STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
BERNARD J. LOMBARDI AND ALLAN GREENSTEIN AND JOHN LOMBARDI AND AUTOMATIC APPLIANCE PARTS, INC.,	:	
Petitioners,	:	DOCKET NO. PR 09-101
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, and an Order under Article 19 of the Labor Law, all dated March 4, 2009,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Bernard Lombardi, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Bernard Lombardi, and Robin Gould, for Petitioners. Lori Roberts, Senior Labor Standards Investigator; and James Schult, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on May 4, 2009. In response to a request from the Board, an amended petition was filed on June 8, 2009. An answer was filed on August 10, 2009. Upon notice to the parties, a hearing was held on June 17, 2010 in Poughkeepsie, New York

before Anne P. Stevason, Esq., 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 make closing arguments.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued Orders against Petitioners Bernard Lombardi, Allan Greenstein, John Lombardi and Automatic Appliance Parts, Inc. (together, Petitioners) on March 4, 2009. An Order to Comply (Wage Order) directs payment to the Commissioner for wages found due and owing to James Schult (Schult or Claimant) in the total amount of $15,389.83, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $2,268.00, and assesses a civil penalty in the amount of $15,390.00, for a total amount due of $33,047.83. A second Order to Comply (Supplemental Wage Order) directs payment to the Commissioner for severance pay found due and owing to Schult in the total amount of $1,800.00, with interest continuing thereon at the rate of 16% calculated to the date of the Supplemental Wage Order, in the amount of $265.44, and assess a civil penalty in the amount of $1,800.00, for a total amount due of $3,865.44.

The Order under Article 19 of the Labor Law (Penalty Order) dated March 4, 2009 assesses a civil penalty against the Petitioners in the amount of $250.00 for violating Labor Law § 661 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from January 13, 2007 through April 13, 2008. The Penalty Order was not challenged by Petitioners.

The main issue in this case concerns the proper interpretation of the employment agreement entered into between Petitioners and Schult on January 13, 2007. The relevant provisions follow:

> "15 Points of Employment
>
> > "1) Base salary will be $900 a week, should total $46,800 for the first year.
> >
> > "2) Commission will start after first $350,000 in sales. First years goal will be $1,500,000. Commission on the first $1,500,000 will be 6% of the gross profit dollars. After the $1,500,000 the commission will go to 3% of the gross profit dollars. All past due accounts will be deducted from your total sales at 60 days. It is agreed that at the year-end base salary and commissions earned will total a minimum of $70,000. . . . "

The Petition alleges that Schult was paid all wages due when he was paid his base salary since he never earned any commissions because his sales did not exceed $350,000. Respondent alleges that the agreement provided for minimum compensation of $70,000 per year and therefore, Schult is due the difference between what he was paid for the year and $70,000.

The other issue concerns whether Petitioners had the right to stop payment on a severance check already transferred to Claimant, but not provided for in the employment agreement.

I. SUMMARY OF EVIDENCE

Petitioners sell wholesale appliance parts and supplies and have been in business since 1961. On January 13, 2007, Petitioners Bernard and John Lombardi and Claimant signed an employment agreement entitled "15 Points of Employment" which set forth the terms of Claimant's employment. On February 3, 2007, Claimant began working for Petitioners as an outside salesman so that the business could expand as a supplier into the heating, ventilation and air conditioning area (HVAC).

The parties discussed the terms of the contract but ultimately Petitioners drafted the language of the contract. The terms of compensation are listed in items one and two of the agreement, as quoted above. Bernard Lombardi (Lombardi) testified that Claimant was to be compensated at a base salary of $900 per week as listed in item one. Item two, he maintained, was separate from one and had to do with commissions only and according to that paragraph Claimant was to start earning commissions only if there was over $350,000 in sales. In addition, $70,000 was a minimum at year-end only when his base salary and earned commissions were combined. Since Claimant never earned commissions because he sold only $139,035.74 worth of product, i.e. less than $350,000, he was not entitled to $70,000. The contract does not say that the $70,000 is a guarantee.

Claimant testified that $70,000 was his minimum yearly compensation. This was specifically discussed prior to the signing of the employment agreement and Petitioners assured him to trust them. Claimant testified that he would not have left his prior employment unless he was guaranteed $70,000. After complaining that he was not being paid anything other than the $900 per week, in October of 2007, Petitioner began paying Claimant the difference between his base salary of $46,800 ($900 x 52) and $70,000. Claimant stated that Lombardi told him that he would be paying out the difference of $23,200 ($70,000 - $46,800) in 10 installments of $2,320. Claimant received and cashed six of these checks for $2,320 prior to February 2008. In March 2008 Lombardi handed Claimant the remaining four checks, each for $2,320, which were postdated.

In February 2008, at the end of Claimant's first year of employment, the parties started to negotiate the terms of employment for the second year. The contract provides, at point 13: "A yearly review of all the above terms will be conducted each February." Claimant submitted a note to Petitioners proposing $70,000 as a base salary and 6% of gross profits after $350,000 in sales. After some initial agreement, the parties were unable to agree on the terms and on April 2, 2008, Claimant was fired. At the time of firing, Lombardi offered Claimant severance pay of two weeks of salary to be paid in two checks, each for $900 in gross wages and postdated for the following two weeks. Claimant accepted the offer and returned the following day to write up his final sales paperwork and collect his severance pay. The two checks were then given to Claimant. Claimant then told Lombardi that

Petitioners owed him an additional $4,000 for the difference in salary from February through April. Petitioners then put a stop payment on the four remaining postdated checks for $2,320 and on the severance paychecks and thereafter sent Claimant a check for $309.88 for the two days that he worked before being fired, which Claimant did not cash.

Although Lombardi admits that some checks were given to Claimant in the fall of 2007 to assist him with his son's college tuition, he testified that the postdated checks given in March 2008 were part of the negotiations for the second year of employment and when the negotiations failed, he stopped payment on the checks. Likewise, when Claimant came back asking for an additional $4,000, he stopped payment on the severance checks. He testified that since severance was never part of the agreement, he was free to change his mind and withhold the money.

On May 19, 2008, Claimant filed a wage claim with DOL seeking the following:

1) $9,280 for the four checks of $2,320 each, for which Petitioners stopped payment;
2) $1,800 for the two weeks of severance checks of $900 each;
3) $5,799.95 for 13 pay periods between February and April 2008 for which Claimant was paid only $900 per week and not $1,346.15, which would constitute a $70,000 annual salary; and
4) $1,298.00 for expense reimbursement for Claimant's mileage for March 2008.

Senior Labor Standards Investigator (SLSI) Lori Roberts testified that she was assigned the investigation of Claimant's claim. After reviewing the claim SLSI Roberts sent a letter to Petitioners requesting payment by June 9, 2008. A number of letters passed between DOL and Petitioners concerning the claims. Eventually Petitioners paid the claim for expenses but disputed the other claims and the above-mentioned Orders to Comply were issued on March 4, 2009. SLSI Roberts recommended that a civil penalty of 100% of the wages be imposed with the Orders due to the fact that it was a first violation and the maximum penalty was 200%, the records were not provided as requested, and the Petitioners failed to pay the violation.

II. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order 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 Board Rules of Procedure and Practice (Rules) 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 Orders are not valid or reasonable.

III. 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).

A. The "15 Points of Employment" constituted an Employment Contract which guaranteed a minimum yearly compensation of $70,000.

Claimant and Petitioners John and Bernard Lombardi signed the "15 points of Employment" on February 3, 2007. It constituted Claimant's employment agreement. The Board finds that the wording of the contract that: "It is agreed that at the year-end base salary and commissions earned will total a minimum of $70,000" clearly means that there shall be an accounting at year's end at which time Claimant shall be paid the difference between $70,000 and what he has already been paid. Claimant had been guaranteed a minimum yearly compensation of $70,000 whether his earned commissions were $0 or $23,200. Although the Board finds that this is the clear and unambiguous reading of the contract, it is supported by the testimony of Claimant and the fact that Claimant was given ten checks for $23,200, six of which he negotiated, which represents the difference between his base salary of $46,800 and the guarantee of $70,000. In addition, if Petitioners intended Claimant to be paid only his weekly salary plus whatever commission he earned, this provision that "at year-end his base salary and commissions earned will total a minimum of $70,000" would be unnecessary.

There is no need for contract interpretation where the terms of the contract are unambiguous. *See, e.g. Guasteferro v Family Health Network of Central New York,* 203 AD2d 905 (4th App Div 1994). In any event, where the terms are ambiguous, they are to be construed most strongly against the drafter of the document. *See Jacobson v Sassower*, 66 NY2d 991 (1985). Since Petitioners drafted the document, and the parol evidence supports the finding of a $70,000 guarantee, the Board comes to the same conclusion in either event.

Therefore, the Board finds that Claimant is due $9,280.00 for wages for the year of February 2007 to February 2008.

B. Claimant is not owed $5,799.95 for the 13 pay periods between February and April 2008.

The employment contract indicated that there would be a yearly review of the terms of employment each February. Although Claimant and Petitioners commenced negotiations, they were never able to come to a meeting of the minds as to what the terms of employment would be after February 2008. DOL argues that the prior contract continues and therefore, Claimant is due a weekly wage of $1346.15 which adds up to a yearly salary of $70,000 since the agreement provides for a yearly review of its terms every February. Claimant specifically offered to accept a base salary of $70,000 plus commissions after $350,000 but

Petitioners did not accept this offer. If this had been accepted, Claimant would receive a weekly wage of $1346.15 but this was not accepted. Claimant continued to receive his base salary of $900 per week and both parties characterize the severance pay, discussed below, as two weeks pay of $900 per week. Therefore, given the fact that the parties could not agree on terms, and judging from the parties' behavior, there was an implied contract of $900 per week in salary after February 2008.

Even if the contract was continuing, since it has no termination date, it only guarantees a minimum wage of $70,000 at year-end. The Board finds that working a complete year was a condition precedent to being paid the difference between whatever Claimant was paid for the year and $70,000. Claimant did not work a complete year and therefore, did not satisfy the condition. Although Claimant was given payments toward the $70,000 owed for the first year in November 2007, prior to the end of the first year's employment, there is nothing in the contract that specifies that Claimant will receive a pro rata portion of the $70,000 guarantee during the year, unless he earned commissions, in which case, he would be paid quarterly.

Claimant is not due the difference in wages of $5,799.95 for February to April 2008.

C. Petitioner was not entitled to stop payment on the severance paycheck.

When the parties could not reach an agreement, Lombardi fired the Claimant. At that time, the Claimant was still owed two days wages. Lombardi, being interested in parting with Claimant on good terms, offered Claimant severance pay of two weeks of gross wages payable in two postdated checks. When Claimant returned the next day to complete his final sales paperwork and return his phone, Claimant was given the two checks totaling $1,800 in gross wages. Afterward, Claimant asked for an additional $4,000. The next day Petitioners stopped payment on the two checks already presented to Claimant.

Petitioners offered the severance pay and Claimant accepted it. Once Petitioners gave Claimant the payment without condition, it was a fully executed contract. A contract is established when there is an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound. *See* 22 NY Jur Contracts § 9 (2010). Although a promise without consideration is not enforceable, once "an informal promise to make a gift is executed and the promised performance is actually rendered, the promisee can safely receive it without any liability to the payment of compensation." *See* 2-5 Corbin on Contracts §5.4 (2011). Since the severance pay was offered, accepted and given, Petitioners could not stop payment on the checks.

Claimant is due gross wages of $1,800.00.

D. Civil Penalties for failure to pay wages are affirmed.

The Wage Order additionally assessed a civil penalty in the amount of 100% 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.

E. Interest is 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." We therefore affirm the rate of interest imposed in the Amended Wage Order but find that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is modified to hold that wages in the amount of $9,280.00 are due and the interest and civil penalty due are to be modified based on that amount;

2. The Supplemental Wage Order is affirmed; and

3. The Petition is otherwise denied.

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 New York, New York, on
September 9, 2011.

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of the Industrial Board of Appeals
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of the Industrial Board of Appeals
at Albany, New York, on
September 9, 2011.