

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Parks Tuttle Financial Services LLC dba Massmutual Northern New England

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages/commissions
RSA 275:44 IV liquidated damages
RSA 275:42 I/II employee/employer relationship

Date of Hearing: March 10, 2016

Case No.: 52189

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$12,999.92 in unpaid commissions for an American Funds trade due after his separation. He argues the employer failed to pay commission to him for a trade made prior to his separation, because the commission was not paid out from the fund company until after he separated. He seeks liquidated damages on these wages.

Parks Tuttle Financial Services LLC dba Massmutual Northern New England denies the claimant was an employee and further, that he is due the claimed commission under the written contract.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee of an employer.

RSA 275:42 Definitions. – Whenever used in this subdivision:

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:

(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 claimant admits to owning and running a business, Atlas Financial Group, which hires employees and had a contractual relationship with Parks Tuttle Financial Services LLC dba Massmutual Northern New England. The Atlas Financial Group office is separate and detached from Parks Tuttle Financial Services LLC dba Massmutual Northern New England. It receives 1099 and W-2 tax forms from multiple entities for commissions received, including Parks Tuttle Financial Services LLC dba Massmutual Northern New England.

The claimant changed affiliations from Parks Tuttle Financial Services LLC dba Massmutual Northern New England for his securities transactions to another broker dealer. The structure of his business, Atlas Financial Group, has remained the same under both affiliations.

The claimant did not prove he was permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any **employment** [emphasis added].

The Hearing Officer finds that the testimony and evidence presented by the parties indicate that he was not an employee of an employer. Because the claimant was not an employee of an employer, this Department does not have jurisdiction over his claim. The claimant may have a cause of action in another legal venue.

DISCUSSION

Even if the claimant had proven he was an employee of this employer, he would still retain the burden to prove he were due the claimed commissions.

The claimant voluntarily terminated his relationship with Parks Tuttle Financial Services LLC dba Massmutual Northern New England on December 1, 2015, which terminated the written agreement between the parties on the same date.

The claimant expected to receive commissions on the value of his book of business as of November 30, 2015, with a payment date of approximately thirteen or fourteen days after December 1, 2015.

The claimant had a written agreement with Parks Tuttle Financial Services LLC dba Massmutual Northern New England, regarding the payment of commissions.

The agreement dated October 1, 2012, reads, in relevant part, "Commissions shall be paid to Representative only so long as the commission is attributable to a sale which occurs while this Agreement is in effect. For this purpose, all sales occur on the trade date for the transaction, and each transaction effected by or on behalf of a customer, whether in the form of dividend reinvestment, periodic payment, or other such payment, shall be a separate sale" and "All compensation earned by Representative pursuant to the Agreement, including commissions which are based, in whole or in part, on payments made to MMLISI pursuant to SEC Rule 12b-1, shall be paid to Representative only as long as this Agreement remains in effect. Except as otherwise provided herein, all rights of Representative to any compensation under this Agreement shall terminate upon the termination of this Agreement."

The New Hampshire Supreme Court, in Bryan K. Galloway v. Chicago-Soft, Ltd. 142 NH 752, established a "general rule" regarding commission sales that states, "a person employed on a commission basis to solicit sales orders is entitled to his commission when the order is accepted by his employer. The entitlement to commissions is not affected by the fact that payment for those orders may be delayed until after they have been shipped. This general rule may be altered by a written agreement by the parties or by the conduct of the parties which clearly (*emphasis in original*) demonstrates a different compensation scheme".

The Hearing Officer finds that the claimant knew that he would not receive commission on sales after the termination of his agreement. Because the claimant signed this agreement, the general was altered to demonstrate a different compensation scheme. Because of this alteration of the general rule, the claimant would fail to prove by a preponderance of the evidence that he is owed the claimed commissions.

As no wages would have been found to be due, no liquidated damages would have been assessed.

DECISION

Based on the testimony and evidence presented, as RSA 275:51 V affords the Wage Claim process to employees of employers only, it is hereby ruled that the Wage Claim is invalid due to a lack of jurisdiction by this Department.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 28, 2016

Original: Claimant
cc: Employer

MJD/aph