




4. Both parties were present during the course of the hearing held herein, and were provided sufficient opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues raised in this proceeding; and
5. The Board has considered the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed here; and
6. The Memorandum of Decision in this matter, issued the date noted below, contains the Board's findings of fact and conclusions of law and is incorporated by reference in its entirety in this Resolution of Decision; and
7. All motions and objections made on the record of this proceeding that are not consistent with this determination are deemed denied.

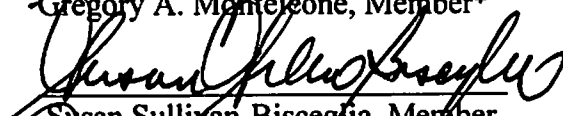
NOW, THEREFORE, IT IS HEREBY RESOLVED:

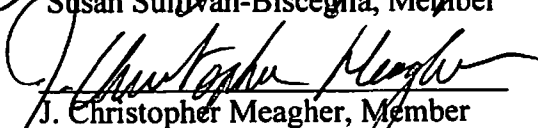
1. That the Order to Comply under review, as modified herein, be, and the same hereby is, affirmed as modified.
2. That the Petition for Review filed herein, be and the same hereby is, denied.

  
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 Anne P. Stevason, Chairman

**ABSENT**  
 \_\_\_\_\_  
 Mark S. Perla, Member

  
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 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 August 22, 2007

State of New York  
Industrial Board of Appeals

Anne P. Stevason  
Chairman

Mark S. Peria  
Gregory A. Monteleone  
Susan Sullivan-Bisceglia  
J. Christopher Meagher  
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STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

WORKFLOW SOLUTIONS, LLC :  
(T/A WORKFLOW), :  
Petitioner, :

To review under Section 101 of the Labor Law: :  
An Order to Comply with Article 6 :  
of the Labor Law, dated August 5, 2005 :

- against - :

THE COMMISSIONER OF LABOR, :  
Respondent. :

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DOCKET NO. PR-05-064

MEMORANDUM OF DECISION

The Petition for Review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 11, 2005. An Answer was filed on October 20, 2005. Upon notice to the parties, a hearing was held on September 27, 2006 at the Board's offices in Garden City before Gregory A. Monteleone, Esq., Member of the Board and designated Hearing Officer in this case.

Petitioner, Workflow Solutions, LLC (Workflow), was represented by Kaufman & Canoles by David J. Sullivan, Esq. and Respondent, Commissioner of Labor (Commissioner), was represented by Jerome A. Tracy, Counsel to the Department of Labor (DOL), Casey Callahan 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.

The Order to Comply with Article 6 of the Labor Law, under review herein, was issued on August 5, 2005 pursuant to Labor Law § 191(1) (failure to pay wages) and directs payment to the Commissioner of wages due and owing to its former employee, Audrey Kahn, for the period June 1, 2003 through July 1, 2004 in the amount of \$20,208.30, with continuing interest thereon at the rate

of 16% calculated to the date of the Order in the amount of \$3,543.37, and assessing a civil penalty in the amount of \$5,050.00, or 25% of the unpaid wages, for a total due of \$28,807.61.

The Board having given due consideration to the pleadings, the testimony, the hearing exhibits, the documents and all of the papers filed herein, makes the following findings of fact and law pursuant to the provisions of Board Rule § 65.39 (12 NYCRR § 65.39):

#### FINDINGS OF FACT

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.

Claimant, Audrey Kahn, was employed by Workflow for approximately seventeen (17) years as a salesperson. Her job duties consisted of contacting customers and selling print, promotional products, janitorial products and office supplies. She was paid by straight commission and did not receive a draw. On April 23, 2004, she was discharged from her employment by Regional Manager Kevin Dwyer. Ms. Kahn could not recall whether she had ever received an employee handbook or manual from Petitioner during her employment. She testified that she was not paid any commission subsequent to her termination and was not provided any explanation as to why she was not paid.

Workflow uses two primary forms of sales orders which generate commissions differently. The first is called the "straight ship." In a straight ship, the Petitioner does not handle the inventory, the merchandise is sent directly to the customer, invoiced immediately and the salesperson receives the commission at the time of invoicing the customer. The other form of sales order is called "bill as ship." In this form of order, the Petitioner purchases the product for the customer and then warehouses it. As the customer needs the product, it is released and invoiced. The salesperson is paid as the product is released and invoiced. However, the customer is required to pay in full within one year from the date of the order and the salesperson is to receive the commission within that time as well. Kahn acknowledged that she was not immediately paid a commission on "bill as ship" orders.

When Kahn began working for Workflow she brought with her a number of customers. Among them were State Bank of Long Island, Castella Imports, HealthTech Systems and Coach Realtors. The contract with State Bank of Long Island provided that "bill as ship" orders for marketing items would be billed within six (6) months as opposed to one year due to the fact that these items were much more expensive than print items. Therefore, it was expected that the commission would be payable to Kahn within six months of the sale. Petitioner produced no evidence contradicting the terms of the contract with the State Bank of Long Island.

Workflow's policy manual provided, at page 32:

"When a sales representative leaves the Company, any commissions owed to him or her, will be paid after all the work in process has been billed, and all the accounts receivable has been collected. The sales representative will continue to receive his or her commission statements and may continue to work with any necessary SFI [Workflow] personnel to resolve any problems. At this point, however, the sales representative should not contact the customer regarding any orders since he or she is no longer representing SFI [Workflow]"

Based on Kahn's work in progress report, and other documents received from the State Bank of Long Island, she filed a claim with DOL for unpaid commissions on fourteen (14) sales totaling \$20,208.30. She said that she was unable to be exact in her calculations as to what was owed and what was paid due to the fact that Workflow did not give her access to its records. DOL sent Kahn's claim to Workflow but Petitioner had not submitted any documents to DOL prior to the hearing.

Petitioner's witness, Jackie Davis, an employee of Workflow for over 23 years, testified that Kahn received all commissions that were due to her. She reviewed all fourteen (14) sales orders which formed the basis of the claim and provided documentation to indicate what was paid to Kahn after termination. A recapitulation of these orders and payments to claimant were provided, which included chargebacks from commissions for freight charges on orders for which Kahn did not receive a commission. She stated that all commissions on straight sales or bill as ship sales that were invoiced prior to Kahn's termination date was paid to her, per company policy. She pointed out that company policy provided that commissions on bill as ship items would be paid to the salesperson who was in charge of the account at the time that the merchandise was released from the warehouse. When a salesperson terminates his/her employment, the account is reassigned. However, this does not always happen immediately so that commissions on bill as ship items which are released in the interim are credited to the former salesperson, even if terminated. Interestingly, although Davis could not recall when exactly Kahn's accounts were reassigned, they were first reassigned to a three person team which included the Regional Manager Kevin Dwyer, who fired Kahn. The current account manager was provided the commission, even if they did not originate the sale, due to the fact that they would be required to service the account prior to and after the release of inventory.

Although Kahn did not recall receiving Workflow's policy manual, a signed receipt was introduced by Petitioner and it is reasonable to assume that Petitioner was aware of the policy concerning commissions on bill as ship orders when the account is reassigned, given the fact that she understood that payment on such orders would not be made until the items were released. The policy manual also provided for many chargebacks from commissions. These chargebacks are not the subject of this case except to the extent that freight charges were used to offset some commissions owed to Kahn.

#### STANDARD OF REVIEW

The Board reviews the validity and reasonableness of an Order of Compliance 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 of Compliance 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.

#### PAYMENT OF COMMISSIONS AFTER TERMINATION OF EMPLOYMENT

Labor Law §191-a(b) defines "earned commission" as:

"a commission due for services of merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by the customer, notwithstanding that the sales representative's services may have been terminated."

Thus, but for Workflow's policy manual, Kahn would be due all commissions on orders which she placed as soon as Workflow was paid on the order. However, the policy manual provides that, although commissions will be paid after termination, on straight ship orders and bill as ship orders which were released and invoiced prior to termination, commissions on bill as ship orders which were released after termination would go to the reassigned account manager. In general, commissions are governed by the terms of the parties' contract. Although we look with disfavor at situations where a salesperson has done all that she is required to do in order to earn her commission and is prevented from receiving the benefits of the contract because she was fired by her employer, the situation here is somewhat different. The commission terms in this case were outlined in the contract. Commissions on bill as ship items were earned when the item was released and invoiced. The commission was earned not only on the initial sale but also with the follow up service of the customer that was required prior to the time the items were released from inventory. This is not the case where the commissions were earned during the employment and forfeited when the employee was discharged. Given Kahn's knowledge of the employee policies and her signature on a receipt of the employee manual we find that there was a written contract which governed the payment of commissions.

However, Kahn is entitled to commissions on orders which, pursuant to contract, should have been released and billed prior to her termination of employment. In particular, the marketing items ordered in May of 2003 by the State Bank of Long Island should have been billed and released within six months of the order. Kahn testified that she requested that this order be billed and was told not to worry about it. "Every contract implies good faith and fair dealing between the parties to it. A duty of co-operation on the part of both parties is also implied in every contract." 22 NYJur.2d Contracts §230 Pursuant to the contract, Kahn earned her commission on these orders prior to her termination. Therefore, Workflow cannot rely on its failure to invoice these orders as required under the contract, as a defense. The items should have been released and invoiced and paid to Kahn well before her termination.

#### DEDUCTION OF FREIGHT CHARGES

In its recapitulation of the fourteen (14) orders which are the subject of the claim, Workflow deducted \$385.65 for various chargebacks, including freight charges, against commissions which were never paid to Kahn. In *Gennes v. Yellow Book*, 3 Misc.3d 519, 776 N.Y.S.2d 758 (2004), *affd* 23 A.D.3d 520, 806 N.Y.S.2d 646 (2<sup>nd</sup> Dept 2005), the court held that certain chargebacks from commissions were illegal deductions from wages in violation of Labor Law §193. We find that the

chargebacks for freight charges on items never credited to Kahn, are illegal deductions and will not serve to reduce the commission wages that are due her. Therefore, \$385.65 will be added to the amount owed Kahn in commissions.

#### AMOUNT OF COMMISSIONS DUE

Accepting Workflow's recapitulation of the commissions on the fourteen (14) orders claimed by Kahn and in keeping with the above, we find that Kahn is still due \$16,876.62 in unpaid wages. She is due \$17,862.90 for the commission wages on the marketing items sold to State Bank of Long Island, which should have been invoiced prior to her termination, minus \$1371.93 (\$1016.52 + \$355.41) which has already been paid in commission, plus \$385.65 in illegal deductions for a total due of \$16,876.62 plus continuing interest thereon of 16% calculated to the date of the Order, to be calculated by Respondent.

#### CIVIL PENALTIES FOR FAILURE TO PAY WAGES

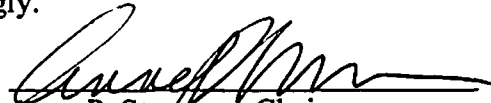
The Order of Compliance additionally assessed an additional 25% of the total unpaid wages in civil penalties. Since the amount of unpaid wages has been reduced to \$16,876.62, the amount of civil penalty is likewise reduced to 25% of \$16,876.62, or \$4,219.16. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order are proper and reasonable in all respects. Petitioner failed to cooperate or provide any documentation to Respondent until the hearing.

#### INTEREST

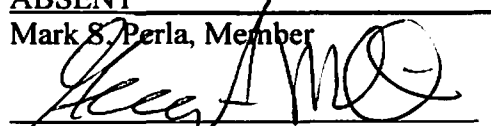
Labor Law § 219 provides that when the Commissioner determines that wages are due then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

The foregoing constitutes our findings of fact and law pursuant to § 65.39 of the Board's Rules of Procedure and Practice (12 NYCRR § 65.39).

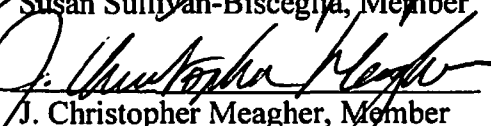
Let a Resolution of Decision issue accordingly.

  
Anne P. Steyason, Chairman

**ABSENT**  
Mark S. Perla, Member

  
Gregory A. Monteleone, Member \*

  
Susan Sullivan-Bisceglia, Member

  
J. Christopher Meagher, Member

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