STATE OF NEW HAMPSHIRE DEPARTMENT OF LABOR CONCORD, NEW HAMPSHIRE

V

SIGNARAMA OF NASHUA

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages

RSA 275:42 I/II employer/employee relationship

Employer: Signarama of Nashua 522 Amherst St. Nashua NH 03063

Date of Hearing: October 28, 2014

Case No. 48810

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on September 4, 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 October 7, 2014. The Wage Claim is for \$21,600.00 in unpaid wages.

The issue of the employee/employer relationship is the first to be addressed. The claimant was listed on the official paperwork as the General Manager of the company. The claimant was in an agreement with a financial backer to pay off the bills and the loan and the business would be his to own and operate.

There were some personal issues that led to the claimant leaving the company. He was not terminated.

The Co-owner (Owner) said that the claimant was considered an Owner/Operator and that the claimant signed as a Franchisee. Part of the agreement was that there would be some times when the claimant would not take a check for wages. The claimant was also responsible for the hiring and the firing of employees. The claimant also gave out raises to employees.

An owner can also be an employee and therefore entitled to wages. In this case there were some wages paid and sometimes the bookkeeper was told not to issue a check. Because the presentations were done by Offers of Proof, there was no opportunity to cross examine or present questions top the claimant.

The claimant was in control of the payroll and told the bookkeeper when to issue checks to him and when not to do so. The employer presented a written statement from the bookkeeper that said the claimant used the company debit card for personal expenditures and cash some checks made out to the company and kept the money for himself.

The "owner" presented an Offer of Proof that he was just a financial backer and had nothing to do with the running of the business. The claimant was responsible for his own wages and the wages of his employees. It was shown that the claimant did give raises to the two company employees.

The circumstances that led to the breakup of the employment arrangement has nothing to do with this Wage Claim.

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

RSA 275:42 I reads: "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 or any of the same, employing any person, except employers of domestic labor in the houseRSA:42 I reads: "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 or any of the same, employing any person, except employers of domestic labor in the house of the employer, or farm labor where less than 5 persons are employed."

RSA 275-42 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:

(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.

 This part of the law spells out when there is an employee/employer relationship.

It is the finding of the Hearing Officer; based on the written submissions and the Offer of Proof from both sides, that there is not an employer/employee relationship and so the Wage Claim process is not the proper forum for this claim.

The claimant has the burden to show that he is an employee and that he is due wages. The claimant did not bear this burden in the Wage Claim. The claimant had complete control of the business and hired and fired employees. He was also in charge of the wages paid to employees and for any raises given to the employee. There was also a question of the claimant using debit cards and cashing company checks for personal use. The claimant did receive some payroll checks and also told the bookkeeper when to issue him a check.

It was not possible to question the claimant on issues brought up about his operation of the company.

It was not a true statement that the claimant was not paid for nine months. He did use company assets as a form of wage payment to himself. There is no finding that there was an employer/employee relationship. The claimant was an agent of the company. It is impossible to determine what was paid to the claimant if he were deemed an employee.

The Wage Claim is invalid in this forum.

DECISION

There is no employer/employee relationship in this Wage Claim. The Wage Claim is invalid.

Thomas F. Hardiman Hearing Officer

Date of Decision: November 21, 2014