

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1040-2003
OF STEPHEN J. SPAULDING,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
AUTO SOURCE, INC., a Montana)	
Corporation,)	
Respondent.)	

I. INTRODUCTION

Steven Spaulding appeals from a Wage and Hour Unit determination and redetermination that dismissed his claim for additional commission from Auto Source, Inc. (Auto Source). The Wage and Hour Unit found that Spaulding had failed to show that he was due additional commissions.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on September 8, 2003 and November 6, 2003. Peter Stanley, attorney at law, represented Spaulding. Michael Anderson, attorney at law, represented Auto Source. Spaulding, David Riddle, Stuart Simonson, and Joanne Berringer appeared and testified under oath. Based on the testimony, exhibits admitted at the hearing, and the oral and written arguments of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE

Does Auto Source owe Spaulding additional commissions and penalty as provided by law?

III. FINDINGS OF FACT

1. Auto Source, Inc., was at all times pertinent to this matter a Montana Corporation.

2. Stuart Simonson was the majority shareholder in Auto Source, Inc. David Riddle and Joanne Berringer were minority shareholders. Riddle acted as the general manager for Auto Source. Employee compensation was handled by ADDICO, an accounting firm owned by Berringer. All employee checks were prepared and distributed by ADDICO.

3. As general manager, Riddle had actual authority to create compensation plans for employees

4. Auto Source hired Steven Spaulding to work at its store as the general sales manager, recruiting him from a California car dealership where he had previously acted as a new car sales manager. When Auto Source hired him, Spaulding had 12 years experience in auto sales. He began working at Auto Source on June 17, 2001.

5. Auto Source carried and serviced loans on some of the vehicles that it sold. At times, Auto Source would sell these "in-house" loans to other financial institutions.

6. Spaulding took a substantial pay cut in order to take the job at Auto Source. Spaulding's pay arrangement provided that for the first six months of his employment, he would receive a monthly salary of \$5,000.00. After the completion of the six months, beginning in January 2002, Spaulding was to be paid based on commissions from the sale of each car sold at Auto Source. This included 15% commission on "in-house" financed deals (sales financed by Auto Source), 25% commission on the profit on cash and conventional deals, commission on UUAC deals, and 15% of "In House Deal Payoffs," referring to the payoffs received from selling "in house deals" to other lending entities.

7. Under this pay plan, once per month Spaulding would review sales reports to determine the prior month's car sales in order to figure out his commission. Spaulding would then present these reports to Riddle, who, after reviewing, adjusting, and approving the report, would then send this information by facsimile to ADDICO. ADDICO would then prepare Spaulding's pay check.

8. Riddle consulted with Simmons and Berringer prior to putting Spaulding's pay plan into effect.

9. Auto Source sold three groups of retail installment contracts to Wells Fargo. Wells Fargo purchased the first group of contracts (Group 1) for \$18,462.00, from which Spaulding was to receive \$2,769.00. Wells Fargo purchased a second group (Group 2) for \$37,689.00, from which Spaulding was to receive a commission of \$5,653.00. Wells Fargo bought the third group (Group 3) for at least \$12,000.00 from which Spaulding was to receive at least \$1,800.00. All of the auto sales that generated the loans, the sales of the contracts to Wells Fargo, and Auto Source's receipt of the proceeds from the sales of these group contracts occurred while the pay agreement for Spaulding was in effect and before Spaulding left his employment.

10. Auto Source sold the three groups of installment contracts in order to generate cash to keep the business going. Even though Auto Source had received payment for these sales agreements, Auto Source did not pay Spaulding his 15% commission in a lump sum. Instead, Riddle and Spaulding agreed that Spaulding would receive the 15% commission he was due over a period of 12 months. Riddle made Berringer aware of this arrangement. Under the 12-month payout arrangement, Spaulding was to receive \$231.00 per month on the Group 1 contracts, \$471.00 per month on the Group 2 contracts, and \$150.00 per month on the Group 3 contracts. Spaulding's payments for commissions from these three contract groups began in July 2002.

11. Auto Source paid Spaulding only 3 months of payments (July, August, and September) on Groups 1 and 2 (a total of \$692.00 on Group 1 and a total of \$1,413.00 on group 2). Auto Source made no payments on the Group 3 contracts.

12. All commissions due to Spaulding from each of the contract groups were earned commissions. Once the contracts were sold to Wells Fargo, there was no further work to be done in order to collect the commissions as Auto Source had received payment.

13. On September 23, 2002, Simonson issued a memo revamping manager pay plans. This occurred almost nine months after Spaulding's commission plan had gone into effect, and some two months after Auto Source had sold the group contracts and received payment for them.

14. Spaulding did not like the September 23, 2002, pay plan, since it would result in a substantial reduction of his pay. As a result, he quit working at Auto Source on September 30, 2002.

IV. DISCUSSION⁽¹⁾

A. Auto Source owes Spaulding for Unpaid Commissions.

Spaulding contends that under the terms of his pay agreement with Auto Source, he is entitled to nine additional months of commission payments from the sales of group contracts to Wells Fargo, as well as statutory penalties for failure to pay the wages. Auto Source contends that no such agreement existed and Spaulding has been paid all monies he is due.

Spaulding's claim falls under the provisions of the Montana Wage Payment Act. Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to § 39-3-204, MCA. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are money the employer owes an employee, including commissions. § 39-3-201(6), MCA; *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

The amount of commissions due from an employer to an employee is generally a matter of contract. *Keneally v. Orgain* (1980), 186 Mont. 1, 5, 606 P.2d 127. Document 16 shows that under the terms of his pay agreement, Spaulding was to receive 15% of the payoff from sales of in house deals sold off to other financial institutions. Riddle and Spaulding modified that agreement slightly when Spaulding agreed to defer a lump sum settlement and take the payments over a 12-month period. Nonetheless, the contract called for Spaulding to receive 15% of the payoffs. He received only one third of the monies he was due on the Groups 1 and 2 contracts. He received no money from the Group 3 contracts.

Auto Source contends that *Keneally, supra*, prevents Spaulding's recovery in this case. *Keneally* stands for the proposition that amounts of commission due are a matter of contract. In *Keneally*, the applicable contract required the salesman to be employed when the payoff from the sale was received by the employer in order to be considered "earned" and, therefore, payable to the salesman. Here, no such provision exists. The only requisite imposed by the commission agreement was the payoff of the group contract sales, a condition that occurred prior to Spaulding's departure.

Auto Source also contends that there never was any contract that provided for Spaulding to receive a commission on the sales of the group contracts. To the contrary, the evidence plainly demonstrates the existence of this contract. Not only the testimony of Riddle and Spaulding, but indeed the testimony of Joanne Berringer supports the existence of such an agreement. Berringer testified that such an agreement existed. Admittedly, Berringer also stated that there was a requirement that Spaulding remain employed throughout the 12-month payout of the commission in order to receive such a commission. The contract, however, contains no such condition precedent to payment. The only condition precedent was Auto Source's receipt of funds from the entity buying the group contracts. That occurred in this case, satisfying the condition precedent and creating Auto Source's obligation to perform by paying the commissions to Spaulding.

Auto Source further suggests that "statements, actions or other representations contrary to the interests of their principal should be disregarded or viewed with distrust." Auto Source's Proposed Findings of Fact and Conclusions of Law, page 6. While the hearing officer is unclear as to which "action or representation" Auto Source is referring to, what is clear is that the agreement to pay Spaulding the commission on the group contracts was not "contrary to the interests of the principal." The commission encouraged Spaulding to sell cars and to encourage his subordinates to sell more cars, thereby garnering more sales for the dealership.

Auto Source also makes an argument that the "claimant is estopped or has waived any claim to entitlement to additional money owed . . . by his failure to assert such a claim during a time when records may have been in possession of the corporation." Auto Source's Proposed Findings of Fact and Conclusions of Law, p. 6. The only "limitation" controlling the time for filing a wage claim is the 180-day requirement of Mont.

Code Ann. § 39-3-207. Auto Source has not suggested that Spaulding's claim is not timely filed. Furthermore, Auto Source does not contend that Spaulding is responsible for Auto Source's loss of its records. The authority cited by Auto Source for its proposition is inapposite. There is no discernable merit to Auto Source's argument.

Lastly, Auto Source contends that Riddle owed a fiduciary duty to Auto Source and that he violated this duty by entering into the commission agreement with Spaulding. Riddle had the power to enter into the payment agreement with Spaulding on behalf of Auto Source. The evidence in this matter does not support the existence of collusion between Spaulding and Riddle to defraud Auto Source. Regardless of Spaulding's conduct after he left Auto Source⁽²⁾, there is no evidence that suggests to the hearing examiner that at the time of the creation of the commission agreement that it was done in any fashion other than at arms' length. Auto Source wanted and needed the services of an experienced general sales manager. Auto Source was able to obtain those services by retaining Spaulding and motivating him to strive for higher overall car sales and thus ensure the success of Auto Source. Under the circumstances existing at the time the commission agreement was entered into, the agreement was good for both Spaulding and Auto Source. Auto Source owes Spaulding \$8,117.00 in unpaid commissions.

B. Auto Source Owes a Penalty.

For valid wage claims other than minimum wage and overtime compensation claims, a penalty of 55% must be imposed in the absence of certain aggravating circumstances, none of which apply to this case. Mont. Code Ann. § 39-3-206, Admin. R. Mont. 24.16.7566. The applicable penalty in this case is \$4,464.35 (\$8,117.00 x .55).

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Auto Source had a contractual obligation to pay Spaulding a 15% commission on the sale of the three group contracts to Wells Fargo.

3. Auto Source owes additional commission to Spaulding for the sales of the group contracts in the amount of \$8,117.00, (representing \$2,077.00 on the Group 1 contract (\$2,769.00 total commissions owed less \$692.00 commissions paid), \$4,240.00 on the Group 2 contract (\$5,653.00 total commissions owed less \$1,413.00 commissions paid), and \$1,800.00 on the Group 3 contract (\$1,800.00 total commissions owed less \$0.00 commissions paid).

4. Auto Source owes Spaulding a 55% penalty in the amount of \$4,464.35.

VI. ORDER

Auto Source, Inc., is hereby ORDERED to tender a cashier's check or money order in the amount of \$12,581.35, representing \$8,117.00 in wages and \$4,464.35 in a penalty, payable to Steven Spaulding, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 11th day of March, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661

2. Auto Source attempted to show collusion between Spaulding and Riddle by attempting to show that Spaulding went to work for Riddle after Riddle left Auto Source and started his own car dealership. The evidence does not convince the hearing examiner that Spaulding either worked for Riddle or diverted any of Auto Source's customers to Riddle's car dealership.