

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



**V**

**OGP LLC**

**DECISION OF THE HEARING OFFICER**

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

**Employer:** OGP LLC, 685 Massabesic St, Manchester, NH 03103

**Date of Hearing:** April 3, 2017

**Case No.:** 54735

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$2,100 for three weeks of unpaid draw which was contractually due. She argues the employer terminated her contract unilaterally, in contravention of their contract, therefore they should pay the three remaining weeks that they did not allow her to work.

OGP LLC denies the claimant was an employee. They hired her as an independent contractor, as signified by the independent contractor agreement they signed. Further, he argues that the contract was terminated by mutual consent because when he notified her of the decision to terminate the contract, she replied in agreement and that she had cancelled the rest of the appointments for the week.

**FINDINGS OF FACT**

This Department must first determine whether the claimant is an employee or an independent contractor. RSA 281-A:2 VI (b)(1) defines an employee as, any person, other than a direct seller or qualified real estate broker or agent or real estate appraiser, or person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, who performs services for pay for an employer, is presumed to be an employee. This presumption may be rebutted by proof that an individual 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.

Further, The New Hampshire Supreme Court opined in Caswell v. BCI Geonetics, Inc. 121 N.H. 1048, that RSA ch. 275 is entitled "Protective Legislation," and we should construe it with that purpose in mind. Further, the definition of "employee" pertaining to this section is set forth in RSA 275:42 II:

"The term 'employee' includes any person suffered or permitted to work by an employer. For the purposes of claims for wages under RSA 275:51, any person in the service of another shall be conclusively presumed to be an employee, not an independent contractor, if it shall have been determined to be more likely than not that the relationship can be terminated summarily, with a right to no more than compensation already earned."

The Hearing Officer finds that the claimant was an employee of an employer, not independent contractor, because OGP LLC (hereafter "the employer") did not provide persuasive testimony or evidence to rebut the presumption that the claimant was an employee by meeting (E) of the above criteria.

The claimant worked for the employer from January 9, 2017 through either January 27 or 28, 2017. She agrees she received her full draw for these three weeks.

The parties signed an independent contractor agreement for her to work for the employer for a six week period beginning January 9, 2017 and ending February 17, 2017.

The claimant argues the employer unilaterally terminated her employment on January 27 or 28, 2017, only three weeks into their six week contract. She seeks the balance of the three weeks of the contract, which she did not work.

She cites section #8 of the contract which reads, "This agreement may be terminated by either party at any time by mutual consent." She argues the employer unilaterally terminated the contract and did not seek her consent.

The employer argues that the contract was terminated by mutual consent because when he notified her of the decision to terminate the contract, she replied in agreement and that she had cancelled the rest of the appointments for the week. He further contends the claimant was not an employee but an independent contractor.

RSA 275:42 III defines the term "wages" as compensation, including hourly health and welfare, and pension fund contributions required pursuant to a health and welfare trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of an employee and agreed to by his employer, for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation.

The claimant did not perform any labor or render any services for the three weeks she claims as payment for the employer's untimely termination of the contract. As such, any payment per the contract would not fall under the definition of wages.

In an August 26, 2016, decision of the Superior Court, Merrimack County, Harris v Concord Food Cooperative Inc, 217-2016-CV-00040, the court opined that "they [the parties] are free to contract as they wish" regarding the contractual terms of employment and payments. However, pursuant to RSA 275:42 III, these payments do not constitute wages in this jurisdiction. Further, this Department does not have jurisdiction over contractual law to award these payments.

Therefore, the Hearing Officer finds the claimant failed to prove she is due any wages. She may have a cause of action in another venue.

### **DECISION**

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 failed to prove by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that the Wage Claim is invalid.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: April 4, 2017

Original: Claimant  
cc: Employer

MJD/das