

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1732-2008
OF RONALD NEDENS,))
))
Claimant,))
))
vs.))
))
FARMERS UNION ASSOCIATION,))
BIG HORN COUNTY, MONTANA,))
a Montana corporation,))
))
Respondent.))

**FINAL AGENCY DECISION GRANTING SUMMARY JUDGMENT
IN FAVOR OF NEDENS**

I. INTRODUCTION

Hearings Officer Gregory L. Hanchett held oral argument on the claimant’s motion for summary judgment on August 20, 2010. Patricia Peterman, attorney at law, appeared on behalf of the claimant, Ronald Nedens. Jeffrey Hunnes, attorney at law, appeared on behalf of the respondent, Farmers Union Association. After hearing oral argument, the hearings officer informed the parties that he would grant the claimant’s motion for summary judgment. By order dated August 23, 2010, the hearings officer vacated the hearing and informed the parties that a written order granting summary judgment would issue in due course. This is that order.

II. FACTS WHICH ARE NOT IN DISPUTE

1. Farmers Union Association (hereinafter FUA) employed Nedens for over 30 years.

2. FUA and Nedens entered into a written Manager’s Agreement (agreement) on February 1, 1977. The agreement remained in force throughout the time that FUA employed Nedens.

3. Of particular importance to the matter before this tribunal is the bonus provision of the agreement. The language of the bonus provision provided:

4. In addition to his salary, the Manager shall be paid an annual bonus to be computed at the end of each year by the Company's auditor upon the following:

A. Bonus

1. A bonus equal to ½% of sales volume.

* * *

5. In the event the employment of the Manager is terminated either by the Company or the Manager prior to the end of the fiscal year, an audit shall be made as of the date of termination. The bonus will be computed at the end of the fiscal year as provided above and will be prorated to and paid to the outgoing and incoming manager according to the audits of the fiscal year during which each was the Manager.

4. Nedens' employment relationship with FUA ended on January 7, 2008.

5. FUA's sales volume for the fiscal year ending December 31, 2007 totaled \$16,800,284.62. ½% of that amount totals \$84,001.42. Pursuant to the agreement, Nedens was due \$84,001.42 in bonus through December 31, 2007.

6. Nedens entered into an agreement with FUA whereby Nedens agreed that FUA could withhold \$20,000.00 of the bonus amount he was due. Subtracting the \$20,000.00 amount, Nedens was due a net total of \$64,001.42 in bonus through December 31, 2007. Other than the \$20,000.00 amount, Nedens never agreed that FUA could withhold his bonus.

7. On January 7, 2008, FUA's Board president, Mr. Weinberg, sent Nedens a letter indicating "You will also be issued a check for your accrued bonus under the Manager's Agreement once it has been calculated after the end of the fiscal year."

8. FUA refused to pay Nedens any of the bonus due him through December 31, 2007. FUA withheld the entirety of the bonus due to Nedens because FUA believed that Nedens defrauded it of several hundred thousand dollars. FUA never filed any report of theft against Nedens with any law enforcement agency.

9. Nedens filed the instant complaint with the Wage and Hour Unit of the Montana Department of Labor and Industry seeking payment of the bonus amounts he was due. After its investigation, the Wage and Hour Unit issued a redetermination finding that Nedens was due \$64,001.42 in unpaid bonus and applicable penalty. FUA paid into the Wage and Hour Unit the \$64,001.42 bonus amount due plus 15% penalty of \$9,600.21 but did so under protest within the meaning of Admin. R. Mont. 24.16.7551.

10. 55% penalty on \$64,001.42 amounts to \$35,200.78 ($\$64,001.42 \times .55 = \$35,200.78$).

III. DISCUSSION

A. *Propriety of Summary Judgment in Administrative Proceedings.*

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment is appropriate where “the pleadings . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. Reasonable inferences drawn from the proof must be drawn in favor of the party opposing summary judgment. *Sherrad v. Prewett* (2001), 306 Mont. 511, 36 P.3d 378.

In this matter, the parties do not dispute any facts necessary to determine Nedens’ claim. As there is no material dispute of fact, the only question here is one of the application of the applicable law to the facts.

B. *FUA Owes Nedens \$64,001.42 in Unpaid Bonus*

Montana law requires that employers pay wages when due, in conformity with the employment agreement. Mont. Code Ann. § 39-3-204. 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” include any money due from an employer to an employee, including bonuses. Mont. Code Ann. § 39-3-201(6); *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 104-105, 973 P.2d 818.

The law in Montana has long recognized that an employer may not withhold wages due an employee except for room, board or incidentals. *Smith v. TYAD, Inc.*, 2009 MT 180, ¶ 30, 351 Mont. 12, 209 P.3d 228. *See also*, Mt. Atty. Gen. Op. 25, Vol. 11 (March 25, 1953). Furthermore, this tribunal has only those powers conferred upon it by statute or by administrative rule. *Auto Parts of Bozeman v. Uninsured Employers' Fund*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 quoting *City of Polson v. Public Service Com'n* (1970), 155 Mont. 464, 473 P.2d 508, 511, *Gwynn v. Town of Eureka* (1978), 178 Mont. 191, 582 P.2d 1262, 1263. The exceptions to the requirement of payment upon separation from employment are very limited and are permitted only where they are deductions for room, board, or for other incidentals supplied by the employer where there is an agreement for such offset in writing. Mont. Code Ann. § 39-2-204(1). Offset can also be ordered under the highly circumscribed conditions set forth in Mont. Code Ann. § 39-3-205. There is no power in this administrative proceeding to offset wages on any type of breach of contract theory.

There is no dispute between the parties that FUA's sales volume through December 31, 2007 was \$16,800,284.62 or that ½% of that amounts to \$84,001.42.¹ Likewise, Nedens does not dispute that he agreed that FUA could withhold \$20,000.00, leaving an amount of bonus due to Nedens of \$64,001.42.

The respondent has never suggested and there is no evidence in this case that the reason for not paying the \$64,001.42 bonus was to offset expenses within an exception contained in Mont. Code Ann. § 39-2-204.² The requisites of Mont. Code Ann. § 39-2-205 were not met in this case as the employer never filed a report of theft with local law enforcement and, consequently, there have been no charges filed against Nedens. Therefore, there is no lawfully cognizable basis upon which the employer could have withheld the \$64,001.42 amount.

The respondent is thus relegated to arguing that the contract which says that ½% of the sales volume is due to the manager does not mean what it says. He has

¹ The respondent disputes that there was any "net savings" under the manager agreement, but has not disputed the amounts pertaining to the sales volume. Whether or not there was any "net savings" has no bearing on the issue of the sales volume bonus. The claimant has not sought any portion of amounts due under the "net savings" provision of the manager agreement and, under the plain language of the agreement, the sales volume provision is not in any way contingent on the net savings provision.

² Nedens initially challenged the redetermination's decision that the employer properly withheld \$20,000.00 of the bonus pursuant to written agreement. During this appeal, he abandoned that claim leaving only the issue of the employer's retention of \$64,001.42 of the bonus at issue.

provided no evidence at all to support such a point and in fact has made no argument to that effect.

C. *Penalty Due on The Unpaid Wages*

The parties dispute the amount of penalty due on the unpaid wages. In accordance with the redetermination, the respondent sent the Wage and Hour Unit a check for not only the \$64,001.42 amount of the bonus due but also 15% penalty on that amount, \$9,600.21, as directed by the redetermination. The respondent, however, paid the amount under protest and pursued the instant appeal. The claimant contends that this scenario requires that a 55% penalty be imposed pursuant to Admin. R. Mont. 24.16.7565.

As explained above, this tribunal's power is highly circumscribed. It is required to follow the administrative regulations pertaining to penalty. *Reier Broadcasting Co. V. Reier*, 2000 MT 120, p. 27, 299 Mont. 463, 1 P.3d 940. The amount of the penalty to be imposed is not discretionary. *Kuhr v. City of Billings*, 2007 MT 201, ¶28, 338 Mont. 402, 168 P.3d 615.

Mont. Code Ann. § 39-3-206 requires that an employer who fails to pay wages when due must be assessed a penalty in an amount not to exceed 110%. Admin. R. Mont. 24.16.7566 requires that for determinations not involving minimum wage and overtime claims and where no special circumstances justifying enhancement of penalties exist, a penalty of 55% must be imposed. Admin. R. Mont. 24.16.7566 provides one exception to the requirement that 55% penalty be assessed against the employer. That exception permits reduction of the penalty to 15% but only when the employer pays the wages and the 15% penalty found to be due within the time period fixed in the determination. Admin. R. Mont. 24.16.7551 provides that money paid pursuant to a determination but paid under protest or in other than a free and clear manner "may be subject to the full penalty allowed in Mont. Code Ann. §39-3-206."

Reading the above provisions *in pari materia*, as this tribunal must, the 55% penalty must be imposed. The redetermination required the respondent to pay the amount found to be due plus the 15% penalty no later than November 30, 2009. The respondent did not pay the amounts over unconditionally by that date but rather paid them in a manner that was not free and clear that would have permitted the claimant to receive the money. Because the respondent did not pay the wages in a free and clear manner within the time prescribed by the rule, he must pay the 55% penalty as prescribed in Admin. R. Mont. 24.16.7566.

Finally, Nedens has suggested (though not strenuously) that 110% penalty is due from the employer based on Admin. R. Mont. 24.16.7556. However, Nedens has not demonstrated that any of the special circumstances denoted in Admin. R. Mont. 24.16.7556 exist in this case. There is no evidence that the employer has failed to provide information requested by the Wage and Hour Unit nor is there any evidence that the employer has previously violated the wage and hour statutes. Thus, special circumstances requiring the imposition of the 110% penalty do not apply in this case. *Kuhr*, 2007 MT ¶30.

IV. CONCLUSIONS OF LAW

1. Ronald Nedens is entitled to summary judgment on his claim.
2. Nedens is due \$64,001.42 in unpaid bonus.
3. Penalty in the amount of \$35,200.78 is due on the unpaid bonus.
4. Special circumstances justifying imposition of 110% penalty do not exist in this case.

V. ORDER

Based on the above, summary judgment in favor of Nedens is granted and this final agency decision finding that Nedens is owed additional wages is rendered. Farmers Union Association is hereby ORDERED to tender a cashier's check or money order in the amount of \$99,202.20 representing \$64,001.42 in unpaid wages and \$35,200.78 in penalty, made payable to Ronald Nedens, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Farmers Union Association may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 1st day of October, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearings 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.