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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CRYSTAL DELORENZO (D/B/A WADE TRAVEL AGENCY), Petitioner, To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 6, dated September 28, 2007, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 07-084 RESOLUTION OF DECISION

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 29. 2007. The Answer was filed on January 7, 2007. Upon notice to the parties a hearing was held on August 15, 2008. Petitioner Wade Travel Agency (Wade Travel) was represented by Perezzi, Coan, Saccocio, PLLC, Lance Hartwich of counsel, and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Mar y McManus 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 Commissioner issued the Order to Comply (Order) under review in this proceeding on September 28, 2007 against Wade Tours, Inc. T/A Wade Travel (Wade Tours). The Order is based on a finding of the non-payment of wages due to one named Complainant for the period April 23, 2005 through October 17, 2006. The Order demands payment of $5,754.17 in unpaid commission wages, $872.74 in interest and a civil penalty of $2,877.00, for a total due of $9,503.91.

The Petitioner alleges that the Order was issued against the wrong entity. Wade Tours is a legal entity that is separate from Wade Travel Agency (Wade Travel) and employed Complainant on a salary basis. Any commissions that might be due to Complainant would be owed by Wade Travel. Petitioner also questions whether any commissions are due to Complainant.

On January 7, 2009, the Board conducted a case management conference with the parties to discuss the following issues:

> "1. Will the parties stipulate to the amendment of the Order to Comply to remove the entity 'Wade Tours Inc. (T/A Wade Travel)' and in its stead insert the entity 'Crystal DeLorenzo dba Wade Travel Agency?'
>
> "2. Does the Board have the authority to modify the Order to Comply dated September 28, 2007 and issued against the entity 'Wade Tours Inc. (T/A Wade Travel)' to substitute 'Crystal DeLorenzo dba Wade Travel Agency' as the entity named?"

At the conference the parties agreed that the Board had the authority to modify the Order to substitute the name of Crystal DeLorenzo dba Wade Travel Agency for purposes of deciding the issue of whether commissions are due to Complainant. The issue of the commissions was fully litigated by the parties and DeLorenzo was represented at the hearing and on notice of every step of the process, both before issuance of the Order and after. However, Wade Travel argued that the issue of the appropriate civil penalty was different since the factors in determining the penalty, such as size of business and length of operation, were applied with Wade Tours in mind and not Wade Travel. Given the parties agreement the Order is modified to substitute the name Crystal DeLorenzo dba Wade Travel Agency for the name Wade Tours Inc.

DISCUSSION

When a petition is filed, 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 is required to presume that an order of the Commissioner is valid (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice 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.

Wade Tours is a family-owned motor coach company which arranges group tours, charters and travel for its customers and has been in business since 1926. Crystal DeLorenzo is the president of Wade Tours. Wade Travel is a sole proprietorship owned by Ms. DeLorenzo and has been in business since 1985. Wade Travel is a travel agency and as such books flights and overseas travel. Ms. DeLorenzo is a registered travel agent. Both entities operated out of the

same office. Wade Travel provided travel agency services to Wade Tours and to Wade Tours' customers as well as to the general public.

Complainant was hired in 2002 by Wade Tours to work as an Assistant Tour Coordinator and was paid on a salary basis. Later that year Complainant also began working for Wade Travel on a commission basis. The new arrangement provided that Complainant was to work 40 hours per week on a salary basis for Wade Tours and would also make travel agency bookings on her off hours for Wade Travel for commission. The initial commission arrangement provided that Complainant and Wade Travel would split commissions on a 50–50 basis, but it was eventually changed to 70% for Complainant and 30% for the agency.

On March 13, 2006 Complainant entered into a contract with "Wade Travel Agency, Crystal DeLorenzo, Owner" and "Wade Tours, Inc. & WDT-PCL, LLC, Crystal DeLorenzo, President, Robert Osgood, General Manager." The Agreement provided that Complainant was to be the Agency Manager for Wade Travel and that her job functions would include acting as a travel agent for agency group tours sold through Wade Tours, Inc., acting as a group tour specialist for packaged group tours sold through Wade Tours, Inc.. Complainant's compensation was to include a weekly salary as well as commissions. Commissions were to be paid by Wade Travel. The Agreement further provided that in the event that Complainant "should cease employment with Wade Travel Agency, all undistributed commissions shall be paid to her, including commissions on her existing bookings, once received by Wade Travel Agency."

On March 29, 2006, Complainant's employment with Wade Tours was terminated. However, subsequent to that time she continued to work finalizing bookings made with Wade Travel and continued to receive commissions on those bookings. On September 11, 2006 Complainant filed a claim with DOL claiming that there are additional commissions due and owing from Wade Travel. After the list of outstanding commissions was sent to Wade Travel, a check was sent for $892.49 to DOL for payment to Complainant of the undisputed portion of her claim.

The following commissions are still at issue:

Frank and Sandra Lyman	**$407.22 commission**
Eugene and Frances Turgeon	**$432.00 commission**

Petitioner alleges that Complainant is not entitled to commissions on these bookings due to the fact that travel was cancelled. However, Complainant provided evidence that travel insurance was purchased and that the travel insurance protected the commissions. No evidence to the contrary was produced by Wade Travel. Therefore, Wade Travel was paid commissions on these trips and thus owes Complainant her portion of the commissions.

Anne Wade Cruise Group	**$565.18 commission**

Petitioner alleges that Complainant is not entitled to commissions on these bookings because it was the policy of Wade Travel to not receive commissions on travel booked for family and that Complainant was aware of this policy and volunteered to book this travel and worked on this booking during her normal working hours for Wade Tours for which she has already been paid a salary. In response, Complainant credibly testified that she was asked to book the travel

for this cruise and that she worked on finalizing the bookings after her employment with Wade Tours ended. The policy of the agency was not to charge commissions on family bookings so Complainant testified that she is not asking for a commission for the travel of Anne Wade or her niece and nephew but she is requesting commissions for the other seven couples for whom she booked the cruise. The requested commissions are found due and owing.

Image Tours $4,045.65 commission

Petitioner maintains that Complainant was never paid and is not due any commissions for bookings on Image Tours due to the fact that all work on these tours was done during the hours that she worked for Wade Tours and that she was reimbursed for this work with her salary. Petitioner argues that it was the policy of Wade Travel that no commission was paid on Image Tour bookings. Wade Tours was the exclusive booking agent for Image Tours. Petitioner argued that customers came to the agency specifically to book Image Tours since Wade advertised these tours and anyone in the office could book the Image Tours.

In response, Complainant testified that the Image Tour bookings were made outside of the hours that she worked for Wade Tours. Although she had never been paid any commissions for bookings made with Image Tours, there was no reason these bookings should be treated any differently from any other bookings. The Image Tours were not company tours, they were tours booked through the travel agency. In fact, if no commissions were to be earned for Image Tour bookings, she would have booked the travel with a different company so that she could have received a commission. There was no evidence presented that Complainant made the bookings while on salary. We find Complainant's testimony to be reasonable and credible and therefore, she is due commissions for the Image Tour bookings.

Albert and Susan MacVilla $152.06 commission
Danielle and Mark Swiderski $152.06 commission

Petitioner testified that she had no record of these bookings but agreed that if evidence was produced by Complainant regarding these bookings that she would pay the commissions. Complainant produced canceled checks indicating that both of these couples were part of a cruise group and that commissions were paid to Petitioner. The checks were dated June and August 2006, the time after Complainant worked for Wade Tours but was still finalizing Wade Travel bookings. Therefore, Complainant is owed her portion of the commissions on these two bookings.

We find that Complainant is owed $5,754.17 in unpaid commissions.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 50% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions,

> rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. 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. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . 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."

Petitioner argues that the assessment of the civil penalty against Wade Travel is not reasonable or valid because the order was issued against Wade Tours and not Wade Travel. Factors considered in assessing a penalty against Wade Travel would be different than those assessed against Wade Tours since Wade Travel is a newer and smaller company. However, in reviewing Respondent's Exhibit Q, the sheet labeled "Background information – Imposition of Civil Penalty," as well as the testimony of Respondent's investigator, it appears that when assessing the penalty DOL looked to the entity Wade Travel Agency and not Wade Tours. In addition, the penalty was based on a failure to send full payment of the claim despite repeated demands. However, it cannot be denied that the original order was against Wade Tours. In addition, Wade Travel did pay those claims for commission that it had no objection to and did have colorable defenses to the other claims asserted. Therefore, it is reasonable to reduce the civil penalty assessed to 10% of the wages due, especially in light of the amendment of the order changing the name to the individual Crystal DeLorenzo dba Wade Travel Agency.

INTEREST

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply is modified by adding Crystal DeLorenzo DBA Wade Travel Agency as the employer and deleting Wade Tours, Inc.; and
2. The Order to Comply is affirmed as to the wages and interest due; and
3. The Order to Comply is modified by reducing the Civil Penalty assessed to 10% of the wages due.

Anne P. Stevason, Chairman

Absent
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 28, 2009.