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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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| In the Matter of the Petition of: | |
| YELLOW BOOK USA, INC AND/OR YELLOW BOOK OF NEW YORK INC | |
| Petitioner, | |
| | DOCKET NO. PR-04-060 |
| To review under Section 101 of the New York State Labor Law: Two (2) Amended Orders to Comply with Article 6 of the Labor Law, dated January 28, 2005 | RESOLUTION OF DECISION |
| -against- | |
| THE COMMISSIONER OF LABOR, | |
| Respondent. | |

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on February 8, 2005. The Answer was filed on May 6, 2005. Upon notice to the parties a hearing was held in three sessions on January 5, 2006, March 15, 2006, and April 12, 2006 in the Board's New York City office before John G. Binseel, then Deputy Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner Yellow Book USA, Inc. (Yellow Book) was represented by Proskauer Rose, LLP, by Aaron J. Schindel of counsel and Respondent Commissioner of Labor (Commissioner) was represented by Jerome A. Tracy, Counsel to the Department of Labor (DOL), John D. Charles of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues. In accordance with arrangements made at the conclusion of the three hearings, both counsel filed post-hearing memoranda. Thereafter, the record of the proceeding was deemed closed on December 29, 2006.

The two Amended Orders to Comply under review here were issued on January 28, 2005. The first Amended Order directs compliance with § 191 of Article 6 of the Labor Law (failure to pay wages earned or payable – salary and commissions) and directs payment to the Commissioner, for wages due and owing to four (4) named Claimants in the combined amount of $4,497.60, during various time periods, with combined interest continuing thereon at the rate of 16% calculated to the date of the Amended Order, in the amount of $1,628.02, and assessing a civil penalty in the amount of $1,125.00, for a total due of $7,250.62. However, by motion granted during the January 5, 2006 hearing, the Respondent removed the claim of Ruth Klein from the first Amended Order.

The second Amended Order directs compliance with § 198-c of Article 6 of the Labor Law (failure to pay or provide benefits or wage supplements – bonuses and vacation) and directs payment to the Commissioner for wages due and owing to four (4) named Claimants in the combined amount of $22,413.16, during various time periods, with combined interest continuing thereon at the rate of 16% calculated to the date of the Amended Order, in the amount of $9,850.35, and assessing a civil penalty in the amount of $5,600.00, for a total due of $37,863.51. At hearing the Respondent made a motion to amend the pleading according to proof.

## THE RECORD EVIDENCE

Petitioner employs sales representatives to sell advertising in the company's directories throughout specified territories. These sales representatives are compensated through various compensation and benefits arrangements, primarily involving commission wages. The claims of four (4) of these sales representatives (Claimants) are the basis of the Amended Orders and are the subject of these proceedings.

All four Claimants testified. It is undisputed that the four Claimants were employed by Petitioner during the various time periods referenced in the Orders. Petitioner contends that all of the Claimants were timely paid all wages and supplements due and owing to them in accordance with the terms and conditions set forth in executed agreements governing compensation applicable to each Claimant and in policies distributed or made available to each of the Claimants. Because each of the four claims involves varying wage or wage supplement agreements and/or policies, each claim is examined separately.

## CLAIM OF HAROLD WATSKY

The first Claimant, Harold Watsky, was employed by Petitioner as a senior account executive (SAE) and filed two claims with the Commissioner. His first claim, in the amount of $814.56, was for unpaid commissions on specified sales accounts made prior to the date of his termination, for the period September 1, 2001 to September 30, 2001. The second claim, in the amount of $17,134.16, was for an unpaid, end of the season "bonus" commission, for the period May 1, 2001 to October 15, 2001.

The Claimant testified that he never signed a written employment contract with Petitioner. The commission policy was verbally conveyed by supervisors or understood among SAEs, and he does not remember receiving an employee manual as an SAE, although he does recall receiving one as a sales representative when he began working for Petitioner. DOL Senior Investigator Sarsfield (Sarsfield) testified that he received little or no response or information from Petitioner regarding his investigation in this matter, and Petitioner did not request a compliance meeting. The Petitioner did not produce a written employment agreement or commission policy for Claimant during the investigation. At the hearing, Petitioner produced a written description of its compensation and termination policy, which included his commission schedule [Pet. #A]. Claimant acknowledged having received this policy while he was

time the bonus was given out in December, and he was terminated in October of 2001. She further stated that a memo was mailed to employees informing them of the bonus in November 2001, which was after Claimant's termination date.

CLAIM OF HOWARD HILLMAN

The second Claimant (Howard Hillman) was employed by Petitioner as a sales representative and filed two claims with the Commissioner. His first claim, in the amount of $1,973.44, was for unpaid commissions on specified sales made prior to the date of his termination, for the period May 8, 2002 to September 4, 2002. The second claim, in the amount of $1,405.00, was for various unpaid "incentive bonuses," for the period June 1, 2002 to August 31, 2002.

Mr. Hillman testified that his compensation during the periods referenced in the Orders was based on a salary plus commission structure. He stated that he never signed a written contract with Petitioner regarding the terms of his salary or commissions, although he did receive a personnel handbook when he started working for the Petitioner. He also stated that he was never informed that upon leaving the Petitioner's employ that he would not receive his incentive bonuses, nor did he receive any memos or employee manuals stating that he was ineligible for the incentive bonuses after he left Petitioner's employment.

He testified as to how he had derived the amount of commissions due on the Respondent's "Commission Salesperson Recapitulation Sheet" [Resp. #10], and why he should not have been charged certain chargebacks on his commission. He also testified that he inadvertently left a chargeback out of the calculations on the Recapitulation Sheet ($68.88). In addition, he stated that the Petitioner has already paid him some of the sales commissions claimed, in the amount of $495.65. He further stated that after his termination he was not able to check the Petitioner's computer system to verify the amounts due.

Sarsfield testified that the first Amended Order reflects adjustments made after it was determined that two accounts were properly cancelled, and therefore no commissions were due as to those accounts. Sarsfield testified that the remaining amounts due to Claimant on the first Order were calculated using the remaining unpaid commissions based on a partial chargeback ($380.59) and unpaid commissions based on other chargebacks ($1,592.85), to arrive at the total commissions due ($1,973.44). In addition, he testified that, although it was not included in the final order amount, another unpaid commission ($68.88) should have been added to the first Order, for a total due and owing on the first Order of $2,042.32.

The investigator also testified that Petitioner did not respond to the portion of the claim related to the incentive bonuses, including information related to whether the incentive bonuses were payable if someone left the company. He stated that the total "incentive bonus" claim in the second Order ($1,405.00) was calculated using an unpaid "sweep bonus" ($650.00), an unpaid "zone bonus" ($685.00), and an unpaid "Islip/Babylon bonus" ($70.00), for a total due on the second Order of $1,405.00.

Petitioner's witness (Wanda Espinal) testified that Claimant was not paid commissions on the first Order for various reasons [Pet. #K], including chargebacks, out of business accounts, or pending litigation. She also stated that some accounts were unverifiable. She testified, regarding the second claim for incentive bonuses, that the sweep bonus ($650) and the zone bonus ($685) were payable on September 12, 2002 but were charged against his overdraft. The claim for the Islip/Babylon bonus ($70) could not be verified. She acknowledged that all her information regarding Claimant's commissions was derived from a document she prepared for hearing [Pet. #K], which was based on information stored on Petitioner's computer system. She stated that she has little or no independent knowledge of which accounts Claimant worked on, or the various transactions that occurred with those accounts, including whether an account

employed by Petitioner as a sales representative, but no policy was produced relating to Claimant's position as a SAE (senior account executive).

Mr. Watsky testified that Petitioner did not pay him commissions ($814.56) on certain specified sales accounts. The senior investigator testified that he calculated the amount due on Claimant's unpaid sales commissions using Claimant's personal sales log book.

Petitioner's witness, Wanda Espinal, acknowledged that Claimant was not paid commissions on these sales accounts. She explained that they were either negated due to an "overdraft situation" or because the sale was a "barter agreement." She stated that Claimant was in an "overdraft situation," meaning that, at the time he left in October of 2001, he owed the company approximately $2,000.00 in overdraft, which negated most of the specified commissions claimed ($710.34). She also stated that the overdrafts could have been caused by a variety of circumstances, such as a chargebacks or cancellations, but she could not identify what specifically caused the overdrafts in Watsky's situation. On the remaining sales account, she stated that the Claimant was not paid commission on the sale because the account was designated as a "barter agreement." In a barter, the Petitioner agreed to provide the customer with advertising in the directory in exchange for services rendered. She stated that there are no commissions on barter agreements, since they are to be worked by management, and sales representatives are provided with the written policy on barter agreements [Pet. #I].

She further testified that based on the Petitioner's compensation policy [Pet. #J], upon an employee's departure, the company would freeze the employee's pay for six months and then release any moneys due. Anything other than commissions, such as bonuses and incentive compensation, was not paid if the employee was not employed at the time.

As to Mr. Watsky's second claim, Claimant testified that he is entitled to an end of the season "bonus" commission as a result of his promotion to the position of senior account executive (SAE). He stated that, at the time of his promotion from sales representative to SAE, Petitioner had guaranteed him a "bonus" at the end of the sales campaign season to cover the difference from what he had previously made as a sale representative. At the time he became a SAE, his commission rate changed from 3% on renewals to 1½% on renewals. He also stated that prior to 2001, he automatically received this three percent "bonus" commission, via a lump sum check from Petitioner, around Thanksgiving or Christmas, because the books were closed in October. He further testified that he used the Petitioner's "Sales Commission Statement," [Resp. #8] to calculate the "bonus" amount, which he determined by multiplying 3 percent times his total volume of business [3% of $662,340.00 = $17,134.16].

Sarsfield testified that Mr. Watsky's claim in the second Amended Order should not have been categorized as a supplement (bonus), even though the employer referred to it as an "incentive bonus." He stated that it was merely a commission paid at the end of the campaign, there was no level that had to be achieved or criteria to be met, and therefore it was not a "bonus." He stated that the two unpaid sales commissions, as well as the unpaid end-of-season payment, should be combined and categorized as unpaid wages and commissions, due and owing to the Watsky in the amount of $21,467.70.

Petitioner's witness Wanda Espinal testified that the Petitioner has no plan, policy or arrangement relating to a guaranteed yearly three percent (3%) bonus commission for SAEs. She stated that the Claimant was likely referring to the company's "Holiday Bonus Plan" [Pet. #M], which was not a guaranteed bonus because the company's CEO would decide whether employees would get the year-end bonus depending upon how the company did that year. The amount of the holiday bonus would also vary from year to year, from two to three and a half percent (2-3½%), and the final dollar amount would then be calculated based on each employee's earnings that year. She also stated that the Claimant would not have received the end of the year bonus for 2001 because the plan required him to be employed at the

was out of business or in litigation. She also acknowledged that anyone in her office could change assignments to particular accounts on the computer.

## CLAIM OF ELIEZER ARROYO

The third Claimant, Eliezer Arroyo, was employed by Petitioner as an account executive and filed two claims with the Commissioner. His first claim, in the amount of $1,210.32, was for unpaid commissions on specified sales accounts, for the period June 1, 2002 to October 11, 2002. The second claim, in the amount of $420.00, was for unpaid vacation, for the period May 1, 2001 to May 1, 2002.

The Claimant testified that he worked on a salary plus commissions basis, but the terms of his employment were never in writing, and he never signed a contract regarding his commission schedule. He also testified that he never received any information or memos informing him that his salary, vacation or commissions would be forfeited upon leaving the company. He stated that his first claim, for unpaid commissions, was calculated based on the Petitioner's commission statements, which show the commissions that he earned prior to leaving the employ of Petitioner, but that were never paid to him.

Mr. Arroyo stated that his second claim, for unpaid wage supplements, was based on seven (7) days of unpaid vacation time. He stated that, while he received a personnel handbook when he began working for the company, he doesn't know whether it had described the vacation or sick pay policies. It was his understanding that he was entitled to two weeks of vacation after one year of employment. He stated that vacation pay was paid out in two ways. A "vacation bonus" payment was paid out in the month of July, based on an average weekly sales earnings over a May to May calendar year, which included all commissions and bonuses, but not salary. He testified that he was paid his "vacation bonus" in July of 2002, representing his average weekly sales earnings during the period from May 24, 2001 through May 9, 2002. He testified, however, that he was not paid certain vacation payments, which are based solely on two-weeks of salary and are usually paid at the time vacation is taken. He testified that, before he was terminated, he had used only three of the ten vacation days to which he was entitled. Based on his salary, he calculated the vacation pay due to be $420.00, which was based on $60 per day salary multiplied by seven days of vacation time.

DOL's Investigator testified that the total commissions due on the first Order ($1,210.32) was calculated based on five unpaid sales accounts, which were evidenced by Claimant's invoices and the Petitioner's commission report. He also stated that the unpaid vacation pay ($420.00) was calculated based on Claimant's average daily salary ($60.00 a day) times the number of days earned but unused (7 days).

Based on his investigation, the investigator testified that the Petitioner had two different vacation plans. A "vacation bonus" was paid out in July to employees, if they were employed on July 1st, that was based on an employee's average commission earnings during a May to May period. He stated that Claimant was paid his vacation bonus in July and was not claiming that amount. In addition to the "vacation bonus," employees who worked for more than one year were entitled to two weeks vacation as of their anniversary date of hire and were paid at their salary rate. He stated that the Claimant had used only three of the ten vacation days earned and was entitled to seven more vacation days at the time he left the company. Sarsfield testified that vacation pay is considered to be due and owing when an employer's vacation policy is silent as to forfeiture of vacation pay upon termination. He further testified that he never received any written policy from Petitioner stating that vacation pay was forfeited upon termination. Although a 1997 policy [Resp. #22] stated that vacation time not used by December would be forfeited, the policy also stated that earned but unused vacation time would be paid.

Wanda Espinal testified that Claimant was already paid on one of the claimed commissions (Latin Travel) on October 10, 2002, in the amount of $470.88. Petitioner's witness offered documents pertaining to Claimant's commissions and earnings record [Pet. #L]. She also testified that Claimant's commission (Tiffany Carpet Cleaning), in the amount of $146.88, was not paid because of a cancellation on another account (United Store Fixture), which resulted in an offset against the amount owed to Claimant. She explained that the commission on the other account (United Store Fixtures) was advanced to Claimant and, because that account subsequently cancelled its ad, the commission was taken from his other sales account (Tiffany Carpet Cleaning) in order to offset the cancellation. She further testified that the three remaining accounts were held, and not paid, because those accounts were delinquent and, as a result, were written off for non-payment.

Ms. Espinal testified, regarding the claim for unpaid vacation pay, that Claimant was not entitled to the unused vacation days, based on a policy in the company handbook [Resp.#14], because he was no longer employed with the company. She also testified that a compensation policy [Resp. #22] says "if the vacation time is not used by December, the time is forfeited," and because Claimant was terminated, his remaining vacation time was forfeited. She stated that, according to the company handbook [Resp. #14, p.15], earned but unused vacation is paid in full only for non-exempt employees, and Claimant was an exempt employee. She also stated that the policy says "no vacation time is accrued or payable if the account executive is not an active employee as of July 1st of the following year" [Resp. #14, p.15]. However, she acknowledged that Claimant was an active employee on July 1st of 2002, and that he had been paid a "vacation bonus" in July of 2002, which had accrued during the previous year, July of 2001 to July of 2002. She also acknowledged that Claimant had earned ten days of vacation time during the previous year, between July 1, 2001 and July 1, 2002.

## CLAIM OF ERIN MAAG

The fourth Claimant, Erin Maag, was employed by Petitioner as an account executive, and was paid a salary plus commission. She filed one claim with the Commissioner, in the amount of $3,454.00, for an unpaid "incentive bonus," for the period August 28, 2002 to November 19, 2002. She testified that Petitioner used various incentive programs and contests during different canvass periods, which paid out bonuses for reaching specific dollar amounts. Specifically, the "East End Early Bird Special" was an incentive program to encourage sales representatives to get a fast start on a canvass on the East End during 2002. The East End Early Bird offered bonuses for any new accounts, increases or renewals that were placed in a directory during a specific canvass period, August 28, 2002 until November 19, 2002. Based on Petitioner's "East End Early Bird Special" document [Resp. #23] and a "Sales Earning Report" [Resp. #24], the Claimant calculated the amount due and owing to her on any sales that qualified for the bonus.

She testified that she was never told, nor was there any indication in writing, that she had to be employed on a specific date to be eligible for those payments. And had she known that such a policy existed, she would not have voluntarily resigned from the position prior to receiving the bonus payment. In addition, she stated that she did not recall receiving a personnel manual, or whether the terms of her employment and commission schedule were provided to her in writing. However, she acknowledged that she did receive a "Compensation and Termination Policy" document [Pet. #B] when she began working for Petitioner.

The investigator, John Sarsfield, testified that based on the "East End Early Bird Special" incentive bonus document, Claimant's claim was adjusted to conform with the specified period applicable to the incentive bonus. According to the "Sales Earning Report" [Resp.#24], and the bonus incentive document [Pet. #B], Claimant had made six "increase" sales, in the total amount of $10,342.00, occurring during the period August 28, 2002 through November 19, 2002, for which she would be eligible to

receive an incentive bonus. Because her sales totaled more than $50,000.00, she was eligible to receive the ten percent (10%) commission on those "increases," for a bonus of $1,034.20. Also, Claimant was entitled to a $25.00 bonus for every "new" sale, which entitled her to $175.00, based on seven "new" sales. In addition, Claimant was entitled to a ten percent (10%) commission bonus on the total of her "new sales" ($20,820.00), which amounts to $2,082.00 in "new sales" bonus commission. Based on his calculations, he testified that the total "East End Early Bird Special" incentive bonus commissions due and owing to Claimant should have been $3,291.20, not the $3,454.00 referenced in the Order.

The investigator testified that, despite Petitioner's claim that Claimant was ineligible to receive her bonus because she was not employed at the time of the payout, there was no evidence that Claimant was ever given a policy or agreement stating that she would be ineligible for the bonus if she was not on the payroll at the time the money was paid out

Espinal testified that Claimant was not entitled to the incentive bonus because she left the employment of the company before the bonus was paid. She testified that the Claimant's "Compensation and Termination Policy" document [Pet. #B] reads, "[c]anvass bonuses will be paid once the account executive has met their objectives and is still employed as of the end of the assignment and re-release of the territory." She acknowledged that the incentive bonus document [Resp. #23] does not indicate any start or end dates for Claimant's assignments. She stated that an "assignment" means a cluster or a specific book that is worked for a period of time, with a start and end date, normally running for three or four months. The incentive bonus programs usually only run for about four to six weeks, and generally do not run the entire length of the assignment.

Although Espinal could not verify the start or end date on Claimant's assignment, she stated that all of Claimant's incentive bonus sales would have to be entered into the system by November 28, 2002, if that was the close date [Resp.#23]. In addition, she stated that if November 28, 2002 was the close date, then Claimant's assignment would be over for those particular books. She further testified that Claimant's last day of employment was December 6, 2002, and that Claimant was not paid the incentive bonus claimed.

## STANDARD OF REVIEW

In general, the Board reviews the validity and reasonableness of an Order to Comply made 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 to comply 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 Board Rule 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.

## EMPLOYER'S OBLIGATION TO PAY WAGES, BENEFITS, OR WAGE SUPPLEMENTS

An employer's obligation to pay the wages, benefits, or wage supplements is found in various provisions of the Labor Law, at Article 6. Regarding the employer's obligation to pay wages of commission salesman, § 191(1)(c) provides, in pertinent part:

> "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 paid 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."

Section 191 (3) further provides:

> "If employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred, as established in accordance with the provisions of this section."

Regarding the employer's obligation to pay commission wages, specifically, § 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 . . . ."

Section 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."

Section 198-c(1) governs an employer's obligation to pay or provide benefits or wage supplements:

> "In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or

> wage supplements to employees or to a third party or fund for the benefit of employees [is required to] to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made...."

Section 198-c (2) further provides:

> "As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay."

Therefore, an employer is required under Labor Law § 191 to pay wages to an employee in accordance with, and within, the prescribed statutory time periods, or if applicable, in accordance with the terms of an employment agreement or compensation plan. Specifically, an employer is required under Labor Law §191-c (1) to pay an employee all earned commissions within either five (5) days of termination, or within five (5) days from when they become due, if not due at the time of termination. If an employer agrees to pay or provide benefits or wage supplements, the employer is required under Labor Law §198-c (1) to pay or provide such benefits of wage supplements within thirty (30) days after they are due.

If the Commissioner determines that an employer has violated these provisions, the Commissioner is required to issue a compliance order to the employer, which includes a demand that the employer pay the total amount of wages, benefits or wage supplements found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

> "If the commissioner determines that an employer has violated a provision of article six (payment of wages), . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest, in addition to or concurrently with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Section 218 provides, in pertinent part:

> "1. ... In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty.... 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.
>
> ....
>
> 4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter."

ILLEGAL DEDUCTIONS FROM WAGES

Under the Labor Law § 193, an employer is prohibited from taking deductions from an employee's wages, except under limited circumstances. § 193 (1) provides, in pertinent part:

> "...No employer shall make any deduction from the wages of an employee, except deductions which:
>
> a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
>
> b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee."

Section 193 (2) further provides:

> "...No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section."

Commissions are "wages" for the purposes of the Labor Law. § 190 (1) provides:

> "... 'Wages' means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term 'wages' also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article."

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The Commissioner's Orders at issue here did not find that the Petitioner made illegal deductions from wages. Rather, the Orders charge the Petitioner with failure to pay wages and wage supplements when due. However, the issue of illegal deductions from wages is pertinent here because that issue has been addressed in a class action lawsuit in which the Petitioner and the Claimants are involved, *Gennes v. Yellow Book of New York, Inc.*, 3 Misc3d 520, 776 NYS2d 758 (Sup Ct Nassau County 2004), *aff'd.*, 23 AD3d 520, 806 NYS2d 646 (2nd Dept 2005). Since the *Gennes* case involves the same parties, and some of the issues before the Board may have been addressed by that court, it is necessary to determine whether the Board's findings are inconsistent, if at all, with the *Gennes* decision.

In *Gennes*, the Supreme Court, affirmed by the 2nd Department, held that: 1) employer could not "charge back" against commissions already earned by employees on advertisements which were not renewed; and 2) a contractual requirement that employee be working for employer as of July 1st to be

credited with vacation benefits was proper since the benefit was prospective in nature, and was designed to keep valued employees on the job, before vacation benefits were earned.

## "CHARGEBACKS" ARE ILLEGAL DEDUCTIONS FROM WAGES

Labor Law § 193 prohibits deductions from wages, except in limited circumstances. Commissions are not considered "wages," for the purposes of § 193 until they vest, meaning they become "earned and payable." Commissions are considered earned and payable either by application of Labor Law § 191-a (b) or through the terms of a contractual provision. A commission is earned under § 191-a (b) if a product has been delivered to, accepted by, and paid for by the customer.

In typical commission arrangements, employers may choose to advance commissions to their salespeople prior to the time their commissions are "earned." Later on, the salesperson's account is reconciled by subtracting out any commissions that were not "earned" from his or her total commission wages, commonly called "truing-up" or "truing-down." For the most part, the process of reconciling accounts has been recognized as valid under Labor Law §193 by the courts which determined that such advances were not "wages," since they had not yet been "earned," and therefore were subject to deductions against earned wages. But, where it has been determined that commissions were "earned" and payable, Labor Law § 193 clearly prohibits employers from deducting those commissions from an employee's wages, except as authorized by the statute. This was the primary issue in the *Gennes* decision.

In *Gennes*, the employer had a policy of reconciling the accounts of commissioned salespeople, whereby advances were paid and accounts were "trued-up" later on. There were numerous policy provisions outlining what commissions were charged against a salesperson's account, and which ones would be paid. One particular provision authorized Yellow Book to take charges against an employee's account whenever an existing account was not renewed for the following cycle, which the employer termed a "chargeable refusal." This particular "chargeback" procedure was found by the *Gennes* court to be an illegal deduction from wages, in violation of Labor Law §193.

In its decision, the court stated, "Section 193 is designed to protect an employee who earned monies from having charges made against their earnings except in limited circumstances." *Id.* at 521. Referring to the specific "charge back" provision, the court stated that the "...employees would suffer negative economic consequences through no fault of their own if a business did not renew its subscription." *Id.* "The purpose of Section 193 is to prohibit employers deducting from employees paychecks any wages already earned unless so required by law or for the benefit of the employee." *Id., citing Hudacs v. Frito-Lay, Inc.*, 90 NY2d 342, 660 NYS2d 700, 683 NE2d 322 [1997].

In affirming the lower court's decision, the Appellate Division, 2nd Department, held that the earned commissions were "wages" under Labor Law § 190 (1). *Id. at 521 citing, Truelove v Northeast Capital & Advisory,* 95 NYS2d 220, 223 [2000]; *Tuttle v McQuesten Co.*, 227 AD2d 754, 756 [1996]. The court continued, "[w]hether a commission is earned is dependent upon the terms of the agreement providing for such commission." *Id. citing, Edlitz v Nipkow & Kobelt*, 264 AD2d 437 [1999]; *Caruso v Allnet Communication Servs.*, 242 AD2d 484, 485 [1997]; *cf. D'Amato v Morgan Stanley Dean Witter Discover & Co.*, 268 AD2d 392 [2000]. Referring to the facts of the case, court concluded, "[h]ere, the evidence established that the [employer's] compensation policy, which provided for the deduction from the [employee's] earned commissions in order to compensate for the [employer's] losses, was a violation of Labor Law § 193." *Id.*

Another recent decision, *Levy v Verizon Information Services, Inc.*, --- FSupp2d ----, 2007 WL 2122050 (EDNY 2007) provides further clarification to the *Gennes* decision. The court in *Levy* stated, "[o]n its face, § 193 does not restrict how an employer determines entitlement to commissions or incentive compensation. Rather, it simply imposes restrictions on the types of deductions that an

employer can make from wages or commissions already earned." *Id. citing e.g., Gennes v Yellow Book of New York.* The court continued, "[i]ncentive compensation and bonuses constitute "wages" under the [NY Labor Law] only once they become vested." *Id. citing, Pachter v Bernard Hodes Group, Inc.*, No. 03-10239, 2005 WL 2063838, *at* *5 *n. 8* (SDNY, 2005) *citing, Truelove v Northeast Capital & Advisory Inc.*, 95 NY2d 220, 224-25, 715 NYS2d 366, 738 NE2d 770 (2000). Furthermore, "[w]here a compensation plan provides that incentive compensation is not earned until the end of a production period - when appropriate adjustments can be made to calculate the 'net figure[s]' to which employees are entitled - the incentive compensation does not vest, and thus does not qualify as 'wages,' until after the amounts due are determined." *Dean Witter Reynolds Inc. v Ross,* 75 AD2d 373, 381-82, 429 NYS2d 653 (1st Dept, 1980). In such a case, advanced, unearned incentive compensation is subject to the employer's recovery. *See Levy, Cf. Truelove* 95 NY2d at 225.

The Board having given due consideration to the pleadings, testimony, documentary evidence and all of the papers filed herein, makes the following findings of fact and law pursuant to the provision of the Board Rule 65.39 (12 NYCRR 65.39).

## FINDINGS

The Petitioner is a private employer doing business in the State of New York, as defined by Article 1 of the Labor Law, and is subject to the jurisdiction of the Commissioner of Labor. It is also an employer as defined in Labor Law § 651.6.

The following determinations of the Board are not inconsistent with or precluded by the holding in *Gennes*. The two (2) Amended Orders to Comply are affirmed, as modified and addressed separately as to each of the four Claimants.

## CLAIM OF HAROLD WATSKY

The Board finds that the Amended Orders, as they relate to both of Mr. Watsky's wage claims, should be affirmed. Specifically, the Amended Order for unpaid commissions ($814.56) on specified sales accounts should be affirmed as valid and reasonable. It was undisputed that Claimant had generated the commissions on all of the specified sales accounts. Based on the credible testimony of the Claimant and the investigator, the Board finds that the Claimant had earned, and is due, all of the commissions on these specified sales accounts.

Although the Petitioner produced various documents relating to employment and commission policies, the Board finds that the Petitioner failed to prove that the application of any employment agreement or policy allows for the non-payment of Mr. Watsky's commissions. The Petitioner's "Compensation & Termination Policy" [Pet. #A] for account executives (A/Es), which Claimant acknowledged signing and receiving at the beginning of his employment, does not indicate whether such policy applied to Claimant after his promotion to a senior account executive (SAE). It is also unclear whether any of the other documents submitted into evidence [Pet #J, Resp #22, Resp #30] were given to the Claimant. Moreover, Petitioner's "Rules & Regulations Manual" [Resp #30] references various sales representative positions and seems to suggest, at least in some respects, that account executives are treated differently than senior account executives and other types of sales representatives [*See e.g.*, Id. at 2-2 and 2-9]. Conversely, the Claimant offered credible testimony that the Petitioner's commission arrangements and policies were conveyed verbally through supervisors or "understood" among particular sales representatives. In addition, Mr. Watsky's testimony regarding his understanding of policy and commission arrangements was consistent with the testimony of other witnesses. Furthermore, given the vague nature of the various documents produced during the hearings, it is unclear to the Board which

commission arrangements or policies, if any, specifically authorized Petitioner to withhold payment of Claimant's commissions.

In addition, Petitioner's explanation for non-payment is murky at best. The Petitioner's sole witness, while having a broad understanding of the various policies and commission arrangements utilized by Petitioner, had no independent knowledge of any of the Claimants' employment situations and a tenuous connection to the particular territories in which they worked. Also, much of her testimony relied on documents that she prepared jus t prior to hearing, based on records obtained from Petitioner's computer system, which she acknowledged could be altered at any time. Even if Petitioner established that a policy was in place to allow non-payment of Claimant's commissions based on some form of "overdraft situation," the Petitioner's witness could not ascertain the basis for the overdraft, and explained that it could have been caused for various reasons, including chargebacks. Certain chargebacks have already been found to be illegal deductions from wages. *Gennes v. Yellow Book*, 3 Misc3d 519, 776 NYS2d 758 (2004), *aff'd*, 23 AD3d 520, 806 NYS2d 646 (2nd Dept., 2005). In light of the credible testimony of the Claimant, and the absence of credible proof from the Petitioner that these commissions were unpaid due to some valid mechanism, other than illegal chargebacks, the Board finds that the commissions should have been paid to Claimant. Secondly, while it has been submitted that Petitioner has a policy related to barter agreements [Pet. #I, Resp. #30 at 2-16], it is unclear whether such a policy applies to Claimant, in his position as senior account executive, and whether Claimant actually knew there was a "barter agreement" in place, prior to generating his commission. Based on the above, the Amended Orders, as they relate to the underlying claim for unpaid commissions on specified sales accounts, should be affirmed.

The Amended Order, as it relates to the underlying claim for an unpaid end-of-the-season commission ($17,134.16) should also be affirmed. According to the credible testimony of the Claimant, Petitioner guaranteed him an annual three percent (3%) end-of-the-season commission, based upon his total sales, to make up the difference due to a change in his commission rate (3% on renewals to 1½% on renewals ) at the time of his promotion from account executive to senior account executive. Although the Petitioner's evidence regarding a "Holiday Bonus Plan" shows some similarities to the Claimant's commission arrangement, the Petitioner has failed to provide credible proof that a three percent (3%) end-of-season commission agreement did not exist. As stated previously, Petitioner did not produce any credible evidence that an employment agreement or policy existed relating to the Claimant's position as a senior account executive. In addition, Petitioner's witness, who stated that no such arrangement existed, had no independent knowledge of Claimant's employment situation. Nor could she fully explain certain discrepancies referenced on the Petitioner's "Sales - Commissions Statements" [Pet. #8], indicating that some type of additional payments were made to Claimant prior to 2001. Furthermore, based on the investigator's testimony that the amount due was incorrectly categorized as a "bonus" under the second Amended Order, and that it should have been categorized as an additional commission under the first Amended Order, the Board finds that claimed amount was a commission, and not a bonus. Therefore, Respondent's motion at hearing to conform the pleading to the proof is granted and the Amended Orders should be modified accordingly.

## CLAIM OF HOWARD HILLMAN

The Board finds that the Amended Orders, as they relate to both of Mr. Hillman's wage claims, should be affirmed. Specifically, the Amended Order, as it relates to the underlying claim for unpaid commissions ($1,973.44) on specified sales accounts should be affirmed as modified herein. It was undisputed that Claimant had generated the commissions on all of the specified sales accounts. While the Petitioner's witness testified regarding the disposition of each of the commissions based on her review of the Petitioner's records, the evidence shows that most of the claimed commissions were not paid due to Petitioner's application of a chargeback procedure [Pet. #K]. As discussed previously, certain

chargebacks have been found to be illegal (*see, Gennes*). Absent credible proof that these commissions were not withheld through an illegal chargeback procedure, they are due and payable. The other commissions, those that were not considered chargebacks, either could not be verified by the witness, in which case they are still owed to Claimant, or they were already paid to Claimant. The amount already paid to Claimant should be deducted from the amount of unpaid commissions under the Order. In addition, based on the testimony of the Claimant and the investigator, as well as the Petitioner's "Sales - Commissions Statements" [Pet. #8], an additional commission, in the amount of $68.88, should be added to the amount due under the Order, as it was also an illegal chargeback. Based on the above, the Amended Order, as it relates to the underlying claim for unpaid commissions on specified sales accounts, should be affirmed, as modified above, for a total due to Claimant in unpaid commissions of $1,546.67.

The Amended Order, as it relates to the underlying claim for "incentive bonuses" ($1,405.00) should also be affirmed. According to the testimony of Petitioner's witness, the Claimant's bonus commissions for the "sweep" ($650.00) and "zone" ($685.00) bonus were payable to him, but were unpaid due to its chargeback procedure. Also, the witness testified that she could not verify the Islip/Babylon ($70.00) bonus. Therefore, the claimed amount of "incentive bonus" should have been paid to Claimant, as they were either withheld as an illegal chargeback, or no valid reason was shown for non-payment. Based on the above, the Amended Order, as it relates to the underlying claim for "incentive bonuses," is affirmed.

CLAIM OF ELIEZER ARROYO

The Board finds that the Amended Orders, as they relate to both of Mr. Arroyo's wage claims, should be affirmed as modified. Specifically, the Amended Order, as it relates to the underlying claim for unpaid commissions ($1,210.32) on specified sales accounts should be affirmed, as modified herein. It was undisputed that Claimant had generated the commissions on all of commissions claimed. Although the Petitioner's witness testified that the first of the claimed commissions (Latin Travel) was paid to Claimant, Petitioner offered no credible proof that such commission was actually paid to Claimant. The Petitioner's "Employee Earnings Report" [Pet. #L], generated by its payroll company does not show, nor can we conclude, that the commission was actually paid to Claimant. The Petitioner did not produce a cancelled check or any record of actual payment. Therefore, the Board finds Mr. Arroyo's testimony about the commission due to be credible, and absent credible proof by the Petitioner that such commission was in fact paid, that commission remains due and owing to Claimant. As to the second commission (Tiffany Carpet Cleaning), the Board finds that the use of his earned commission to offset the Petitioner's loss on an another account (United Store Fixtures) to be an illegal offset. A deduction, unless specifically authorized by law, cannot be taken against the earned wages of an employee to compensate for the company's losses (*see, Gennes*). As to the remaining commission on the three accounts, the Petitioner's witness testified that the commissions on those accounts were not paid because the accounts were delinquent, and the customers did not pay [*See,* Pet. #H]. Respondent acknowledged that the basis for non-payment on these accounts was not ascertainable at the time of the investigation because Petitioner did not provide the requested records and Claimant did not have access to the Petitioner's records in order to verify them for his claim. Based on the above, the Board finds the payment of the commissions was properly withheld, as no commission was earned due to non-payment by the customer. Therefore, the Amended Order, as it relates to the underlying claim for unpaid commissions on the specified sales accounts, should be affirmed, as modified above.

The Amended Order, as it relates to the underlying claim for unused vacation pay ($420.00) should also be affirmed. It is undisputed that the Claimant was entitled to a vacation bonus, which was based on his average weekly earnings from the period May 24, 2001 through May 9, 2002, he was eligible for a lump sum payout of the vacation bonus on July 1, 2002, because he was an active employee on that date, and he actually was paid this vacation bonus in July of 2002. One of the Petitioner's vacation policies, introduced by both parties at hearing, was consistent with the above [Resp. #22, same as Pet. #J,

same as Resp. #30, p. 9-1].

At issue, however, is an additional vacation payment, which was apart from the vacation bonus mentioned above. According to the Claimant, he was entitled to an additional vacation payment that was based solely on two-weeks of his salary, calculated from the anniversary date of hire, and payable to him if not used by that date. While Claimant could not remember whether any vacation policy was given to him, his understanding was consistent with the policy introduced by respondent during the hearing [Resp. #14, page 14], as well as his testimony that he had already used, and was paid for, three of the ten vacation days claimed. The Petitioner's policy [Pet. #14] states, "any earned vacation unused [within one year after the anniversary date that the vacation time is accrued] will be paid in full for non-exempt employees." Although the witness contends that the Claimant was an "exempt employee," and not entitled to this payout, Petitioner offered no evidence to prove that the Claimant was classified as an "exempt employee" under the policy, nor any clarification as to the exact definition of the term. In addition, Petitioner's sole witness testified that, according to the policy, Claimant forfeited his vacation pay because he was not employed in December. However, that particular policy, [Resp. #22, same as Pet. #J, same as Resp. #30, p. 9-1] refers only to forfeiting vacation "time" (*emphasis added*) if not used by December, and as stated before, that policy only requires the employee to be employed on July 1st to receive the vacation payout, which he did receive. Furthermore, Petitioner failed to establish which policy offered by the Petitioner, if any, applies to the Claimant and to what extent that policy regulates the payment of unused vacation time and vacation pay. Petitioner did not produce any written acknowledgements by Claimant that he received any of the policies referenced, nor testimony from any witnesses directly familiar with Claimant's employment situation to verify that Claimant had received, or was aware of, any such policy.

Based on the above, the Board finds that the Petitioner failed to meet its burden of proof and Claimant should have received his earned but unused vacation pay, in the amount of $420.00. In addition, the Board notes that the findings herein regarding vacation pay are not inconsistent with the court's finding in *Gennes*. In *Gennes*, the court determined that an agreement providing for plaintiff's vacation benefits expressly stated that "[n]o vacation time is accrued or payable if the account executive is not employed as of July 1 following the calculation period." The court found that the vacation accrual policy was clear and that the employees were not entitled to vacation pay because they were not employed on July 1st. Here, Petitioner has introduced a virtually iden tical vacation policy. However, there is no contention by either party that Claimant was not an active employee on July 1st following the calculations period, nor is there any contention that he wasn't paid that vacation benefit. To the contrary, the vacation policy at issue here, which is distinguishable from the one described in *Gennes*, states that vacation time accrues from anniversary date to anniversary date and any portion of vacation time unused after that date is payable to the employee. Therefore, the Amended Order, as it relates to the underlying claim for unused vacation pay should be affirmed.

## CLAIM OF ERIN MAAG

The Board finds that the Amended Order, as it relates to Ms. Maag's wage claim for unpaid "incentive bonus" commissions ($3,454.00) should be affirmed as valid and reasonable. It was undisputed that Claimant had generated the incentive bonus commissions during the periods referenced. These incentive bonus commissions were based on Petitioner's "East End Early Bird Special" [Resp. #23]. Claimant testified that she was never informed, verbally or in writing, that she had to be employed on a specific date to receive payment of these commissions, and would not have resigned at the time she choose had she known of such a policy. Although the Petitioner states that the Claimant was not owed the incentive bonus because she had to be "...employed as of the end of the assignment and re-release of the territory," the witness could not verify the start or end date of the assignment in Claimant's case. Based on the above, the Board finds that the Petitioner has failed to prove that a clear policy exists that expressly

allows forfeiture of the referenced commissions here. In addition, the Board finds that the amount due under the Order should be adjusted to reflect the proper amounts due ($3,291.20), as was testified to by the investigator and in conformance with the proof offered at the hearing. Therefore, the Amended Order, as it relates to the underlying claim for unpaid commissions on the specified sales accounts, should be affirmed, as modified above.

## CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The first Amended Order assessed 25% of the unpaid wages in civil penalties. The second Amended Order assessed 25% of the unpaid wages in civil penalties. The Board finds that the considerations and computations required to be made by the Labor Commissioner in connection with the imposition of the civil penalty amount set forth in both Orders, as modified, are proper and reasonable in all respects.

## INTEREST

Labor Law § 219 provides that when the Labor 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Let a Resolution of Decision issue accordingly.

Anne B. Stevason, Chairman

Mark S. Perla, Member

Gregory A. Monteleone, Member

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on October 24, 2007.

KHG