

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
JEFFREY A. HEATH AND LANDSTONE SEARCH	:
CORP. (T/A THE LANDSTONE GROUP) ALSO	:
(T/A MANAGEMENT RECRUITER OF	:
MANHATTAN),	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated September 24, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 09-328
RESOLUTION OF DECISION

APPEARANCES

Timothy P. Kebbe, Esq., for the petitioners.

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

WITNESSES

Jeffrey Heath and Stephen Levy, M.D. for Petitioners; Stephen Levy, M.D. and Labor Standards Investigator Julio Rodriguez for the Respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 16, 2009, and seeks review of an order issued by the Commissioner of Labor (Commissioner or respondent) against the petitioners Jeffrey A. Heath and Landstone Search Corp. (collectively, Landstone or petitioners) on September 24, 2009. Upon notice to the parties a hearing was held on April 8 and May 3, 2011 in New York, New York, before Devin A. Rice, Associate 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, and to make statements relevant to the issues.

The order is to comply with Article 6 of the Labor Law. It finds that the petitioner failed to pay wages (commissions) in the amount of \$4,500.00 to claimant Stephen Levy, M.D. from August 23, 2008 to August 30, 2008. The order further finds interest due at the rate of 16% calculated to the date of the order, in the amount of \$769.32, and assesses a civil penalty in the amount of \$1,125.00, for a total amount due of \$6,394.32.

SUMMARY OF EVIDENCE

Petitioner Landstone Search Corp. is an executive search firm founded by petitioner Jeffrey Heath in 1981 that recruits middle to senior managers for placement in the consumer electronic, technology, waste and medical industries. On August 25, 2005, claimant Stephen Levy, M.D. signed an "associate/account executive employment agreement" with the petitioners. Paragraph 7 of the agreement, entitled "compensation" provides that "[t]he employee's compensation for the services to be rendered . . . shall be pursuant to the terms of Exhibit A, which is attached to and made a part of this Agreement, or as may be periodically published by [the petitioners]. The Employee's compensation may be modified from time to time as [the petitioners] in [their] sole discretion, deem[] appropriate, provided that no such modification may be applied retroactively. Employee's acceptance of compensation shall be conclusive evidence of Employee's agreement as to the terms of compensation established by [the petitioners]." The claimant testified that he reviewed the employment agreement before signing it, and made suggested changes. Petitioner Jeffrey Heath testified that the proposed changes were accepted by the petitioners.

The compensation agreement, which was Exhibit A of the claimant's employment agreement, was as follows:

"THE LANDSTONE GROUP

"2005 ASSOCIATE COMPENSATION

"COMMISSION BONUS: YOUR SALARY IS \$35,000, YOUR QUOTA WOULD BE \$25,000 QUARTERLY. YOU WILL EARN 35% ON ALL PRODUCTIN CASH-IN OVER YOUR QUOTA UP TO \$100K THEN YOUR COMMISSION GOES TO 40%.

"OVER \$100K COMMISSION GOES TO 40% FROM \$100K UP TO \$200K

OVER \$200K COMMISSION GOES TO 45% FROM \$200K UP TO \$325K

OVER \$325K COMMISSION GOES TO 50% FROM \$325K UP

"PRODUCTION: 100% OF THE FEE FOR A SEARCH OBTAINED & FILLED BY YOU & FEE CASHED-IN

“50% OF THE FEE FOR FULLFILLMENT OF ANOTHER ASSOCIATES SEARCH COMPLETED AND CASHED-IN

“EXAMPLE: \$250,000K CASHED-IN LESS QUOTA \$25,000 PER QUARTER/\$100,000 ANNUALLY 100,000 X 40% + \$50,000 X 45%

BASE \$35,000 + COMMISSION \$62,500 = \$97,500

“10 PLACEMENTS AT \$25K EACH = \$250K CASH-IN EARNINGS WOULD = \$97,500

“12 PLACEMENTS AT \$25K EACH = \$300K CASH-IN EARNINGS WOULD = \$120,000

“16 [PLACEMENTS AT] = \$400K CASH-IN EARNINGS WOULD = \$168,750

“20 [PLACEMENTS AT] = \$500K CASH-IN EARNINGS WOULD = \$218,750.¹”

The claimant could not recall whether he had ever seen the compensation agreement, but did acknowledge that Heath did go over the commission structure with him. Heath testified that he reviewed Exhibit A with the claimant and that it was included with the claimant's employment agreement just as it was always included with the employment agreements of all prospective account executives.

Heath testified that unlike the vast majority of searches the claimant had worked on, the DKT project was a “retained” search meaning that DKT paid a retainer to the petitioners. Heath testified that this was because the DKT project was an international search which is more difficult. Heath testified, and the claimant agreed, that other than two prior projects, all of the claimant's work had been on contingency projects, meaning the client paid no fee to the petitioners unless and until the position being recruited for was filled by a candidate obtained by the petitioners. On the two prior retained searches the claimant worked on, which consisted of two payments, the petitioners paid the claimant a fee after receipt of the first payment and after receipt of the second payment which was paid after a candidate had been hired. The terms of the contract between DKT and the petitioners were \$10,000.00 to be paid upon execution of the contract, \$10,000.00 to be paid upon receipt of a slate of candidates for the position, and \$10,000.00² to be paid at the start date of the candidate. Heath and the claimant agreed that they worked together on the DKT project and that Heath was present at the initial meetings with DKT. Heath testified that his international experience was necessary to land the contract with DKT.

The parties agree that the petitioners paid the claimant \$4,500.00 or 45% on the initial \$10,000.00 payment from DKT. The parties also agree that the claimant prepared a slate of three candidates which the petitioners presented to DKT, and that none of those candidates were ultimately hired by DKT. The claimant testified that the petitioners owe

¹ Petitioners' Exhibit 3 reproduced as offered into evidence at hearing. ALL CAPS in the original.

² The petitioners' fee on the contract was 30% of the total gross compensation to be earned by the candidate employed by DKT during his or her first twelve months of employment. The petitioners estimated this to be \$100,000.00 with the final payment to be adjusted upward or downward as needed.

him a \$4,500.00 commission because they received \$10,000.00 from DKT on September 2, 2008 for the slate that he had prepared. He further testified that "I worked the search and the only reason I worked the search was because I was going to be paid on each payment." Heath testified that since none of the candidates put forth by the claimant were ultimately hired by DKT, the petitioners do not owe the claimant any commission for the job. Heath further testified that the initial \$4,500.00 payment he gave to the claimant was to "incentivize" him. Heath also explained that ultimately he had to re-do the candidate slate for DKT because the claimant resigned his position with the petitioners on September 1, 2008 prior to completion of the project. Heath testified that it took three and a half months to complete the job after the claimant resigned.

FINDINGS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The petitioners have the burden to show that the Commissioner's order is unreasonable or invalid (Labor Law §§ 101 and 103; 12 NYCRR 65.30). Accordingly, it was the petitioners' burden to prove that the amount the Commissioner found due and owing to the claimant on the DKT project was unreasonable.

The employment agreement in this matter, which was negotiated by the parties as evidenced by the fact that the petitioners accepted the changes proposed by the claimant, states in relevant part:

**"PRODUCTION: 100% OF THE FEE FOR A SEARCH
OBTAINED & FILLED BY YOU & FEE CASHED-IN."**

We find that this means a full commission could be earned by the claimant if he provided a candidate to a client who was ultimately hired by the client, and if the client paid the petitioners for the service. In the case before us, it is undisputed that none of the candidates provided by the claimant to DKT were hired. Therefore, the petitioners do not owe him a full commission on the project.

The employment agreement also contemplates that in some situations a split commission may be earned:

**"50% OF THE FEE FOR FULLFILLMENT OF ANOTHER
ASSOCIATES SEARCH COMPLETED AND CASHED-
IN."**

We understand this to mean that the claimant could earn a half commission if he found a candidate for another associate's search, and that candidate was hired by a client of the petitioners. That is clearly not the situation here, where, as stated above, the claimant put forth no candidate who was ultimately hired by DKT. Accordingly, the petitioners do not owe the claimant even a partial commission for the project.

The respondent argues that the petitioners owe a commission to the claimant for the DKT job because the contract is ambiguous, is silent on retained searches, and past practice between the parties supported payment of a commission to the claimant after each payment received by the petitioners on a retained search. We disagree.

The contract is not ambiguous. In fact, it is clear that a commission is not earned until a candidate is hired. While we agree that the contract is silent concerning retained searches, we also note that it is silent on contingent searches. We find that the commission agreement applies to all searches whether contingent, retained, or some other type of search. The commission on all searches is earned when a candidate is hired and the petitioners are paid a fee. With respect to past practices, there is evidence that the petitioners paid the claimant a commission on two prior retained sales after the down payments and after candidates were hired by the client. Those two prior instances were different from the DKT project because the claimant ultimately earned a commission on those jobs when the petitioners' client hired a candidate put forward by the claimant, and because payment was made in two installments, not three as with DKT. It is undisputed that the claimant's efforts on DKT did not lead to the hiring of a candidate. Therefore, no commission was earned.

Based on the above, we find that the order is unreasonable and must be revoked.

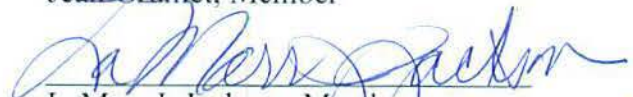
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:


1. The order is revoked; and
2. The petition for review be, and the same hereby is, granted.


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
October 11, 2011.