STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROCKY NAPOLI, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Articles 6 and an Order under Article 19 of the Labor Law, both issued April 25, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-089 RESOLUTION OF DECISION

APPEARANCES

Frank Napoli, Esq., for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Rocky Napoli, for the Petitioner;

Glen Shefkowitz and Frank King, for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) on June 26, 2008. An answer was filed on October 17, 2008. Upon notice to the parties, a hearing was held on April 9, 2009 in Garden City, New York before Anne P. Stevason, 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, to make statements relevant to the issues, and to file post-hearing briefs. Post-hearing briefing was completed on June 22, 2009.

The Orders under review in this proceeding were issued by the Commissioner on April 25, 2008 and direct compliance with Articles 6 and 19 of the Labor Law. The Order to Comply with Article 6 of the Labor Law (Wage Order) directs payment to the Commissioner for wages due and owing to Glen Shevkowitz (Shevkowitz or Claimant) in the amount of $10,674.98, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $1,445.94, and assesses a civil penalty in the amount of $5,337.00, for a total amount due of $17,457.92. The Order under Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner in the amount of $250.00 for failing to keep and/or furnish true and accurate payroll records for each employee.

The Petition alleges that the Claimant was never employed by the Petitioner Rocky Napoli (Petitioner or Napoli). The Answer states that the Order is based on the Claimant's claim which included an email offer of employment from Napoli, and Petitioner's failure to respond to letters of inquiry from Respondent concerning the claim.

SUMMARY OF EVIDENCE

Petitioner testified to the following facts. He has worked in the mortgage business since 2000. From 2000 to 2007, he worked for First Capital, which was a subprime lender. As of the date of the hearing, he continued to maintain an email address under First Capital's domain name. In April of 2007, due to the collapse of the subprime market and the demise of First Capital, Petitioner looked to banks to start a wholesale business. In an effort to obtain this source of income, Petitioner approached four or five banks in an attempt to negotiate a deal for himself and his team, some of whom he brought with him from First Capital. Petitioner testified that Andrew Steinberg (Steinberg), a friend of Petitioner and a team member, referred Claimant to Petitioner, and that Claimant then became a member of the team. Petitioner further testified that Claimant was the only member of the team who had wholesale broker experience, which Petitioner felt would make the team more marketable. Petitioner and the other members of the team had previously worked in the retail end of the business.

Petitioner reached an agreement with Lend America, doing business as Ideal Mortgage Bankers (Ideal Mortgage or Ideal), in May 2007 when Petitioner and the other members of his team became employees of Ideal Mortgage based on the contract that Petitioner negotiated with Ideal. The team would bring in loans from other brokers which would then be processed by Ideal Mortgage. Each member of the team, including Claimant, had to fill out an application with Ideal Mortgage for a background check in order to legally obtain loans. A wholesale broker could work for only one bank at a time. Petitioner denied that Claimant was his employee or was entitled to a salary. However, he did state that he had "the power to bring in the people. I could ask him to get fired." Petitioner also stated that Claimant was working to obtain loans prior to Napoli's agreement with Ideal.

Petitioner testified that the only persons making a salary were those employees who worked in the office and clocked in and out. They made minimum wage for all of the hours

worked, and their wages operated as a draw against their commissions. Since the Claimant did not work in the office, he was not entitled to a salary, and Petitioner denied ever sending an email to Claimant setting the terms of employment that included a salary. However, as head of the team, Petitioner made sure that Claimant and other members of his team were paid and would negotiate commissions with Ideal on their behalf. He made sure that Claimant was paid his commission on a loan that was completed (Baldamero loan). Petitioner admitted that Claimant complained about not being paid which is why Petitioner spoke with Ideal about sending Claimant his commissions check and also told Ideal to send to Claimant Petitioner's portion of the commission on the Baldamero loan. "He called up - - I promised him he was going to get a check, right on Friday before payroll." Normally, Petitioner would be paid .10 % and Claimant would be paid .35 % on every loan brought in by Claimant. On this loan, Petitioner was supposed to split his commission with Steinberg. Petitioner remembered getting a check for Claimant for about $600 in commission and then another one which represented Petitioner's and Steinberg's part of the commission. "I told payroll whatever we made on the loan, give it to him [Claimant], he needed the money."

Claimant testified that he was hired by Petitioner on April 2, 2007 and that the terms of his employment were contained in an email he received as of that date. The email was from Napoli's First Capital email address and provided that Claimant was to be an account executive, start up a branch in Albany and surrounding areas, and be paid $650.00 a week to "assist you in getting started and not having to worry about your family and the bills. We appreciate your coming to us and we look forward to a successful future." On April 4, 2007, Claimant completed and sent in an application form for Ideal Mortgage, which had to be completed prior to Claimant's obtaining loans. He started working after sending in the application.

On June 27, 2007 Claimant filed a claim against Ideal Mortgage Bankers with DOL for unpaid wages of $10,000 in salary and $674.98 in commissions on the Baldamero loan which was for $192,850, and named "Rocky" as the owner of the firm. The claim provided that Claimant had been employed since March 30, 2007 and was still working there but had not been paid. Claimant testified that he mistakenly claimed that he was due $625.00 per week when actually the agreed rate, per the email, was $650.00 per week. On or about July 2, 2007, Claimant was paid $600 by check, which contained the memorandum that it was for "branch expenses." On or about July 9, 2007, Claimant was given an additional check for $1,000. Other emails moved into evidence by Respondent indicated that Claimant represented himself as Account Executive for Ideal Mortgage, communicated with both Ideal Mortgage and Petitioner as such and performed work obtaining loans for Ideal Mortgage. Claimant testified that an Account Executive was different from a Loan Officer. An Account Executive usually got a salary and a Loan Officer did not because the Account Executive would spend a lot of his time marketing. The Order listed June 20, 2007 as Claimant's last day of employment.

STANDARD OF REVIEW

In general, the Board reviews the validity and reasonableness of an order issued 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 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 the Industrial Board of Appeals Rules of Procedure and Practice (Rules) Rule 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable in the respects asserted in its Petition.

FINDINGS AND CONCLUSIONS OF LAW

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

Claimant was employed by Petitioner

The Petitioner in this proceeding bore the burden of proving that the Commissioner's determination that he was an employer under Article 6 was invalid or unreasonable (*see* Labor Law § 101; Rules 65.30, 12 NYCRR 65.30). He did not meet this burden.

"Employer" 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 FSupp2d 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 explained the test used for determining employer status::

> "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]).

It is well established that an employee may have more than one employer (*Ansoumana v Gristedes*, 255 FSupp2d 184, 195 [SDNY 2003]; *Franbilt v Commissioner of Labor*, PR 07-019 [July 30, 2008]; *Frank Bova et al. v Commissioner of Labor*, PR 06-024 [November 28, 2007]). Therefore, even if Ideal Mortgage may have been an employer of Claimant, the Board is not precluded from finding that Petitioner was also his employer.

Considering the four factors of the economic reality test, the Board finds that Petitioner was Claimant's employer. He hired Claimant and set the terms and conditions of his employment. We find that the email dated April 2, 2007, which contained an offer of employment, and Claimant's testimony support our finding. In addition, one of the checks issued to Claimant contained the notation that the money was for "branch expenses," which is consistent with the email which referred to Claimant "starting up a branch." Petitioner's testimony that the $600 check was for commissions and that the $1000 check represented his and Steinberg's portion of the commission was not credible, because according to the terms of the employment agreement, Claimant would get .35% of the loan amount and Petitioner would receive .10%. With a loan of $192,850 the commission of .35% equals $674.98 and the .10% override which would go to Petitioner would be $192.85 neither of which is consistent with the second check that the Claimant received. In addition, as admitted by Petitioner, Claimant commenced work prior to the time that Petitioner had an agreement with Ideal Mortgage. Petitioner also negotiated and determined the rate and method of payment and readily admitted that he felt responsible and made arrangements for wages to be paid to Claimant.

The Order is modified with respect to the wages due to Claimant.

Claimant testified that he began work after he completed the application on April 4, 2007 and the Order lists June 20, 2007 as the last day of the claim. Therefore, we find that the Claimant worked for Petitioner from April 4, 2007 until June 20, 2007. At $650 per week, Claimant earned $7,280.00 in salary (11 weeks x $650 + 1 day x $130). Claimant also earned $674.98 in commissions on the Baldamero loan (.35% x $192,850). Therefore, Claimant earned a total of $7,824.98 in wages. After filing his claim, Claimant was paid $1,600, therefore, he is still owed $6,224.98 in unpaid wages and the order is modified to reflect this amount, along with the attendant interest and penalty based on 50% of the wages.

The Civil Penalty for failure to have records is upheld.

Labor Law §§ 195 (4) and 661 require employers to maintain payroll records. Labor Law § 661 requires employers to make such records available to the Commissioner:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

The Commissioner's regulations at 12 NYCRR 142-2.6 also provide in relevant part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage."

Petitioner did not contest the assessment of the civil penalty except to argue that Petitioner was not Claimant's employer and, therefore, was not required to keep records. Based on our finding that Petitioner was an employer and Petitioner's admission that he did not keep records, we affirm the Penalty Order as reasonable and valid.

INTEREST DUE

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 § 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 with Article 6 is modified to provide that Petitioner owes $6,224.98 in unpaid wages plus interest of 16%; and

2. The Order to Comply with Article 6 is further modified to assess a civil penalty in the amount of 50% of the wages due or $3,112.00;

3. The Orders are affirmed in all other respects; and

4. The Petition is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 21, 2009.