

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

WILLIAM C. DOW,

Petitioner,

To Review Under Section 101 of the Labor Law:
Two Orders to Comply with Article 6 of the Labor
Law, dated June 3, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 09-157

RESOLUTION OF DECISION

APPEARANCES

William C. Dow, petitioner pro se.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel),
for respondent.

WITNESSES

William F. Smith II, claimant; Amy Clark, Senior Labor Standards Investigator, for the
Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 25, 2009, seeking review of two Orders to Comply issued on June 3, 2009. An Order to Comply with Article 6, Section 191, was issued for failure to pay wages and commissions due and owing to claimant William F. Smith II (Smith), a former employee, in the amount of \$4854.68, with interest at the statutory rate of 16% in the amount of \$457.54, and a civil penalty in the amount of \$9,710.00 in accordance with the provisions of Section 218 of the Labor Law, for a total amount on this Order of \$15,022.22. The Order to Comply with Article 6, Section 198-c, finds that the petitioner failed to pay vacation pay to Smith in the amount of

\$250.00, with interest at the statutory rate of 16% in the amount of \$20.27, and a civil penalty in the amount of \$500.00 in accordance with the provisions of Section 218 of the Labor Law, for a total amount on that Order of \$770.27.

The petition alleges that the claimant is not owed any vacation pay; that the commission rate of 10% claimed by the claimant is in error and that the claimant actually owes the petitioner money for commissions that were paid for training that could not be delivered. The petitioner also seeks relief on the civil penalties and interest charges.

On notice to the parties, a hearing was held on June 16, 2011, in Buffalo, New York, before LaMarr J. Jackson, Esq., Member 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, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Global Technical Associates, LLC (Global Technical) conducted business as New Horizons Computer Learning Center of Buffalo (New Horizons), a franchise of New Horizons Franchising Group, Inc. New Horizons was managed by Michael Dow as President and his wife Lisa Dow was General Manager. The firm was in the information technology (IT) business, primarily selling training classes in various IT subjects to businesses. Petitioner William C. Dow has described himself as a "silent" investor in Global Technical, investing in excess of \$1.1 million dollars, with no involvement in the day to day management or operations of the business.

At its peak, Global Technical had over 25 employees but by the time the business closed in late October/November 2008, the company had less than eight employees. The petition states that Michael Dow and Lisa Dow were the day to day operators of the business over the seven plus years that the business operated. William Dow claimed that he had very poor communications with his son and daughter-in-law regarding the business and that he had no access to the payroll records of the company.

Claimant Smith testified that he saw an advertisement from New Horizons in the spring of 2008 seeking sales executives and he was very interested since he thought the company might provide international business opportunities. Smith interviewed with the company on April 2, 2008, with Joe Galligan and he was asked to come back on April 3rd to demonstrate his skills at making cold calls on potential customers. After the cold call exercise, Smith was hired and started work on April 7, 2008. Smith testified that he was given the employee handbook for Global Technical/dba New Horizons that was introduced as Respondent's Exhibit B and that he confirmed terms of the employment offer in an email to Joe Galligan dated April 7, 2008, introduced as Respondent's Exhibit C. The email states that the starting base pay is \$500.00 per week and "the commission is 10%."

Petitioner William Dow introduced into evidence at the hearing Petitioner's Exhibit #2 that was a letter agreement with Attachments A, B and C, all of which purport to be the standard form employment agreement for Account Executives at New Horizons. The copy introduced

was unsigned and Mr. Dow did not introduce any evidence that this form agreement was ever signed by Smith or any other employee of New Horizons. Mr. Smith testified that he had never been given Petitioner's Exhibit #2 and that the first time he had ever seen the document was when it was presented to him at the hearing.

Smith testified he was paid on the 15th of the month and on the 30th or 31st of the month. On the 15th he was to receive payment for his salary at \$500 a week and at the end of the month his payment was to be for salary and any earned commissions. He claimed that throughout his employment he did not receive consistent and detailed pay stubs that showed the breakdown of salary, deductions and commissions. Smith testified that throughout his employment he attempted to obtain proper pay stubs and commission reports and Respondent's Exhibit E is a copy of an email that he sent to Lisa Dow on October 21, 2008, requesting his pay stubs and commission reports so that he would be able to properly prepare his tax returns.

The email also notes Smith's claim on his commission rate: "In addition we also need our commission reports to check on what transactions were paid or not paid. It appears I have not been paid on numerous transactions. By the way, it was agreed by written and verbal agreements that my commissions are 10% and not 5%." Lisa Dow responded to this email that she would provide the commission reports and pay stubs but she was under the impression that his commission rate was 5% "...but if you can provide me with the written documentation stating otherwise, I will gladly pay you what you are owed. Also, let me know which accounts you feel you have not been paid on. I have tried to make sure that everyone has receive [sic] proper credit for the work they have done."

Lisa Dow provided Smith with pay stubs and commission reports, marked as Respondent's Exhibits F and G, respectively. Smith testified that in looking at the pay stubs "...it didn't seem like I was getting the proper amount of money for each pay period (Transcript p.123)." As to the commission reports, Smith testified that these documents were his first confirmation that his commission rate was being calculated at 5% instead of 10% and that the costs of "Kits" (books used in classes) were being deducted from the total amount of fees collected for the commission calculations.

Smith testified that he was laid off from his job at 5 o'clock in the evening of October 31, 2008: "...Lisa Dow and Joe Galligan put me in a room and told me that I was laid off, and on October 31st is when we were supposed to receive our pay, and I asked for my check, but they wouldn't give me a check or any pay. So they never gave it to me (Transcript p. 137)." Smith was told that they would mail him his pay in a couple of weeks but no pay was ever sent despite Smith's repeated calls to try and get his pay and pay stubs.

Smith also testified that he went online to the New York Department of Labor website on October 31, 2008, the evening he was laid off, and filled out a Claim for Unpaid Wages, a Claim for Unpaid Wage Supplements, and the Commission Salesperson Recapitulation Sheet. These documents were received by the Department of Labor on or about November 5, 2008, and were introduced at the hearing as Respondent's Exhibit K. The claims in these documents included \$250.00 for earned vacation time (2.5 days), \$1200 for unpaid wages (calculated based on 12

days at \$100 per day [10/16-31/08]), and \$1995.65 for unpaid commissions (total equals \$3445.65).

The initial DOL demand letter of November 7, 2008, referenced a wage claim for wages, commissions and vacation in the amount of \$3195.65. The next demand letter was dated January 8, 2009, and noted claims of "\$1200 in salary, \$1995.65 in commissioner (sic) and \$250 in expenses [total equals \$3445.65]." The "Final Notice" letter of April 1, 2009, included a demand for \$3195.65 for Smith while the Order to Comply of June 3, 2009, includes a wage demand for Smith in the amount of \$4854.68 (this figure presumably was derived from Respondent's Exhibit I that was Smith's revised wage and commission calculations in the amount of 23.6364 days x \$100.00 per day = \$2363.64 plus \$2427.40 in unpaid commissions for a total of \$4791.04 and not \$4854.68).

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that 'any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 § [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]; *see also* State Administrative Procedure Act § 306 [1]).

It is therefore petitioner's burden to prove, by a preponderance of the evidence, that claimant's wages, commissions and miscellaneous expenses are not due and owing, and that the Civil Penalty is invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Wage Claim

The petitioner takes the position that Smith was hired as a commissioned sales representative with an annual base salary of \$24,000 payable bi-monthly and with a 5%

commission on collected funds from the sales of training courses. The wages were paid on the 15th and on the 30th or 31st of each month in the gross amount of \$1000 and any earned commissions were to be paid with the check at the end of the month. The claimant has taken shifting positions with respect to the wage claim, from claiming \$500 a week, to \$100 a day to \$12.50 per hour (Respondent's Exhibits I and K). The wage claim changed from an initial claim of \$1200 for the period of October 16 through October 31, 2008 (12 work days at \$100 per day) to a revised calculation of 23.6364 days starting at April 3, 2008 at \$100 per day for a total of \$2363.64. Claimant's initial email accepting the job of April 7, 2008, however, spoke in terms of a "starting base pay" of \$500 a week and the pay stubs note a regular salary amount of \$1000 every two weeks. The petitioner's form Account Executive Agreement notes an annual base salary that "...will start at \$24,000 and could rise to a potential \$36,000" and claimant's email speaks of the potential for his earnings to increase significantly.

While the claimant testified that he had never seen the Account Executive Agreement, the totality of the evidence does suggest that the position that the claimant accepted was a salaried position at \$24,000 annually and payable twice a month at \$1000 gross each pay period. Smith had worked from April and the pay stubs document that he was generally paid \$1000 in salary each pay period with some commission payments added to the second monthly salary payment. There is no indication that there was any meeting of the minds with respect to his salary being paid on a daily or hourly basis. It is only after Smith was laid off that his salary claim was presented in terms of \$100 a day and that posture shifted from an initial claim of 12 unpaid days to a later calculation that went back all the way to April and became 23.6364 days. The petitioner admits in Petitioner's Exhibit #3 that Smith is owed \$1000 for wages for the period October 16-31, 2008, but then attempts to offset that liability by claiming that Smith owed the company \$1091.90 for commissions paid for undelivered training. That position is not credible and we reject the petitioner's attempt to shift the burden for the company's failure to deliver training onto the sales staff (*See Labor Law § 193*). We find that the wage claim should be adjusted to \$1000 for the period October 16-31, 2008, based upon the salary payment agreement and payment record of the parties.

Commissions Claim

Claimant was in part "paid on a commission basis and a commission is considered a wage under section 190 (l) of the Labor Law" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-18 [2008]). Regarding the employer's obligation to pay commission wages, specifically, Labor Law § 191-c (1) provides, in pertinent part:

"When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated."

Labor Law § 191-a further provides:

"For purposes of this article the term:

- (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of wholesale orders or sales.
- (b) "Earned commission" means a commission due for services or 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 terminated."

Labor Law §191(1) (c) provides in part:

"...The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request. . . . 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."

Commissions are, therefore, determined based on the agreement of the parties. In this case, the parties differ concerning the terms of the agreement with regard to the commission rate.

The petitioner failed to meet his burden in proving that the Respondent's Order finding that the commissions claimed by Smith were owed, was invalid or unreasonable. In his adjusted commission calculations in Respondent's Exhibit I, the claimant sets forth a claim of \$2427.40 in unpaid commissions. A review of the hearing transcript shows that the petitioner failed to adequately challenge the commissions claim in the Order to Comply. Mr. Dow took the position that he was a "silent investor" who was not involved in the day to day operations of the business. He also claimed that he was somewhat estranged from his son and daughter-in-law at the time the business went into decline so that he did not receive any on-going communications about the condition of the business until the situation was dire when the company was sued over its franchise agreement. Mr. Dow's son Michael Dow was the president of the company and was present at the hearing but despite the fact that Michael Dow was in charge of this small business, Mr. Dow failed to use him as a witness to support his petition. Since William Dow admitted that he was not involved in the operation of the business, the failure to use Michael Dow as a witness as to the issues at stake is extremely telling. Michael Dow was in the best position to know about and to testify as to the salary structure of the business, the commission rates paid to sales personnel, the vacation policy and all other aspects of the business. The petitioner failed to meet his burden in challenging the testimony of both the claimant and DOL Investigator Clark.

The petitioner also did not meet his burden in proving that the claimant was wrong in his claim of a 10% commission rate. Smith's testimony on that point was credible and consistent and all that the petitioner offered to counter were blank contract forms that Smith testified he had

never seen before and documents that referenced the 5% commission rate that Smith testified he only received right before he was laid off. Again, Michael Dow was the best potential witness for the petitioner and the fact that he was not used raises an inference that perhaps his testimony would not have been helpful for the petitioner after all.

Mr. Dow asked Ms. Clark a few innocuous questions about certain of the commission reports but he rested his case without asking her any detailed questions about those reports and he asked her no questions at all about the calculations of the penalties. Mr. Dow offered no verbal closing argument and presented no written closing statement despite being given an extended opportunity to do so until September 12, 2011, for a hearing that took place on June 16, 2011. The Board is required to presume that an order of the Commissioner is valid and the petitioner's failure to meet his burden of proof means that the order's determination with respect to the unpaid commissions must be upheld in the amount of \$2427.40.

Vacation Pay

The claimant claimed that at the time of his discharge he had two and one-half days of accrued vacation time and a business record of the company introduced into evidence at the hearing as Respondent's Exhibit H notes that Smith had 2.5 days of earned vacation time. The company's employee handbook states that eligible employees who provide at least two weeks advance notice of their resignation will be paid for accrued but unused vacation time. Since the claimant was involuntarily laid off he is entitled to his accrued vacation time under the vacation policy in the Global Technical Employee Handbook and the petitioner presented no credible evidence to counter this claim. The petitioner having failed to meet his burden of proof on this issue, the order with respect to the vacation pay is affirmed in its entirety, including the imposition of civil penalties and interest.

Civil Penalty for Failure to Pay Wages

The civil penalty for the wage and commissions claims was calculated to be \$9710.00 which is approximately 200% of the Order to Comply's calculations of wages and commissions due to the claimant (\$4854.68). The assessment of civil penalties for the failure to pay wages, benefits or wage supplements is provided for under Labor Law § 218 that reads in relevant part:

“...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.”

In this case, while the petitioner requested “relief” from the civil penalties and interest in his petition, he failed to challenge the penalties and interest during the hearing. The petitioner failed to ask DOL Investigator Clark any questions regarding the basis for or the calculation of the penalties and interest. It is the petitioner's burden to prove that the penalties and interest are invalid or unreasonable, and having a full opportunity to do so at the hearing and in a post-

hearing closing statement, the petitioner completely failed to adequately address the issue. In light of the petitioner's failure to meet his burden of proof, the imposition of a 200% civil penalty must be upheld but the amount due must be recalculated in light of our finding with respect to the wage claim.

Interest

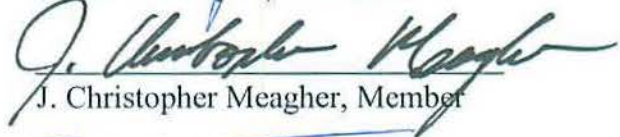
Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." We therefore affirm the rate of interest imposed 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 order to comply with Article 6 of the Labor Law issued June 3, 2009, is modified to reduce the wages and commissions due and owing to \$3427.40 (\$1000 in unpaid wages and \$2427.40 in unpaid commissions) with the interest recalculated based on the new principal; and
2. The civil penalty is recalculated to \$6854.80 (200% of \$3427.40); and
3. The supplemental wage claim for the vacation time with civil penalty and interest in the total amount of \$770.27 is affirmed; and
4. The petition be, and the same hereby is, otherwise denied.



Anne P. Stevason, Chairman

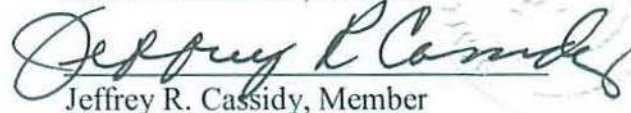


J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 29, 2013.

hearing closing statement, the petitioner completely failed to adequately address the issue. In light of the petitioner's failure to meet his burden of proof, the imposition of a 200% civil penalty must be upheld but the amount due must be recalculated in light of our finding with respect to the wage claim.

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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." We therefore affirm the rate of interest imposed 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 order to comply with Article 6 of the Labor Law issued June 3, 2009, is modified to reduce the wages and commissions due and owing to \$3427.40 (\$1000 in unpaid wages and \$2427.40 in unpaid commissions) with the interest recalculated based on the new principal; and
2. The civil penalty is recalculated to \$6854.80 (200% of \$3427.40); and
3. The supplemental wage claim for the vacation time with civil penalty and interest in the total amount of \$770.27 is affirmed; and
4. The petition be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
April 29, 2013.

Jeffrey R. Cassidy, Member