

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Performance Marketing Inc. dba Miller Chevrolet Cadillac

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:42 I/II Employer/employee relationship
RSA 275:43 I unpaid wages
RSA 275:43 I unpaid commissions
RSA 275:43-b unpaid salary

Employer: Performance Marketing Inc., dba Miller Chevrolet Cadillac, 13 Labombard Road, Lebanon, NH 03766

Date of Hearing: January 8, 2014

Case No.: 46879

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$1,000.00 in unpaid salary for his final week of work, ending September 28, 2013. He further argues he is due 14% of the gross profit of the dealership for the month of September 2013. He estimates that each of the three departments within the dealership, sales, parts, and service, each produced \$40,000 in gross profit, totaling \$120,000 in gross profit. He calculates he is due 14% of the \$120,000, or \$16,800.

At the hearing, the claimant testified he was an employee, not an independent contractor, because the employer set his schedule and paid a set salary per week. He further testified that the original arrangement between himself and Performance Marketing Inc. was a subcontractor arrangement. However, as he was unable to secure Workers Compensation Insurance Coverage for himself in a timely manner, Jaime Lanfranconi of Performance Marketing Inc. sent an email to the Human Resources area on September 23, 2013, previously submitted, that the claimant "needs to be paid as an employee starting this week. No exceptions."

Performance Marketing Inc. denies the claimant was an employee. They claim he was an independent contractor, whom they paid \$1,000 per week and did not take any deductions. They presented a 1099 form for the year 2013, Defendant's Exhibit #1.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee of an employer or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any

employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria in (c), (e), (f) or (g). The claimant testified credibly that the employer dictated the time during which the work was to be performed. The claimant did not hold himself out to be in business for himself and did not have any recurring business liabilities or obligations. The claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work. The claimant was required to work exclusively for the employer.

Further, Performance Marketing Inc.'s Jaime Lanfranconi sent an email to the Human Resources area on September 23, 2013, previously submitted, that the claimant "needs to be paid as an employee starting this week. No exceptions."

The claimant was paid a sum of money, each pay period, without any deductions to the check. Performance Marketing Inc. provided a 1099 for 2013, Defendant's Exhibit #1, for the purposes of proving he was an independent contractor. The IRS and this Department have different criteria to determine which workers can be considered independent contractors. Therefore, the fact that the IRS allows this worker to be paid as an independent contractor has no bearing on the decision of this Department.

Therefore, the claimant is found to be an employee of the employer, Performance Marketing Inc. (hereafter "the employer").

The claimant began a working arrangement with the employer on September 1, 2013, as an independent contractor. Because he was unable to produce Workers Compensation Insurance Coverage documents, he was treated as an employee,

pursuant to an email by the employer, dated September 23, 2013. The parties executed a written agreement which outlines a Pay plan of \$1,000 per week salary and “% of dealership net profit paid monthly from financial statement” and an included schedule of criteria. He was terminated by the employer on September 28, 2013.

The claimant received four checks from the employer. He received a check for \$3,000 upon commencing work. The parties disagree as to whether the \$3,000 was a sign on bonus or an advance. The employer did not reduce any description or arrangement for this check to writing. The payment of \$3,000 cannot be used to offset any wages due to the claimant. The claimant received three additional \$1,000 checks for the each of the first three weeks of September 2013. He did not receive any wages for his final week of work ending September 28, 2013. He performed work for the benefit of the employer during the week ending September 28, 2013.

Pursuant to RSA 275:43-b requires that an employer pay a salaried employee their full salary for any pay period in which the employee performs any work. It also allows employers to make deductions to a salaried employee's wages under certain circumstances, but none of those exceptions apply to the facts of this case.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed wages/salary in the amount of \$1,000.00.

The claimant further seeks \$16,800 in unpaid commissions for the month of September 2013. He argues the employer produced \$40,000 in gross profit for each of the three departments within the dealership, sales, parts, and service, totaling \$120,000 in gross profit. He calculates he is due 14% of the \$120,000, or \$16,800. The claimant did not provide any documentation to support his claim of the employer's profits.

The written agreement for commissions or “% of the net profit” stated it would be paid on net profit, not gross profit, as the claimant is seeking. The employer provided credible testimony that they were not profitable for the month of September 2013.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was not paid for all commissions due. The Hearing Officer finds that the claimant failed to meet that burden of proof. The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed wages/commissions.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that he is owed the claimed wages/salary, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$1,000.00.

As RSA 275:43 I requires that an employer pay all wages/commissions due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages/commissions, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$1,000.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: January 14, 2014

Original: Claimant
cc: employer

MJD/all