

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**MCM MERCHANDISING**  
**DbA KIRBY**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid commissions  
RSA 275:43 I unpaid wages  
RSA 275:42 I/II employer/employee relationship

**Employer:** MCM Merchandising (Kirby)  
25 Old Dover Rd Ste D  
Rochester NH 03867

**Date of Hearing: September 25, 2014**

**Case No. 48679**

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on August 13, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on September 2, 2014.

The claimant testified that he found the job on Craig's List. The claimant stated that he was to be paid \$550.00 if he did 15 demonstrations. He was also on a commission pay plan. If the commission on unit sales was higher than the \$550.00 he would get the greater of the two figures.

The claimant stated that there were no taxes or insurance to be deducted from his wages. He also could hold other jobs while he was working for the employer. The claimant said that he understood that he would receive a Federal 1099 tax form for commissions earned.

In order to participate in the business, the claimant had to undergo a training period of three days. This training was to learn the operations of the system he was trying to sell. The claimant said that he had to sign a notice that the training period was voluntary and therefore not paid. The claimant was told that each demonstration he did while learning the sales process would result in a \$20.00 bonus to offset the voluntary training.

The claimant testified that he did two demonstrations but did not make any sales. He finally quit the job and returned the issued equipment.

The employer testified that the hiring agreement signed by the claimant clearly said that the training sessions were voluntary and the only money to be paid out was for demonstrations and/or sales. In this case the claimant did not have any sales and he only did two demonstrations to family members.

### **FINDINGS OF FACT**

RSA 275:43 I Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

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This part of the law places an issue such as commissions under the category of wages when the commissions are due and owing.

RSA 275:42 I. The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person, except employers of domestic labor in the home of the employer, or farm labor where less than 5 persons are employed.

II. "Employee" 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

This part of the law spells out when and how the employer/employee relationship is brought about.

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is valid in part and invalid in part. The claimant has the burden to show that there are wages due and he met part of this burden.

The employer laid out a scenario that shows the claimant is an independent contractor once he/she starts the selling process. The employee has a commission base wage structure and it is also possible for the employee to work another job(s).

In this Wage Claim the area of concern is the voluntary training program. The claimant is seeking 15 hours of time at the minimum rate. The claimant did sign a statement that the training was voluntary but the question arises if an employee can waive a right under the law.

In the testimony provided by the employer it was unclear if an employee could just take the equipment and not undergo the training sessions. The Hearing Officer finds that this training had to be taken and completed before an employee could go out and sell the product. The training was beneficial to the employer and assisted the employee in learning how to sell the product. The employee could not waive his right to be paid the minimum wage required to be paid.

The Wage Claim is valid in the amount of \$108.75.

### **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 Hearing Officer finds that the claimant proved by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$108.75. This is only for the training period when the claimant was asked to do the training on a voluntary basis.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$108.75, less any applicable taxes, within 20 days of the date of this Order.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 16, 2014

TFH/slh