

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 GUARDIAN LOAN COMPANY OF :
 MASSAPEQUA, INC. (T/A GUARDIAN LOAN), :
 :
 Petitioner, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply with Article 6 of the Labor Law, :
 an Order to Comply with Article 19 of the Labor Law :
 and an Order under Article 19 of the Labor Law, all :
 dated March 20, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-091

RESOLUTION OF DECISION

APPEARANCES

Carl Schultz, and Stuart Schultz, *pro se*, for petitioner.

Pico Ben-Amotz, Acting Counsel, New York State Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Stuart Schultz, and Jessica Russom, for petitioner.

Elizabeth Ares, Stephanie Russell, and Jessica Russom, for respondent.

WHEREAS:

The petition for review in this case was filed with the Industrial Board of Appeals (Board) on April 15, 2009. An answer was filed on July 27, 2009. Upon notice to the parties, a hearing was held on April 27, 2010, in Albany, New York before Sandra N. Nathan, then Deputy Counsel to 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 to the issues, and to make closing arguments.

The Commissioner of Labor (Commissioner) issued Orders against Petitioner Guardian Loan Company of Massapequa, Inc. (Petitioner) on March 20, 2009. An Order to Comply (Wage Order) directs payment to the Commissioner for wages found due and owing to various claimants, including Jessica Russom (Claimant), in the amount of \$6,563.86, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order in the amount of \$1,711.18, and assesses a civil penalty in the amount of \$1,641.00, for a total amount due of \$9,916.04. The Commissioner also issued a Wage Order for wages found due and owing to another claimant (Val Vanwie), in the amount of \$26.68, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order in the amount of \$5.97, and assesses a civil penalty in the amount of \$7.00, for a total amount due of \$39.65. Prior to hearing Petitioner paid \$2,513.12 to the Department of Labor (DOL) and stated at hearing that it was only challenging the portion of the Wage Order for Claimant Russom. Petitioner did not file an amended petition to include other claimants, even though the Board gave Petitioner the opportunity to do so.

The Order under Article 19 of the Labor Law (Penalty Order) dated March 20, 2009, assesses a civil penalty against Petitioner in the amount of \$250.00 for violating Labor Law § 661 by failing to give each employee a complete wage statement with every payment of wages during the period from on or about July 1, 2007 through August 13, 2007. Petitioner did not challenge the Penalty Order.

The main issue in this case concerns the conditions under which loan commissions to mortgage consultants (consultants) are due and owing. Petitioner asserts that commissions are due and owing not when loans close, but when they are funded, and that consultants are entitled to commissions only for loans that fund before an employee's termination date. According to Petitioner, Claimant is not entitled to commissions on a loan (Johnson loan) because it was not funded until after she was terminated. Further, Petitioner argues that regardless of whether the Johnson loan was funded before or after Claimant's termination, she was not entitled to commissions on that and two other loans (Oversby and Valentine) because she did not have the requisite amount of commissionable income in either the month in which the Oversby and Valentine loans closed and were funded, or in the month in which the Johnson loan was funded.

Petitioner relies on the following employee handbook (Handbook) provision:

“Mortgage Consultants may be eligible for a commission based upon their individual funded loan production. These **funded loan** commissions are paid to the employee based upon the previous month's funded loans generated by the employee. Mortgage Consultants are encouraged to consult with their immediate supervisor to determine the details of the commission program. Mortgage Consultants are eligible to receive funded loan commissions only for those loans that fund prior to the employee's termination date.”

The Commissioner argues that notwithstanding the Handbook, by practice commissions are due and owing in the month after the loans close as long as they eventually fund, and not in the month after they fund; that such practice modifies the Handbook

language; and, that Claimant is entitled to commissions on all three loans because they all closed prior to her termination. The Commissioner also argues that Claimant is entitled to commissions because during the month in which the loans closed, she earned sufficient "commissionable income" to qualify her for commissions. "Commissionable income," according to Petitioner, is the total of the amount of funds that Petitioner received from the borrower and the buyer of the loan.

The other issue before us is whether the amount of Claimant's commissions, as indicated in the Wage Order, are correct, assuming that Claimant is due commissions. Petitioner argues that the Department of Labor's (DOL) commission calculation on the Johnson loan is incorrect because its calculation was premised on an incorrect loan amount (\$282,000 rather than \$234,465) and an incorrect origination fee (1% rather than 5%). The Commissioner responds that Claimant reported to DOL the correct commission amount and origination fee, given the information that she had at the time.

SUMMARY OF EVIDENCE

Claimant's Employment

Petitioner employed numerous consultants, including Claimant, to sell mortgages. Stuart Schultz ran the Petitioner's day-to-day operations and his father, Carl Schultz, was the Chief Executive Officer.

Towards the end of July 2007, Petitioner senior vice-president of operations Marc Pompilio called all consultants and told them not to report to work until further notice. Between July 31, 2007 and August 14, 2007, when Petitioner shut down, some of Petitioner's employees continued to work, including vice-president of human resources Stephanie Russell. After the business shut down, several employees claimed that they were owed additional wages. Petitioner paid the majority of the wages due prior to the issuance of the Orders to Comply. The parties agree that the issues in this case are whether Claimant, a mortgage consultant, is entitled to commissions and whether the civil penalty attached to the wage order is reasonable and valid.

Consultants were not given termination letters on July 31st, and according to Russell, Pompilio's phone call did not terminate consultants because had they been terminated she would have been directed to send COBRA notices and termination letters. Russell also testified that consultants were effectively terminated on August 14th when Petitioner closed its operations.

Claimant testified that Pompilio called her in the first few days of August to tell her that she was "on hold until further notice," and that she did not receive "final" notice of termination until August 14th, 2007. She also testified that she worked on the Johnson loan between the time she talked to Pompilio and August 14.

The Commission Structure

Though not contained in the Handbook, it is undisputed that Petitioner required consultants to have a minimum amount of commissionable income in a given month in order

to be eligible for any commissions for that month. If a consultant's commissionable income did not total at least \$15,000 in a given month, no commissions were due on any of the loans sold in that month.

A consultant's commission percent for all loans sold in a month was determined by the amount of commissionable income. Consultants earned a 15% commission if their commissionable income in a month was between \$15,000 and \$19,999. Commission percentages increased by an additional 2.5% for each \$4,999 in commissionable income to \$29,999. Thereafter, commissionable income had to increase by \$9,999 for each additional 2.5% in commissions, to a maximum commission of 30%.

Assuming that a consultant's commissionable income in a month met the \$15,000 threshold, the commission percent was applied to the percent the borrower was charged for the loan. The amount charged for the loan was the origination fee, and according to Claimant, commissions were also based on a "yield spread", which she described as "money [Petitioner] made on interest." This spread would occur if Guardian sold a mortgage for an interest rate higher than the rate a buyer was qualified to receive.

Claimant closed and funded a mortgage for \$246,000 in July 2007 (Oversby loan). Claimant testified that she charged 2% for the loan. If her July commissionable income was between \$25,000 and \$29,999, as she claimed, her commission percentage was 20%. The 2% charge to the buyer would be multiplied by the loan amount ($\$246,000 \times 2\%$) for a product of \$4,980. That amount would then be multiplied by the 20% commission, for a total commission of \$984.00.

Claimant closed and funded a second mortgage in July 2007 for \$198,500 (Valentine loan) and testified that she charged the buyer 2% for the loan and she claimed a commission of \$794.00 ($\$198,500 \times 2\% \times 20\%$).

The last mortgage that Claimant closed was the Johnson mortgage for which she claimed a \$2,820 commission. Claimant claimed that the Johnson mortgage was \$282,000 and that she charged 5% for the loan, resulting in a \$2,820 commission. On cross examination, Claimant testified that the buyer's charge that she used for the Johnson loan was off of her computer screen and notes, and not off the U.S. Department of Housing and Urban Development (HUD) settlement statements, which, she agreed, showed the actual charge. The Johnson HUD statement reported a 1% origination fee, or charge to the buyer - not the 5% charge Claimant claimed in her DOL wage claim. Similarly, Claimant's commission calculation for the Johnson loan was based on \$282,000 mortgage rather than the \$234,465 amount shown on the HUD statement. If Claimant's commission were recalculated using the figures on the HUD statement her commission would have been \$468.93 ($\$234,465 \times 1\% \times 20\%$), not the \$2,820 ($\$282,000 \times 5\% \times 20\%$) she submitted to DOL.

At hearing, Claimant recalculated the Johnson commission to \$2,344 ($\$234,465 \times 5\% \times 20\%$) and testified that she did not change the 5% charge despite the HUD statement reporting only a 1% charge (origination fee) because it was possible that in addition to the 1% charge there may have been "a fee on any sort of back-end YSP [yield spread]."

However, when questioned by the Hearing Officer, Claimant testified that she did not know if there was a “yield spread” on the Johnson loan.

The Oversby and Valentine loans both closed and were funded in July 2007. The Johnson loan was closed in July, but did not fund until sometime in August, 2007. Petitioner testified that he was not sure when in August the Johnson loan was funded. Claimant testified that she believed it closed on August 6.

The Closing/Funding Practice

The Commissioner argues that Petitioner had a practice of paying commissions upon closing, which modified the Handbook language basing commissions on funding. She contends that this modification entitled Claimant to commissions for the Oversby, Valentine, and Johnson loans because all three loans were closed during July 2007, and cumulatively met the monthly threshold of \$15,000 commissionable income required for any commissions to be paid.

Claimant testified that during the last few months of 2006, Petitioner’s managers informed consultants that they would receive commissions even if loans were funded in the following month. She stated she had two loans that closed in March 2007, but did not fund until April 2007, and she received her commissions for those loans in April 2007.

Vice-president of human resources, Stephanie Russell, testified for Respondent and stated the Handbook commission policy quoted above was in effect in July and August of 2007 and that exceptions were sometimes made to the Handbook policy; that the policy was not strictly adhered to; and, that “sometimes if [the loan] funded prior to the 15th of the month, they would pay [the commission] in that month, or if it funded after the 15th, it would be paid the next month.” Consultants were paid twice a month, on the 1st and 15th, and commissions were paid on the 15th of each month for commissions earned from the previous month. Even though commissions were paid upon closing, they were only paid, in the subsequent month, if they funded prior to the 15th of that month.

Russell added that these exceptions were frequent and were initiated because some of the consultants asked managers to be paid commissions upon closing so they did not have to wait an additional month to be paid. Russell also testified that managers did not have the authority to grant the exceptions, but had to get further approval.

In evidence is a letter from Petitioner’s assistant-vice president for sales, Stephen Sgambati, which opines that the Johnson loan counted towards Claimant’s July commissions as the policy in effect in July 2007 was that any loan that closed from the beginning to the end of a month was counted in that month’s commissions. Also in evidence is an undated “To Whom it May Concern” letter, signed by Claimant and two other consultants stating that starting in October 2006 Guardian started the practice of using a loan’s closing date for commission entitlements. The Handbook is dated 2007 and Claimant’s acknowledgement of the Handbook is dated February 27, 2007.

STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order (s) is valid and reasonable. 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). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Industrial Board of Appeals' (Board) Rules of Procedure and Practice (Rules) § 6.30 (12 NYCRR § 65.30), "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." The burden is on the petitioner to prove that the Orders are not valid or reasonable.

FINDINGS AND CONCLUSIONS OF LAW

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

The 2007 Handbook establishing the funding date for commission payments is controlling. Claimant's commission for the Johnson loan accrued in August 2007.

PAYMENT OF COMMISSIONS

Article 6 of the Labor Law includes commissions within the definition of wages (Labor Law § 190 [1]) and requires that:

"a commission salesman 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 made 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."

(former Labor Law § 191 [1] [c]). Labor Law §191-a(b) defines "earned commission" as:

"a commission due for services of merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by

the customer, notwithstanding that the sales representative's services may have been terminated."

The Handbook states that consultants are entitled to commissions based on when loans that they have sold are funded, not when they close. The funding requirement is emphasized in bold type ("These **funded loan** commissions . . ."), by underlining ("Mortgage Consultants are eligible to receive funded loan commissions only for those loans that fund prior to the employee's termination date."), and by the use of the term "fund" or "funded" five times in the Handbook's controlling paragraph. At no place are the terms "close" or "closing" included in relevant Handbook paragraphs. The Handbook also states that commissions are due and owing only for those loans that fund prior to the employee's termination date.

The Commissioner argues that during the claim period the commission plan was modified concerning when commissions were earned, from funding date to closing date. The Commissioner contends that Claimant was entitled to payment for commissions on August 15, 2007, for the three loans that she sold and closed prior to July 31, 2007, even though one of those loans (Johnson) did not fund until sometime after August 2007.

Eligibility for any commission is contingent on the consultant's commissionable income in any given month. While this condition is not specifically included in the Handbook, the Commissioner does not dispute this condition for commission eligibility. If Claimant's eligibility for her commission on the Johnson loan is based on funding, and not closing, she is not entitled to any of her three claimed commissions as the two loans that were closed and funded in July 2007 did not meet the required commissionable income minimum. However, if her eligibility for commissions is measured from closing, Claimant may have been eligible for commissions on the three loans because, when totaled, they may have met the minimum commissionable income requirement.

Respondent's witness and human resource manager Stephanie Russell testified that the commission plan in the Handbook was in effect in July and August 2007, and stated that if a mortgage consultant was paid based on closing rather than funding it was done on a case-by-case basis, was an "exception" to the policy, and required Petitioner's approval. Petitioner testified that he did not give approval.

Claimant provided documents from co-workers confirming the ability to collect commissions based on closing date. However, even if we were to consider these statements, they merely support Claimant's testimony that Petitioner allowed, under certain limited circumstances, the ability to make commission claims based on closing dates. In addition, these statements say that the policy changed in October 2006 when the Handbook is dated 2007, Claimant signed it in February 2007 and Respondent's own witness, Stephanie Russell, testified that it was in effect in July and August 2007. If the policy had changed in October 2006, it should have been included in the subsequently published Handbook.

As the Johnson loan did not fund until after July 31, 2007, it could not accrue towards the commissionable income requirement for July 2007. As neither the Johnson loan standing alone, nor Claimant's two other loans together, reached the commissionable income threshold, she was not entitled to commissions for any of the three loans.

The Handbook language states that commissions are not due and owing unless a loan closes prior to an employee's termination. While we find that Petitioner has not sustained his burden to show that Claimant's termination post-dated the funding of the Johnson loan, such finding does not establish Claimant's entitlement to a commission on that loan, or any other. Even if the Johnson loan closed prior to Claimant's termination, Claimant would only be entitled to a commission if the Johnson loan, standing alone, met the \$15,000 commissionable income threshold, which it did not. The Johnson loan could not be combined with the Oversby and Valentine loans to meet the commissionable income requirement as those loans accrued in July 2007, while the Johnson loan accrued in August 2007.

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." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of payment."

Petitioner did not challenge the assessment of interest made by the Wage Orders. Subject the modifications below, the Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Orders are valid and reasonable in all respects.

IMPOSITION OF CIVIL PENALTIES

The Wage Orders additionally assessed a civil penalty in the amount of 25% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount is reasonable in all respects.

Petitioner did not challenge the Commissioner's assessment of the civil penalty under the Order under Article 19 for the failure to give each employee a complete wage statement.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The Wage Orders in the amounts of \$6,563.86 and \$26.68 shall be reduced by \$4,598.00, the amount allocated for Russom's claim, for a total due and owing of \$1,992.54 with interest at 16% and a civil penalty of 25% of the wages due. The Commissioner will recalculate the interest and civil penalty due based on these findings and credit Petitioner with \$2,513.12 which was paid prior to the hearing.
2. The Penalty Order is affirmed.



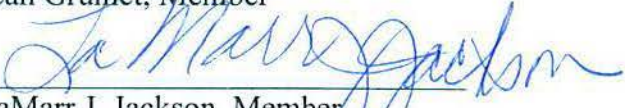
Anne P. Stevason, Chairperson



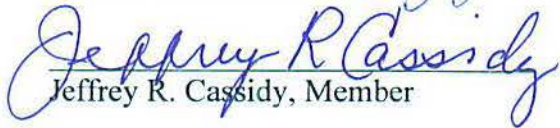
J. Christopher Meagher, Member



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 14, 2011.