

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



**v.**

**Genius Central Systems.**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid commissions

**Employer:** Genius Central Systems

**Date of Hearing:** September 21, 2017

**Case No.:** 55699

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns the status of commissions following the expiration of an employment agreement and subsequent termination.

The employer develops and provides software platforms for retailers of natural and organic merchandise.

The claimant worked for the employer for over eleven (11) years, most recently in the capacity of Vice President of eMedia.

The claimant asserts he is owed commissions on eligible sales commensurate with his employment agreement for the entire last month of employment of which he worked a portion.

The employer holds that the claimant's employment contract termed the final day of the prior month and is not owed commissions beyond the term of the agreement.

On the basis of the claimant's assertion he is owed commissions from the employer, the claimant filed a Wage Claim with this Department on August 4, 2017. The employer's objection to the claim was received on August 11, 2017. On August 15, 2017 the claimant requested a hearing. A Notice of Hearing was sent to both parties on August 30, 2017 and accordingly a hearing was held on September 21, 2017.

This case was kept open until the end of business Friday October 6, 2017 in order for the employer to provide additional exhibits requested by the Hearing Officer.

On September 27, 2017 the Department, as well as the claimant on or about this date, received the requested additional exhibits from the employer that provide the amount of collected revenue up to the date of the claimant's termination.

### **FINDINGS OF FACT**

The claimant worked for the employer for eleven (11) years. As Vice President of eMedia and Advertising the claimant's duties included, but were not limited to, supervising an advertising team, planning advertising campaigns and assessing promotional efforts. His base salary of approximately \$160,000.00 per year was augmented by commissions of 6.5% of collected revenues, targeted bonuses and fringe benefits.

On November 11, 2011 the claimant signed an employment agreement ("The Agreement"), submitted earlier by the employer, that termned on December 31, 2016. On September 12, 2016 the claimant signed an extension agreement ("Extension Agreement"), also submitted earlier by the employer, extending the terms of the original agreement to June 30, 2017.

The Agreement informed the claimant that his compensation would, in-part, include commissions. The Agreement reads in-part: "Commissions shall be earned and will payable (sic) only for collected revenue and will be paid to Employee in installments consistent with the Company's normal payroll and withholding practices." "Exhibit B To Employment Agreement Summary of Compensation Plan" reads in-part "your commission structure is 6.5% on all collected Promo Genius revenue (excluding Affiliate Ad sales), plus 6.5% of collected revenue on Affiliate Ad sales (less the 30% cost).

The employer notified the claimant on July 5, 2017 his position was being eliminated. On July 11, 2017 the employer terminated the claimant's employment.

The documents requested by the Hearing Officer, and subsequently provided by the employer, reflect the employer's collected revenue from July 1, 2017 through the last day of the claimant's employment, July 11, 2017.

### **DISCUSSION AND CONCLUSIONS**

Upon returning to work on July 5, 2017, after taking two (2) days off from work, the claimant was informed during a meeting with the employer that his position was being eliminated. At this time the employer offered the claimant a separation agreement.

With no response from the claimant regarding the separation agreement offer, the employer terminated the claimant's employment six (6) days later on July 11, 2017.

Both parties agree the Extension Agreement termned on June 30, 2017.

The claimant acknowledges the employer paid him his regular salary through the end of July 2017, his expenses and commissions on the revenue collected through June 2017.

However, the claimant reasons when he was paid in the manner above, it was according to the provisions in the Extension Agreement, and because he was not informed otherwise, he argues he is due commissions on that portion of the employer's collected revenue for the month of July 2017 which were a result of his previous efforts.

The employer holds they paid the claimant in the manner they did through the end of July 2017 "on good faith" as well as for his years of service to the company, not according to the Extension Agreement. They assert it was never their intention to do so, nor did they ever inform the claimant he would be paid according to the Extension 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 it 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 "general rule" in the current case was altered in The Agreement and its successor Extension Agreement to clearly specify that "collected revenue," is the condition that needs to be met in order for the claimant to have earned the commission.

RSA 275:49 requires employers to notify employees of changes in their compensation prior to the change and Lab 803.03 reads in-part:

- (a) Every employer shall at the time of hiring and prior to any changes notify his or her employees in writing as to the rate of pay or salary, whether by daily, weekly, biweekly, semi-monthly, or yearly, or by commissions, as well as the day and place of payment and the specific methods used to determine wages due pursuant to RSA 275: 49.
- (c) Pursuant to RSA 275:49, every employer shall inform his or her employees in writing of any change to such employees rate of pay, salary, or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change.

The Hearing officer finds that the employer failed to properly inform the claimant as to the compensation arrangements he would be working under after June 30, 2017, at the time the Extension Agreement termed, as required by statute. Further, the Hearing Officer finds the claimant's testimony credible that it was his understanding he continued to work his remaining days under the conditions set forth in the Extension Agreement.

The claimant contends he is due commissions on collected revenue for the entire month of July, 2017 despite having left the company on July 11, 2017. As stated above, the commission agreement in place between the parties specified that commissions are earned upon the collection of revenue, given that the claimant's employment ended on July 11, 2017, he was eligible to earn said commissions through employment with the company only until that date.

The documents requested by the Hearing Officer, and subsequently provided by the employer, reflect the employer's collected revenue from July 1, 2017 through the last day of the claimant's employment, July 11, 2017

On September 27, 2017 the Department, as well as the claimant on or about this date, received the requested additional exhibits from the employer that provide the amount of collected revenue up to the date of the claimant's termination.

These additional exhibits show a "total invoice amount" for the period to be \$119,468.00 and a "total payment amount" to be \$106,439.00. From the September 27, 2017 submissions (and resultant responses) it appears that the "total invoice amount" is reflective of collected revenue for the period.

The employer argues that if the Department were to find the claimant due any amount it would 6.5% of the "total payment amount" because that is what was offered in the separation agreement.

The claimant argues the amount owed needs to be 6.5% of the "total invoice amount" because that is what the basis of his commission was.

The Hearing Officer finds the employer's argument that because the "total invoice" amount should prevail because it was *offered* in a proposed separation agreement to be unconvincing.

The Hearing Officer finds that the claimant proved by a preponderance of the evidence he is due commissions from July 1, 2017 to July 11, 2017 on collected revenue expressed as 6.5% of the "total invoice amount" or \$7,765.42 ( $.065 \times \$119,468.00 = \$7,765.42$ ).

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence he is due commissions on collected revenue for the entire month of July 2017.

### **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 the claimant failed to prove by a preponderance of the evidence that he is due commissions for the entire month of July, 2017 it is hereby ruled this portion of the Wage Claim is invalid.

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:49 requires employers to notify employees of changes in their compensation prior to the change and as this Department finds the claimant proved by a preponderance of the evidence that he is due commissions from July 1, 2017 to July 11, 2017 or \$7,765.42 it is hereby ruled that this portion of the Wage Claim is valid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total amount of \$7,765.42 less any applicable taxes, within 20 days of the date of this Order.

---

David M. Zygmunt  
Hearing Officer

November 9, 2017  
Date of Decision

Original: Claimant  
cc: Genius Central Systems, Inc., 2025 Lakewood Ranch Blvd., Suite 202  
Bradenton, FL 34211

DMZ/nm