

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 ANDREW KAUFMAN and GLOBAL PORTFOLIO :
 TRADING, LLC, :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: An :
 Order to Comply with Article 6 of the Labor Law, :
 dated April 4, 2008, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
 -----X

DOCKET NO. PR 08-088
RESOLUTION OF DECISION

APPEARANCES

Andrew Kaufman, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin T. Garry, of Counsel, for Respondent.

WITNESSES

Andrew Kaufman; [REDACTED]; Zenaida Berroya; Frank King, Senior Labor Standards Investigator, New York State Department of Labor Division of Labor Standards.

WHEREAS:

On June 23, 2008, Andrew Kaufman and Global Portfolio Trading, LLC (Petitioners) filed an Amended Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66), seeking review of an order to comply that the Commissioner of Labor (Commissioner or Respondent) issued against them on April 4, 2008. The order to comply with Article 6 of the Labor Law finds that Petitioners failed to pay wages to [REDACTED] (Claimant), and demands payment of \$3,779.59

in unpaid wages, interest at the rate of 16% calculated to the date of the order in the amount of \$2,032.90, and a 25% civil penalty in the amount of \$945.00 for a total amount due of \$6,757.49.

The Petition alleges that the Order is unreasonable and/or invalid because the Claimant's draws exceeded her commissions, and her last two weeks of draw were used to cover the deficit in her account.

The Commissioner filed a motion to dismiss in this matter alleging that the Petition was untimely. The Petitioners opposed the motion and a hearing was held on March 27, 2009. The Board denied the motion by letter to the parties dated May 29, 2009. The Commissioner filed her answer to the Petition on June 2, 2009, and upon notice to the parties, the Board held hearings on the merits of the Petition in Old Westbury, New York on December 3, 2009 and January 7, 2010 before Board Member Jean Grumet, Esq., the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Petitioners broker loans in the secondary mortgage market.¹ In March 2004, [REDACTED] was hired by Petitioners for a loan acquisition position and was paid solely on a commission basis. Claimant's job entailed soliciting banks to send their portfolios to Petitioners so that Petitioners could bid on millions of dollars in loan packages, which Petitioners would then place with an investor. It is undisputed that under the terms of the Claimant's initial commission agreement, she would get 50% of the Petitioners' commission on any completed deal. Both Kaufman and [REDACTED] testified that a typical commission would be 1% of the loan, and they would split that commission 50-50. When she was hired, Claimant was under the impression that she would eventually learn the technical aspects of placing the loans she solicited from banks with investors, and that she could earn \$70,000 in a single commission. By August 2004, however, Claimant became frustrated because although she brought in approximately 35 deals, 32 of them did not close, and she had earned only a few thousand dollars in commission. [REDACTED] told Kaufman that she was upset because she was not earning any commissions. To remedy this situation, Kaufman and [REDACTED] verbally agreed that Claimant would receive a bi-weekly "forgivable draw" based on \$24,000 per year. [REDACTED] testified that:

"We went back to the office. I was standing there – I can remember a triangle, and he was explaining to [Petitioners' bookkeeper] Zenaida that I would be paid based on \$24,000 a year. And Zenaida didn't understand what a forgivable draw was. And Andrew said "Think of it as a salary. It never has to be repaid."

The "forgivable draw" was paid by check on a bi-weekly basis. Five of the six bi-weekly checks [REDACTED] received contained the notation "FD" and the dates that Claimant

¹ Kaufman admitted that Petitioners were employers within the meaning of Labor Law § 190(3).

worked on the memo line. In October 2004, the annual basis for the “forgivable draw” was raised to \$30,000.

Kaufman and [REDACTED] have different interpretations of what was meant by “forgivable draw.” Kaufman testified that a “forgivable draw” was an advance against future commissions and that if Claimant “ever left the company for any reason, she would not have to pay me back any of the draw.... That’s why we call it a forgivable draw. Some people pursue salespeople... so I told her the forgivable draw, meaning that I wouldn’t pursue her for the money she owed me if she left the company.” According to Kaufman, if [REDACTED] earned a commission, “it would go to cover her draw first and then whatever was left over she would get.” Since she was overdrawn over \$5000 at the time of the Soma commission “that money would not be due her. It would just go to pay down the draw.”

[REDACTED] testified:

[W]e both know, having been in the mortgage industry for a long time, a forgivable draw is something that once it’s paid never has to be paid back. Never. We had an understanding that we would go for a forgivable draw and the first time that I made one of those \$60,000 commissions, he would not have to give me any more salary, forgivable draw.”

“We came up with forgivable draw with the understanding that as soon as it was paid, it was forgiven and no monies would be taken away from any commissions. That was our understanding.”

When [REDACTED] was asked by the Hearing Officer if she ever discussed with Kaufman what the terms of the forgivable draw would be, [REDACTED] replied, “Well, I was sure that he knew what it was... So yes, I believe we did, and it is only now that I am hearing differently.”

On November 23, 2004, Claimant was terminated. On November 26, 2004, Petitioners received a wire transfer of \$3,405.33 in commission for a transaction (described as the Soma deal) that Claimant had solicited. It is undisputed that claimant’s commission on the Soma deal was \$1,702.67, which represented 50% of Petitioner’s commission. Petitioner withheld Claimant’s final bi-weekly draw, and did not pay her any part of the \$1,702.67 Soma commission.

On April 14, 2005, [REDACTED] filed a claim against Petitioners with DOL for two weeks of unpaid wages and \$5,000 in unpaid commissions for the Soma deal. In response to the claim, Kaufman told DOL that the Claimant was not entitled to any commissions on the Soma deal because her draws exceeded the \$1,702.67 commission due on the Soma deal, and her last two weeks’ draw was not paid to offset her deficit in earned commissions.

Senior Labor Investigator Frank King reviewed the Petitioners’ records two years after the claim was filed, and noticed a discrepancy in a chart Kaufman supplied to the DOL. Kaufman’s chart listed check 1930 as payment for the period “10/23 – 11/1/04”, but King noticed that the memo line on the check indicated the dates of work as “10/15-10/28.” King

concluded that the Claimant had not been paid for work performed after October 28, 2004, and was therefore owed a draw for three weeks and three days rather than the two weeks she originally claimed. King testified that in a phone conversation with Kaufman, he requested any other checks that Kaufman had, but none were ever provided. [REDACTED] testified that when King mentioned the discrepancy to her, she realized that she had been at a convention in Boston at the time she would have been paid for work after October 28th, and did not realize she had not been paid until King brought it to her attention. During the first day of hearing, Kaufman testified that the checks he supplied to the DOL might not have been all of the checks that he wrote to Claimant. When the hearing resumed more than a month later, however, he failed to furnish any additional checks to [REDACTED] for her work during the eighteen-day period from October 28 to November 23, 2004.

King testified that during his investigation, he had a conversation with Petitioners' bookkeeper, Zenaida Berroya, who explained that a forgivable draw "is quite similar to a salary except for the fact that if the claimant earns sufficient commission to exceed her draw on a biweekly basis, then the draw would no longer be paid." Berroya, a friend of [REDACTED], was Petitioners' part time bookkeeper for a year and a half until she, herself, was terminated in April 2005. She testified that she did the bi-weekly payroll and wrote checks at Kaufman's direction. According to her testimony, Kaufman told her that [REDACTED] payments were "going to be forgivable draw, and I didn't understand first what a forgivable draw was, so he explained it to me... it will be like a salary and it's not going to be paid back. And it's going to stop when [REDACTED] is going to get, like, a big commission." On re-cross examination, Berroya testified that forgivable draw:

"is independent of the commission because she is only getting that forgivable draw because she doesn't have any commission for that — you know, for that month. And I don't know what the arrangement was with her. I was just given the instruction that I am giving [REDACTED] a forgivable draw based on the \$24,000 a year every two weeks... I really don't have any—what do you call it? I am not included in their—whatever agreement they... agreed upon."

King testified that after investigating the case, he concluded that forgivable draw "was more or less in a structure of a base salary; however, one condition is that if the claimant's commissions exceeded the amount of her draw, the draws would not be paid...during that biweekly period." At the hearing, however, he testified that because there was no written agreement explaining how [REDACTED] draws and commissions would be paid, "there is no way for us to definitively determine the exact terms." King stated that because every commission structure could be different, there is no generally held definition of draw against commissions, and that a draw "in many situations" is "calculated against the commissions during a specific or specified period of time; however, that may not always be the case." King conceded that Kaufman's explanation of "forgivable draw" (as an advance against future commissions, which Petitioners would not have to pay until earned commissions exceeded the draw advanced) "could be a possibility."

DISCUSSION

STANDARD OF REVIEW

In general, the Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for review. 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].

When reviewing an Order to comply issued by the Commissioner, the Board shall presume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

“Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter.”

Pursuant to Board Rule 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 that the Order under review is not valid or reasonable in the respects asserted in its Petition.

EMPLOYER’S OBLIGATION TO PAY WAGES

At all times relevant to this proceeding, Article 6 of the Labor Law provided that a commissioned 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 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 commission salesman, upon written request, a statement of earnings paid or due and unpaid.”²

² Labor Law § 191(c) was amended in 2007. The statute now requires a written agreement describing “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.” The present case arose in 2005 before this amendment to Labor Law § 191(c).

(Labor Law § 191[1] [c]).

Article 6 further provides:

“If employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred, as established in accordance with the provisions of this section.”

(Labor Law § 191 [3]).

If the Commissioner determines that an employer has violated these provisions, the Commissioner is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages, benefits or wage supplements found to be due and owing.

When an employee is regularly paid a draw/advance against commissions, the draw/advance constitutes the employee's minimum compensation and, absent an agreement to the contrary, does not need to be repaid to the employer, even if the employee's draws exceed the commissions earned. The draw can only be recouped against future commissions. In addition, a regularly paid draw is considered the employee's minimum compensation and must be paid for the entire period of the employee's employment. As we stated in *Matter of York Furniture Centers, Inc.*, Docket No. PR 06-081 (August 27, 2009):

“There is a long line of New York cases dealing with advances against agents' commissions. They hold uniformly that, in the absence of a specific agreement to the contrary, a commission salesman who receives advances on account of anticipated commissions is not personally liable for repayment of the advances. The advances are treated as prepaid compensation and are credited against commissions as they subsequently become payable” (citations omitted).

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR § 65.39).

The Board is called upon in this matter to determine the amount of unpaid draws against commission owed to the Claimant by the Petitioners, if any, and to rule on whether the Claimant is due any commission from a transaction she worked on for the Petitioners referred to as the Soma deal. For the reasons set forth below, we find that the Petitioners did not meet their burden to prove that the Commissioner's determination that the Petitioners owed the Claimant \$2,307.78 in unpaid draws against commission, representing unpaid draws from October 29 to November 23, 2004, was unreasonable; however, the Petitioners have met their burden of proof to show that they do not owe the Claimant a commission for

the Soma deal.

A) Claimant is owed unpaid draw for the period from October 29 to November 23, 2004

It is undisputed that Petitioners owe Claimant two weeks of draw. As Senior Labor Standards Investigator King testified, there were discrepancies between the dates provided in a chart prepared by Kaufman (which shows the dates Claimant was paid her draw) and the actual checks paid to [REDACTED], which indicate different dates. An analysis of the checks supplied to the DOL confirms King's determination that [REDACTED] was not paid her draw from October 29, 2004 until her last day of work on November 23, 2004:

Check No.	Check Date	Check Amount	Date of draw according to Petitioner's chart	Actual dates of work covered by payment
1814	8/19/04	\$1,000.00	August	Not indicated
1830	9/2/04	\$ 923.00	9/2 -9/16	8/20 - 9/2/04
1856	9/9/04	\$ 923.00	9/6 - 9/30	9/3 - 9/16/04
1879	9/30/04	\$ 923.08	9/30 - 10/14	9/17 - 9/30/04
1901	10/14/04	\$ 923.08	10/14 - 10/28	10/1 - 10/14/04
1930	10/28/04	\$1,153.84	10/28 - 11/11	10/15 - 10/28/04

Investigator King testified that during the investigation, DOL asked "numerous times for all the documentation" that Petitioners had regarding payment to Claimant, and "nothing else was supplied." On the first day of hearing, Kaufman testified that the checks he submitted during the investigation might not have been all of the checks paid to Claimant. Nonetheless, when the hearing continued more than a month later, Kaufman did not proffer any additional checks and merely argued that it was unlikely that Claimant would forget about a missing check in excess of \$1,000.00. [REDACTED] testified that when King brought the discrepancy to her attention, she remembered that she was at a convention in Boston soliciting bank portfolios at the time, and did not realize she had not been paid.

The burden of proving that the Claimant was paid for the period of October 29 through November 23, 2004 is the Petitioners'. They were legally required to keep payroll records, and were repeatedly asked for documentation of any payment to Claimant. Having no documentation to support their position, Petitioners have failed to meet this burden.

B) A commission is not due to Claimant for the Soma deal

Kaufman and [REDACTED] agree that Claimant was promised a "forgivable draw," but disagree on what was intended by that term. Kaufman described the draw as compensation [REDACTED] would be paid regardless of how low her sales might be. She would receive additional payments beyond the draw only if her earned commissions exceeded her draw. If not, the draw could be recouped out of future commissions, but return of the draw itself could never be demanded by the Petitioners if [REDACTED] left the company, regardless how low her sales might be. According to Kaufman, this is why the draw is termed "forgivable." The compensation scheme he described is essentially the same

type of compensation described as typical in *York Furniture Centers, Inc.*, *supra*: the “commission salesman who receives advances on account of anticipated commissions is not personally liable for repayment,” but the advances are “credited against commissions as they subsequently become payable.”

[REDACTED], on the other hand, described the forgivable draw as a guaranteed base salary with any commissions she earned to be paid in addition to the draw. What distinguished the draw from a “salary,” by her account, was simply an agreement that “the first time that I made one of those \$60,000 commissions,” Kaufman would cease to pay the draw, whereas a salary, in [REDACTED] understanding, would continue indefinitely. Here, regardless of [REDACTED] personal understanding of the term “forgivable draw,” nothing substantiates her position that terms of employment, which included that understanding, were ever agreed on.

The evidence shows the term “forgivable draw” can have various meanings and is understood differently by different people. King testified that without a written agreement there is no way to “determine the exact terms,” and that “every commission structure could be different... there was no clear definition,” and that “I cannot generally provide an answer” as to the term’s meaning. Kaufman and [REDACTED] had different understandings of the term.

In a New Jersey case involving an identical dispute, the court found that:

“Plaintiff understood that ‘forgivable draw’ was ‘money...that [the employer] would not deduct against...commission earnings’...He believed he was entitled to his draw plus his commissions.

“His employer, on the other hand, considered a forgivable draw to be an advance on commissions; if the employee earns less in commissions than the amount of the draw, the employee is not required to pay the shortfall back to the employer. Nevertheless, if the employee earned more commissions than the draw, the employee would receive only those commissions above the amount of the draw”

(*Noto v. Skylands Community Bank*, 2005 N.J. Super. Unpub. LEXIS 408, **5-6 [N.J. App. Div. Sept. 28, 2005]).

The *Noto* court found a factual hearing on the contract’s meaning necessary, and noted that an enforceable contract requires that “both parties must have a common intention to the contract’s terms and meaning.... ‘The contract cannot be based upon the secret or hidden intention or understanding of one party’” (*Id.*, *15 [citation omitted]).

[REDACTED] testified to an “understanding” that her interpretation was correct, although there was no evidence that Kaufman or even [REDACTED] herself had ever expressed such an understanding. When the Hearing Officer asked [REDACTED] if she and Kaufman had “ever discuss[ed] what the terms of forgivable draw would be,” [REDACTED]

responded: "Well, I was sure that he knew." That does not establish agreement on the term's meaning.

██████████ testified that when Berroya "didn't understand what a forgivable draw was.... "Andrew said, 'Think of it as a salary. It never has to be repaid.'" She also testified that Kaufman said "that if I made other little commissions, it didn't do anything. But if I made a \$60,000 commission... at that point all forgivable draw would stop."³ Kaufman's reported comparison of the forgivable draw to a salary that never has to be repaid does not show an agreement to pay commissions in addition to the draw; such a description is equally consistent with Kaufman's position that ██████████ would receive at least the draw each pay period and would never have to repay it, even if she left the company.

Similarly, ██████████ testimony that Kaufman said that the draw would stop if she made a \$60,000 commission does not imply that she was to receive commissions from the first dollar sold while the draw continued. Nor does her testimony that Kaufman instituted the forgivable draw because she was dissatisfied with her small earnings in contrast to the \$60,000 commissions she expected establish the correctness of her interpretation. It is equally consistent with Kaufman's interpretation of the arrangement, as a guaranteed income which she would receive even if her earned commissions were very small, and would be able to keep even if she ultimately left the company. While both ██████████ and Kaufman implied that "forgivable draw" is a term of art that is generally understood in the mortgage industry, they did not agree on what that supposed understanding is, and it is clear from King's testimony that the Commissioner did not base her finding on any determination that the term has a special meaning in the industry (*Cf. Noto, supra*).

As a general matter, *York Furniture Centers, Inc.* implies that Kaufman's understanding of forgivable draw is not only permissible, but is a standard method for compensating commission salespeople, which has been presumed to be in effect in the absence of a special agreement to the contrary:

"When an employee is regularly paid a draw/advance against commissions it is generally held that the draw/advance constitutes the employee's minimum compensation and, absent an agreement to the contrary, does not need to be repaid to the employer, even if the employee's draws exceed the commissions earned. *The draw can only be recouped against future commissions.*"

(*Matter of York Furniture Centers, Inc., Supra.* [emphasis supplied]). ██████████ argument with respect to the Soma commission is, essentially, that the forgivable draw paid to her by Petitioners could *not* be recouped against future commissions. While that arrangement would also have been legally permissible, it was not legally required in the absence of a specific agreement to that effect.

³ Berroya confirmed that Kaufman "explained... it will be like a salary and it's not going to be paid back. And it's going to stop when ██████████ is going to get, like, a big commission." Berroya also testified that forgivable draw is "independent of the commission because she is only getting that forgivable draw because she doesn't have commission for that...month. And I don't know what the arrangement was with her...I am not included in their - whatever agreement, you know, they agreed upon."

As discussed above, there was no evidence of such a specific agreement nor did the Commissioner contend that such a specific agreement existed. The characterization of Claimant's wages as forgivable draw rather than salary on her pay checks is further substantiation of this conclusion. For these reasons, we find that Petitioners met their burden to show that the Commissioner's order with respect to the "forgivable draw" and payment of the Soma commission was invalid or unreasonable. While [REDACTED] may have understood that she was to receive commissions from the first dollar in addition to her draw, there was no basis for the Commissioner to conclude that that was ever agreed to by Petitioners. Absent such an agreement, payment of the draw in the manner described by Kaufman was permissible under Board precedent and the Labor Law.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order assesses civil penalties in the amount of 25% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

"In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . In assessing the amount of the penalty, the commissioner shall 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."

The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is reasonable and valid.

INTEREST

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

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply is modified to provide that Petitioners owe \$2,307.78 in unpaid wages plus interest of 16%, and the civil penalty is reduced proportionately; and
2. That part of the Order to Comply pertaining to unpaid commissions of \$1702.67 is revoked;
3. The Order is affirmed in all other respects; and
4. The Petition is otherwise denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Jean Grumet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
December 15, 2010.