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

V

# Enxing Auto Holdings LLC dba Volvo Cars Exeter

## **DECISION OF THE HEARING OFFICER**

Nature of Dispute: RSA 275:43 I unpaid wages/commissions/bonus RSA 275:43-b unpaid salary

**Employer:** Enxing Auto Holdings LLC dba Volvo Cars Exeter, 140 Portsmouth Ave, Exeter NH 03833

Date of Hearing: January 24, 2018

Case No.: 56418

### BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$820.63 for October 2017 commission; \$750 for October 2017 bonus; \$1,000 October 2017 used car bonus; and \$816 in unpaid salary for August 10 through November 1, 2017.

At the hearing, he amended his claim to \$820.63 for October 2017 commission; \$250 for October 2017 bonus; \$1,000 October 2017 used car bonus; and \$750.50 in unpaid salary for August 10 through November 1, 2017, as he received \$250 towards the October 2017 bonus and \$65.50 for salary.

The employer denies the claimant is due any further commission or bonus as he left prior to the sales process being completed. They further deny he is due any salary.

#### **FINDINGS OF FACT**

The claimant worked for the employer from August 10, 2017 through October 30, 2017, when he quit.

The claimant argues he completed sales for three cars in October 2017 and did not receive the earned commission.

The employer acknowledges the claimant did make the sales, but was not employed during the remainder of the sales process which includes completing the paperwork, the funding of the sale to the dealer, and delivery of the vehicle to the customer. RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The claimant presented a pay plan notice stating he would receive "20% of the gross profit". The plan was not signed by either the claimant or the employer. The employer admits they did not memorialize in writing that employees needed to be present throughout all phases of the sale from inception to delivery in order to be paid for the sale. However, they argue all employees are told verbally of the commission plan. The claimant disagrees.

Nothing in the employee handbook notices the claimant that he would not receive commission on sales that funded and delivered after his separation.

The Hearing Officer finds it more likely than not that the employer did not specifically notify the claimant that he would forfeit commissions on sales which funded and delivered after his separation.

The New Hampshire Supreme Court, in <u>Bryan K. Galloway v. Chicago-Soft, Ltd.</u> <u>142 NH 752</u>, 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 <u>clearly</u> (*emphasis in original*) demonstrates a different compensation scheme".

The Hearing Officer finds that the claimant was not informed in writing or otherwise, that he would not receive commission on sales that funded and delivered after his separation. Because the claimant was not informed of the forfeiture policy, the general rule was not altered to demonstrate a different compensation scheme. Therefore, the Hearing Officer finds that the claimant proved by a preponderance of the evidence that he is owed the remainder of the commissions on the outstanding sales made prior to his termination in the amount of \$820.63.

The claimant originally claimed \$750 due for an October volume bonus. The employer paid \$500, leaving a balance of \$250, which the claimant argues is still due.

The employer argues the \$250 relates to the sale of the three cars which the claimant did not complete.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The claimant presented a pay plan notice stating he would receive a volume bonus of \$500 if 10 cars were sold and \$750 if 12 cars were sold. The plan was not signed by either the claimant or the employer.

As the Hearing Officer has determined the claimant earned the commission on the three sales in question, it is found that he claimant sold thirteen vehicles for the month of October 2017 (the employer agreed to ten cars and three cars found due in this hearing), earning a bonus of \$750. The employer paid \$500, leaving a balance of \$250.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the balance of the claimed October volume bonus in the amount of \$250.

The claimant argues he is due an October used car bonus of \$1,000, as the dealer sold the target amount of twenty-one cars.

The employer argues the claimant is not due an October used car bonus as the dealer did not sell the required number of used cars, which is twenty-five, not twenty-one.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer did not notify the claimant in writing of the used car bonus plan. However, there were text messages from the employer which reference \$100 for each used cars sold if the dealer sold twenty-five cars.

The employer provided credibly testified they had not sold twenty-five cars as of the end of the month.

As the dealer did not meet the required number of used car sales for the bonus program to become payable, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed bonus.

The claimant argues he is due \$816 in unpaid minimum wage as the \$250 weekly salary did not cover the required minimum wage for all hours worked during each pay period of his employment. He amended the claim to \$750.50 after the receipt of \$65.50 from the employer. The claimant argues he worked between forty-four and forty-eight hours each week.

The employer agrees that the claimant did not receive minimum wage for the first two weeks of his employment with only the \$250 weekly salary. They paid the claimant the balance of \$65.50 for thirty-nine hours worked during each of the first two weeks. They argue the claimant received bonus and commissions which covered minimum wage for all hours worked during the remaining weeks.

The claimant submitted a sample schedule which shows a schedule for the claimant of forty-four hours, without an allowance noted for lunch periods.

The claimant did not maintain any contemporaneous notes regarding his actual time worked.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer on this issue. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he worked the hours claimed and was not paid minimum wage for all hours worked. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed any additional wages for the first two weeks of employment, August 10 through 23, 2017.

The claimant argues he only received \$250 salary for the remaining weeks worked, with the exception of his final week when he received \$150 in salary after he quit. The claimant produced pay stubs which show he received bonus and/or commissions each of the remaining weeks of his employment.

Among the salary, bonus and commissions, the claimant earned more than the statutory minimum wage, \$7.25, for all hours worked.

Therefore, the Hearing Officer finds the claimant failed to prove he is due any additional minimum wage for hours worked.

#### **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 that the claimant proved by a preponderance of the evidence that he is owed the claimed commissions/wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$820.63.

As RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that he is owed the claimed bonus/wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$250.00.

As RSA 275:43 I requires that an employer pay all wages due an employee and RSA 279:21 requires an employer to pay employees at least the hourly rate forth in the federal minimum wage laws (\$7.25), and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed unpaid minimum wage, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to **Example**, in the total of \$1,070.63, less any applicable taxes, within 20 days of the date of this Order.

Date of Decision: February 16, 2018

Original: Claimant cc: Employer Employer's Attorney