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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROCHESTER LINOLEUM & CARPET CENTER, INC. Petitioner, To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6 of the Labor Law, dated October 20, 2006 -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-06-079 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 2, 2006. Upon notice to the parties a hearing was scheduled and held on July 19, 2007 in the Board's Albany office before Khai H. Gibbs, then Associate Counsel to the Board and designated Hearing Officer in this proceeding.

Petitioner Rochester Linoleum & Carpet Center, Inc. was represented by its Senior Vice President, Andrew Goldslager, and Respondent, Commissioner of Labor (Commissioner), was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro of counsel. 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 to Comply under review in this proceeding was issued by the Commissioner on October 20, 2006 and directs compliance with Article 6 of the Labor Law. The Order directs payment to the Commissioner for wages due and owing to one named Claimant in the amount of $4,907.68 for work performed from June 11, 2005 to July 24, 2005, with interest continuing

thereon at the rate of 16% calculated to the date of the Order, in the amount of $974.54, and assesses a civil penalty in the amount of $1,225.00, for a total amount due of $7,107.22.

The Petitioner challenges the Order on the grounds that (1) the Claimant was paid on a draw against commission and not on a salary basis; and (2) the Claimant was not employed by the Petitioner during the time period covered by the Order. The Respondent denies the material allegations raised by the Petition and asserts the Petitioner's failure to produce payroll records as an affirmative defense.

SUMMARY OF EVIDENCE

There is no dispute that the Petitioner employed the Claimant as a full-time Account Sales Representative commencing April 11, 2005. The dispute here concerns only the terms and duration of such employment.

The Claimant testified that he was hired on a salary basis as memorialized by a letter dated March 14, 2005, signed by the Petitioner's then Vice-President of Sales, Ronald Cassin, and signed by the Claimant on March 15, 2005 (Hiring Letter), stating in relevant part:

> "Rochester Flooring Resource is pleased to offer you a full-time position as an Account Sales Representative with our Albany, NY branch. Your starting salary will be $62,500.00 per year, paid bi-weekly with an Auto Allowance of $400/month."

At the time he was hired, the Claimant understood the terms set forth in the Hiring Letter to be the terms of his employment. The Claimant further testified that his bi-weekly paychecks were consistent with the Hiring Letter.[1]

The Claimant, an individual with 15 years of experience marketing commercial flooring products, testified that he would not have accepted the position on a draw against commission basis. Since the position involved marketing a difficult to sell product in a sales territory where he had no accounts, this would result in a significant time delay between the initial work of developing new clients and actually finalizing sales. Most of the sales positions the Claimant had previously held were also in a "start up" role either marketing a new product or opening a new sales territory and he had always been paid on a salary basis in those positions. In his 15 years in the business, the Claimant had never worked on a draw against commission basis.

The Claimant worked for the Petitioner for approximately three months as a sales associate in the Hudson Valley, working primarily from home or out of his car and therefore was not often present at the Petitioner's Albany office. During that time, he made sales calls, attended meetings when required, responded to phone calls from management, and documented to Cassin sales calls that he had made. The Claimant conceded that during the time he was

[1] Respondent's Exhibit 2 is a paystub received by the Claimant during his employment with the Petitioner which lists the then current amount earned as $2,403.84. This amount paid over 26 bi-weekly pay periods amounts to $62,500.00, the Claimant's purported salary in this matter.

employed by the Petitioner he made no sales; however, he believed that some of his work led to eventual sales on two occasions.

The Claimant testified that he resigned from his position with the Petitioner on July 8, 2005, during a conversation with Cassin at the Petitioner's Albany office, and that he was not paid for his last four weeks of employment.

Andrew Goldslager, the Petitioner's Senior Vice President, was the only witness to testify on behalf of the Petitioner. Goldslager did not dispute that the Petitioner had employed the Claimant, but contested that the Claimant was paid on a salary basis. According to Goldslager, the Claimant was paid on a draw against commission basis.

Goldslager testified that during the time period relevant to this proceeding, all of the Petitioner's approximately 100 sales associates, including the Claimant, were paid on a draw against commission basis. In support of this, the Petitioner introduced into evidence a document entitled "Sales Incentive Plan for Commission Sales Associates: Summary Plan Description" which describes in detail the commission plan for sales associates including the commission draw guidelines. However, Goldslager conceded that he did not have a copy of a Sales Incentive Plan that had been signed by the Claimant, and the Claimant, for his part, testified that he did not recall either ever seeing a copy of the Sales Incentive Plan or ever signing one.

Additionally, the Petitioner introduced a two-sentence letter dated November 17, 2005, from its President, Albert Pelusio Jr., stating that "[a]ll Rochester Flooring Commercial Sales Associate's pay is base on draw against commission. This is our only company sales compensation policy." The Petitioner also introduced a document that was, according to Goldslager's testimony, created after July 31, 2005 showing the Claimant's commission and draw calculations. Goldslager conceded that he did not personally create the document in question and did not know when it had been created.

The remaining documentary evidence introduced by the Petitioner consisted of undated, self-serving and conclusory emails that were admittedly prepared in response to DOL's investigation. Those emails state that the Claimant was paid on a draw against commission basis and that he was not working for the Petitioner during the period covered by the Order.

Goldslager also testified that at a meeting held on June 10, 2005, the Petitioner decided that because the Claimant had been unresponsive to repeated telephone calls from management, it would call him into the office to let him know that his services were no longer needed, and that Claimant came into the Albany office two weeks later and was, at that time, told that he was terminated. Goldslager testified that he did not personally terminate the Claimant and that in fact, he was not even present at the time that the Claimant was allegedly terminated.

No letter of termination was ever sent to the Claimant, but an "Employee Separation Record" prepared by the Petitioner's Operations Manager was produced. The Employee Separation Record has the box for "voluntary quit" checked, and beneath that, the box for "personal reasons" is checked off. The box for "abandoned job (3 days no call/no show)" was not checked, nor was the box for "discharge" checked under which "unsatisfactory work performance," "attendance/tardiness" and "violation of company policy" all remained

unchecked. A handwritten notation on the Separation Record states that "[e]mployee came into office morning of 7/8/05 to resign from position. Per supervisors his last date worked was 6-10-05."

The Claimant testified that June 10, 2005 was not his last day of work, and that in fact between June 10, 2005 and July 8, 2005, the date he resigned, he continued to make sales calls and to document those calls to Cassin. He further testified that he did not remember any calls from management that went unreturned, and that Cassin had excused him from the meetings he had missed because it was inconvenient for him to drive from the Hudson Valley to Albany to attend nonessential meetings.

Labor Standards Investigator Lori Robinson, testifying for the Respondent, stated that on August 29, 2005 DOL received a complaint from the Complainant alleging that the Petitioner had failed to pay him wages and an automobile allowance for the period from June 13, 2005 to July 8, 2005. Roberts made a site visit to the Petitioner's Albany office where she explained the complaint to the Petitioner and asked for copies of payroll records or any other evidence that wages were not due to the Claimant. Although the Petitioner informed Robinson that an employment agreement demonstrating that the Claimant was paid on a draw against commission basis existed, no such document was ever produced. Robinson testified that the Order under review in this matter was issued based on the amounts due and owing as stated by the Claimant because "[t]here was no proof that these monies were not due based on records or lack of records."

GOVERNING LAW

Standard of Review

In general, upon a filing of a petition for review, the Board reviews whether the Commissioner's Order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . . not raised in the [Petition] shall be deemed waived" (Labor Law § 101).

The Board shall presume that an order of the Commissioner 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 12 New York Code of Rules and Regulations 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

The Commissioner's Authority to Issue an Order to Comply and Assess Civil Penalties

If the Commissioner determines that an employer has violated Article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount 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 based on the amount owing. The civil penalty is in addition to or concurrent with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Labor Law § 218 provides, in pertinent part:

> "1. In no case shall the order direct payment of an amount less than the total wages . . . . 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 . . . . 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."

Payment of Wages under Article 6 of the Labor Law

Article 6 of the Labor Law requires, in relevant part, that every employer shall pay wages to clerical and other workers "in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer" (Labor Law § 191[d]).

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing and testimony, documentary evidence, and all of the papers filed herein, makes the following findings of fact and law pursuant to section 65.39 of the Board's Rules of Procedure and Practice (12 NYCRR 65.39).

The parties to this proceeding dispute whether the Claimant was to be paid on a salary basis or on a draw against commission basis. A "salary" is a "fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered" (*Benedict v. United States*, 176 US 357, 360 [1900]). Draw against commission, on the other hand, is an arrangement by which a sales employee is advanced money against future commissions earned (*see Pease Piano Co. v. Taylor*, 197 AD 468 [1921]). The distinction is of importance here because the Petitioner argues that the Claimant is owed nothing because his draws against commission exceeded the commissions that he earned, whereas the Respondent contends that the Claimant was paid on a salary basis and thus any sales he may or may not have made are irrelevant to the calculation of wages owed to him.

At the outset, we hold that where there is a dispute concerning terms of employment, as there is in this matter, the unambiguous terms of any written agreement between the parties must control (*see Guasteferro v. Family Health Network of Central New York*, 203 AD2d 905 [1994]). Here, the Hiring Letter signed by the Petitioner and the Claimant states unequivocally that the Complainant's salary was $62,000.00 per year, paid bi-weekly, with an Auto Allowance of $400.00 per month. Our finding that the Claimant was paid on a salary basis is further supported by the Claimant's credible testimony that he was to be paid on a salary basis. Indeed, in light of the Claimant's testimony that he would not have accepted the position on a draw against commission basis due to the challenges of opening accounts in what was for him a new sales territory with a difficult to market product, we find that the Claimant accepted the position in reliance on the terms and conditions that were clearly set out in the Hiring Letter. We also note that any ambiguities in the terms of the Hiring Letter must be resolved against the party that drafted it, in this case the Petitioner (*see Jacobson v. Sassower*, 66 NY2d 991, 993 [1985]). Additionally, based on the wage statements showing that the Claimant was paid a regular bi-weekly salary amounting to 1/26 of the annual salary provided for in the Hiring Letter, we find that the Petitioner itself acted in accordance with that letter. All of the credible evidence shows that the Claimant was a salaried employee.

In contrast, the documents and testimony supplied by the Petitioner cannot be credited. Only Goldslager testified on behalf of the Petitioner, and by his own admission he was not present for all of the discussions between the Petitioner and the Claimant during which the terms and conditions of employment were discussed. Furthermore, he was unable to produce any contemporaneous documentary evidence showing employment terms different than those in the Hiring Letter.[2]

We also credit the Claimant's testimony regarding the duration of his employment with the Petitioner. He testified that he worked for the Petitioner until July 8, 2005, during which time he was making sales calls and maintaining regular contact with Cassin. Although it may be true that, as Goldslager testified, the Claimant did not attend meetings at the Albany office from June 13, 2005 to July 8, 2005, in the absence of evidence to the contrary, we accept the Claimant's testimony that Cassin had excused him from those meetings.

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[2] We give no weight to the emails and letters created by the Petitioner after it had already received notice of the DOL's investigation (*see e.g. Matter of Maxfield v. Tofany*, 34 AD2d 869 [1970] [self serving evidence should be excluded when the danger of fabrication outweighs the probative value the evidence may possess]).

Furthermore, the Claimant's version of events that he resigned on July 8, 2005 is supported by the Petitioner's own business records. The "Employee Separation Record" prepared by the Petitioner's operations manager on July 8, 2005 incontrovertibly states that the Claimant "came into the office [the] morning of 7/8/05 to resign from his position." Tellingly, the "Employee Separation Record" indicates that the Claimant "voluntarily quit" for "personal reasons" and does not indicate by a check or otherwise that the Claimant was terminated for "abandoned job (3 days no call/no show)," "unsatisfactory work performance," "attendance/tardiness" or "violation of company policy," which were all options listed in the document.

In conclusion we note that it is the Petitioner's burden to prove that the Order under review is invalid or unreasonable (Labor Law § 103[1]; 12 NYCRR § 63.30). The Petitioner has failed to meet this burden because it has not established either that the Claimant was to be paid on a draw against commission basis or that the Claimant was paid the wages and benefits that are the subject of the Order (*see* Labor Law § 196-a). Accordingly the Order is affirmed.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Amended Order additionally assessed a 25% civil penalty, in the amount $1,225.00. 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 is proper and reasonable in all respects.

INTEREST

Labor Law § 219 provides that when the Commissioner determines that wages are due, 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."

NOW, THEREFORE, IT IS HEREBY RESOLVED:

1. That the Order to Comply with Article 6 of the Labor Law, dated October 20, 2006, under review here is affirmed; and

2. That the Petition for review be, and the same hereby is, denied.

Anne P. 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 December 19, 2007.

DAR