).

In lieu of adequate payroll records, petitioner disputed the Commissioner's calculation based principally on his unsubstantiated claim that claimants failed to perform their duties. We have repeatedly held that such conclusory testimony is insufficient to meet an employer's burden of proof (*see, e.g., Matter of Iqbal Ahmed*, PR 12-081 at 9 [April 13, 2016]; *Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]). Also incredible is petitioner's contention that claimants worked only several hours per day. In the absence of reliable employment records or other

In lieu of adequate payroll records, petitioner disputed the Commissioner's calculation based principally on his unsubstantiated claim that claimants failed to perform their duties. We have repeatedly held that such conclusory testimony is insufficient to meet an employer's burden of proof (*see, e.g., Matter of Iqbal Ahmed*, PR 12-081 at 9 [April 13, 2016]; *Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014]). In the absence of reliable employment records or other evidence to substantiate petitioner's claim that claimants worked on several hours a day, we credit claimants' testimony that they worked thirty hours per week as stated in their claim forms (*see* Labor Law § 196-a). Accordingly, we find the Commissioner's calculation of claimants' hours to be a reasonable approximation as it was based on claimants' written claims submitted to DOL and supported by claimants' credible, specific, and unrebutted testimony at hearing that they worked between 9:30 a.m. or 10:00 a.m. until 4:30 p.m. or 5:30 p.m. during the week and would work for several hours on the weekend for a total of 30 weekly hours (*see Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688 [1946] ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records."]).

We must modify, however, the wage order as to the amount of wages owed. At hearing, Muller and Zagavino testified that petitioner paid them for their first two weeks of work, including the week of February 21, 2014. Accordingly, we recalculate the wages owed for the period of the claim from February 7, 2014 to March 13, 2014, utilizing a pay rate of $10.00 per hour at 30 hours per week, crediting petitioner with a payment of $300.00 for the week ending February 21, 2014, for a total of $1,800.00 due and owing.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment 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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioner did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). However, consistent with our findings above, the amount of interest in the wage order must be recalculated.

Liquidated Damages

Labor Law § 198 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed 100% of the total amount of wages found to be due. Petitioner did not challenge the liquidated damages assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). However, consistent with our findings above, the amount of liquidated damages in the wage order must be recalculated.

Civil Penalty

Labor Law § 218 authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioner did not challenge the civil penalties assessed in the wage order and the issue is thereby waived

Penalty Order

Labor Law § 661 and 12 NYCRR 142-2.6 require that every employer establish, maintain and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment. Petitioner did not challenge the penalty order and the issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed, but modified to reduce the amount of wages owed to $1,800.00, with the interest, liquidated damages, and civil penalty reduced proportionally; and

2. The penalty order is affirmed; and

3. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in Albany, New York, on
July 13, 2016.