

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer
Governor

J. Randall Evans
Secretary

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

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Baltimore, Maryland 21201
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— DECISION —

IN THE MATTER OF THE APPEAL OF:

Springhill Memory Gardens

Decision No.: 29-EA-91

Date: August 7, 1991

Exec. Determ. No.: 6922

Employer Account No.:

ISSUE: Whether services performed by sales managers and salesmen for the petitioner constitute employment under Section 20(g)(6) of the Unemployment Insurance Law.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY, IN THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU DO BUSINESS.

THE PERIOD FOR FILING AN APPEAL TO COURT EXPIRES September 6, 1991

— APPEARANCES —

For the Appellant:
Not Present

For the Secretary: John McGucken -
Legal Counsel
Jerry Placek -
Review Deter.
Unit Supvr.

EVALUATION OF THE EVIDENCE

This decision is based on the evidence presented at the three hearings before the special Examiner. After the Special Examiner issued his decision, both the Agency and Springhill Memory Gardens filed an appeal to the Board of Appeals. The Board granted the appeal and scheduled a hearing. At the hearing, Springhill Memory Gardens did not appear. The agency appeared, represented by its counsel, but it did not present any additional evidence. Only legal argument was made at the hearing before the Board of Appeals. The Board, therefore, will adopt the findings of fact made by the Special Examiner, excepting only those additional or changed findings specifically noted below.

FINDINGS OF FACT

The Board adopts the findings of fact of the Special Examiner.

CONCLUSIONS OF LAW

1. The Sales Agent

The Special Examiner concluded that the individual sales agents were employees of Springhill Memory Gardens within the meaning of Section 20(g)(6) of the Law. Under that section of the law, a person is deemed an employee, for unemployment insurance law purposes, irrespective of whether the common law relationship of master and servant exists, unless three specific criteria are met. The Special Examiner found that the individual sales agents did not meet any of the three criteria. First, he found that the non-competition agreement in the contract between them and the cemetery constituted an element of control within the meaning of Section 20(g)(i). In addition, he found that the criteria of subsection (ii) were not met, because these agents' sales were not outside of the ordinary course of business of the cemetery, nor was their work conducted outside of all places of business of the cemetery. Lastly, he found that there was insufficient evidence presented that they met the criteria of subsection (iii), since there was no proof that they were customarily engaged in an independent trade or business.

The Board agrees with all of these conclusions. The non-competition clause in the sales agents' contracts was an exercise of control over their activities, a type of control incompatible with the concept of an independent contractor. These non-competition agreements are also strong evidence that these sales agents were not customarily engaged in an independent business of a similar nature. In fact, these agreements substantially restricted these people from engaging in an independent trade or business. This contractual clause, therefore, not only shows that the requirements of subsection (i) were not met, but it also is good evidence that subsection (iii) was not satisfied. The Board recognizes that most of the sales were probably made off of the premises. Many of the sales, however, were made on the premises. In fact, one of the contracts in question in this case calls for the "full and complete use of a private office and salesroom for sales personnel" at both cemetery locations. Although this contract does not deal specifically with these sales agents, it is evidence which supports the oral testimony that some of the sales took place on the employer's premises.

There can be no serious doubt that these agents were employees within the meaning of the unemployment insurance law. The closer question is who they worked for. They were selected, trained and sometimes paid by the "sales contractor." The cemetery would have a good argument that sales agents were employees of the "sales contractor" and that any unemployment tax due should be paid by him, but for the written contract between the cemetery and the individual sales agents. The legal relationship set up in that contract is directly between the sales agents and the cemetery. It was by this contract with the cemetery that the sales agents were limited in their outside sales work, both during and after the term of employment with the cemetery. Having made this contract with the individual sales agents, and having exacted significant control over them by the use of this contract, the employer cannot now argue that they are employed by someone else. In addition, the cemetery paid all of their remuneration, sometimes directly and sometimes indirectly through the "sales contractor." In summation, the evidence in this particular case shows not only that the sales agents were employees, but that they were employees of Springhill Memory Gardens.

2. The "Sales Contractor"

The Special Examiner found that the "sales contractor" who recruited, trained and sometimes directly compensated the sales agents, was not himself an employee within the meaning of Section 20(g)(6). The Special Examiner was not specific in exactly why this finding was made, but mention was made in the conclusions of law of a paragraph of his contract, and extensive findings were made concerning his method of remuneration by the cemetery. The Board finds that these are insufficient reasons to make a finding that the sales contractor was not an employee. First, the inclusion of a specific paragraph stating that a person is an "independent contractor" is not binding on the Special Examiner, nor is it more than marginally relevant. The issue is whether the person meets the three requirements of Section 20(g)(6). Likewise, the method of remuneration (whether by commission or otherwise) is only marginally relevant. Some of the other factors cited in the findings of fact by the Special Examiner, such as the fact that the "sales contractor" paid his own expenses and had substantial control over his own method of performing the work, are relevant. But in any case, all of the requirements of Section 20(g)(6) of the law must be met.

The Board concludes that the cemetery did show that the "sales contractor" met the first requirement under subsection (i), namely, that the cemetery did not have control over his performance of the work. There was a restrictive agreement in the contract by which the sales contractor agreed not to hire for himself anyone employed by the cemetery for two years. But this does not appear to be a substantial restriction on the sales contractor's operations, nor is it incompatible with the concept of his being an independent contractor.

It is unclear as to whether the employer has met the requirements of subsection (iii) of the law. Some of the employer's evidence on this issue was proffered but rejected by the Special Examiner. On the other hand, the employer did not appear at the Board hearing to offer any additional proof on this issue. The Board does not have to rule on this issue, because a dispositive ruling can be made based upon subsection (ii) of the Law.

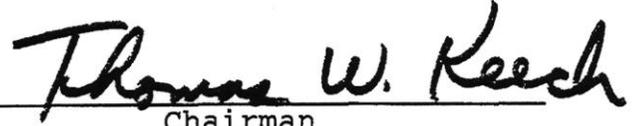
Subsection (ii) of the law requires that the service performed be either outside of the normal course of business of the cemetery or outside of all places where the cemetery conducts business. In this case, the sales contractor's services were certainly within the normal course of business of the cemetery. A significant part of its operations consist of selling grave lots and monuments to customers. Nor was this service performed outside of all places of business of the cemetery. It is conceded that the sales contractor used an office on the premises for several weeks for training purposes. In addition, an ongoing percentage of sales (by the testimony, about 10%) took place directly on the employer's premises in the sales room. The sales contractor's contract itself called for "full and complete use of a private office and salesroom for sales personnel" at each of the two locations of the employer. Although much of the sales contractor's work was apparently conducted at home or in the homes of customers, a substantial part of that work took place on the cemetery premises. The requirement of a private office and salesroom at each location was a prominent part of the contract. For this reason, the sales contractor did not meet the requirements of subsection (ii) of Section 20(g)(6) of the Law, in that his services were neither outside of the course of business of the cemetery, nor were they performed outside of all places of business of the cemetery.

Since the sales contractor did not meet all the requirements of Section 20(g)(6) of the Law, he also will be held to be an employee of Springhill Memory Gardens within the meaning of that section.

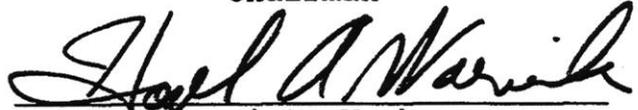
DECISION

Both the sales agents and the sales contractor were employees of Springhill Memory Gardens within the meaning of Section 20(g)(6) of the Maryland Unemployment Insurance Law for the periods in question.

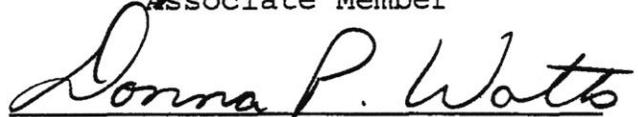
The decision of the Special Examiner is affirmed with respect to sales agents, reversed with respect to the sales contractor.



Chairman



Associate Member



Associate Member

DATE OF HEARING: March 12, 1991

COPIES MAILED TO:

EMPLOYER

Vernon Robbins, Esquire

Harold R. White Company

Jerry Placek - Room 407

John T. McGucken - Legal Counsel, DEED

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

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(301) 333-5033

William Donald Schaefer, Governor
J. Randall Evans, Secretary

BOARD OF APPEALS

Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

IN THE MATTER OF THE APPEAL OF:
Springhill Memory Gardens

Decision No.: 50-EA-90
Date: December 4, 1990
Exec. Determ. No.: 6922
Employer Account No.:

ISSUE

Whether services performed by, sales managers and salesmen for the petitioner constitute employment under Section 20(g)(6) of the Unemployment Insurance Law.

—NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT OFFICE OR WITH THE BOARD OF APPEALS, ROOM 515, 1100 NORTH EUTAW STREET BALTIMORE, MARYLAND 21201. EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON December 19, 1990

—APPEARANCES—

For the Appellant:

For the Secretary:

Present for Hearing on June 26, 1990

James T. Wolfe, Sr. , President
Vernon Robbins, Esq.
G. B. Freeman, Jr. , Witness
Richard Freeman, Witness

Jerry Placek, Review
Det. Unit Supervisor

PRELIMINARY STATEMENT

James T. Wolfe, Sr. , President of Springhill Memory Gardens, attended the initial hearing on June 26, 1990. He passed away in August, 1990.

FINDINGS OF FACT

James T. Wolfe, Sr., was President of the Maryland corporation, Springhill Memory Gardens, Inc. The corporation operates a cemetery, mausoleum and pet cemetery on Maryland's Eastern Shore. The issue in this case is whether services performed by a sales manager and salesman, during the calendar years 1985 and 1986, constitute employment under Section 20(g)(6) of the Maryland Unemployment Insurance Law.

During 1985 and 1986, James T. Wolfe, Sr. had several individuals performing sales work for his business. These individuals would seek customers to purchase cemetery lots, cremation vaults, urns, vaults, granite bases, bronze markers, marker restorations, family mausoleums, community mausoleum or lawn crypts.

From August 12, 1985 to approximately the middle of 1986, Ronald C. McHugh performed services, in what the employer contends to be that of an independent sales contractor, at Springhill Memory Gardens, Inc. By a written agreement entered into between Ronald C. McHugh and James T. Wolfe, Sr., Mr. McHugh agreed to:

"Contractors relationship with Springhill Memory Gardens and Henlopen Memorial Park shall be limited to that of an independent contractor and shall not represent to any other party that the Contractor is employed by or associated with such parks in any capacity other than as an independent contractor. Springhill and Henlopen shall have the sole responsibility for the performance of all sales contracts and contractors only responsibility with respect to the sales contracts shall be that of an independent sales agent and according to the terms of this agreement."

During the first several weeks of his employment, Ronald McHugh uses the sales room, located on the employer's premises, to train new salespeople. After this limited period, the training sessions were moved to a room in his home.

Approximatley 90% of all sales contracts were "closed" at the customer's home. The remaining 10% were concluded at the employer's premises.

Mr. McHugh, as well as all salespersons, were paid strictly on a commission basis. Mr. McHugh personally was responsible for payment of all his individual income taxes. He was financially responsible for all newspaper advertising, as well as for telephone calls he placed in order to solicit sales. The employer representative did not reimburse Mr. McHugh for any of his expenses. In addition, since he failed to remain with the employer for one year, he was not reimbursed for his moving expenses.

The pricing structure for each category of sale was set by James T. Wolfe, Sr. and not by Ronald McHugh, or any of the salespersons.

The employer representative did not train any new salespeople. Training was the responsibility of Mr. McHugh. James T. Wolfe, Sr., individually, did not exercise any control over the salespeople. Ronald McHugh both hired and fired the salespersons, and he would have instructed them when to report and when to leave the work premises.

Mr. McHugh, and the other salespeople, were paid either out of Ronald McHugh's own account, or they were paid directly by the employer. Regarding direct employer payments to Mr. McHugh and the other salespeople, such salespersons commissions were recorded in the employer's Cash Disbursement Journal.

Ronald McHugh received no health insurance coverage, sick leave days or paid vacation from the employer.

The hearing was continued to allow the employer to secure certain documentation and present it at the continued hearing. The continued hearing was held on Thursday, September 13, 1990. The employer was represented by June T. Wolfe, Vice President, Vernon Robbins, Esquire and Harold R. White, Accountant. The Agency was represented by Jerry Placek, Review Determination Unit Supervisor, and Wayne Hickman, Field Auditor. on Thursday, September 13, 1990, the Special Examiner was advised that James T. Wolfe, Sr. passed away suddenly in August, 1990. June Wolfe, Vice President, was present in order to represent the employer.

Based on the field audit conducted by Wayne Hickman, the Agency determined that twenty-three individuals, including Ronald McHugh, were to be extended coverage, as employees, under the Maryland Unemployment Insurance Statute. Mr. Hickman relied extensively on the information contained in the employer's Cash Disbursement Journal in reaching his conclusions.

With the concurrence of the employer's attorney, the hearing was continued in order to allow the employer the further opportunity to locate specific records to support their position that the twenty-three individuals identified in the Agency's audit were independent contractors and not employees.

The continued hearing was held on Tuesday, October 16, 1990. At this proceeding, the employer was again represented by June Wolfe, Vernon Robbins and Harold R. White. The Agency was again represented by Jerry Placek. June Wolfe, Vice President, was only able to produce one additional Sales Representative Agreement. This agreement, dated May 10, 1980, was with Jack Elliott.

Paragraph #7 of the Sales Representative Agreement, signed by Flo Poppendiecke and Joan D. Brown, which were representative of the agreements signed between the employer and the sales representatives, excluding Ronald McHugh, in 1985 and 1986, read as follows:

- "7. That during the life of this agreement, REPRESENTATIVE will not represent any other cemetery within a 10 mile radius of SPRINGHILL MEMORY GARDENS, INC. REPRESENTATIVE further agrees that upon his termination of this Agreement for whatever cause, he shall not act as employee, servant, agent, independent contractor, partner, officer, advisor or in any capacity whatever for any corporation, association, person of any kind performing any function for any cemetery within a 10 mile radius of SPRINGHILL MEMORY GARDENS, INC. for a period of (6) months. REPRESENTATIVE further agrees that he will not hire, employ or otherwise engage in any business activity, except that of the CORPORATION, in the cemetery business with any other agent, employee, servant, independent contractor, of the CORPORATION during the term of this agreement and for a period of one (1) year from the termination of this AGREEMENT."

The Special Examiner finds as a fact that the employer has not been able to establish by their evidence that any of the individuals listed in the Field Auditor's Report for the calendar years 1985 and 1986, with the exception of Ronald C. McHugh, were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question.

CONCLUSIONS OF LAW

Section 20(g) (6) (i)(ii) (iii) of the Maryland Unemployment Insurance Law States:

20(g)(6): Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this article, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the Secretary that:

- (i) That individual has been and will continue to be free from control of direction over the performance of those services, both under his contract of service and in fact; and
- (ii) The service is either outside the usual course of the business for which that service is performed, or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (iii) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question."

Based on the written agreement entered into between James T. Wolfe, Sr. and Ronald C. McHugh on August 12, 1985, as well as other evidence and testimony presented in the case, the Special Examiner finds that this individual met the three criteria, as set forth in Section 20(g)(6)(i)(ii)(iii) of the Maryland Unemployment Insurance Law, for being an independent contractor.

The Special Examiner cannot, however, conclude that any other individuals listed in the Field Auditor's Report for the calendar years 1985 and 1986, were independent contractors within the meaning of this statutory section of the Maryland Unemployment Insurance Law.

Unlike paragraph eight of Ronald C. McHugh's Agreement, paragraph seven of the Sales Representative Agreement exercises significant control over the actions, duties and responsibilities of the Sales Representatives by the employer.

Such examples of control or direction exercised by the employer over the salespersons were:

- (1) That during life of the Agreement, the Sales Representative could not represent any other cemetery within a ten-mile radius of Springhill Memory Gardens, Inc.

- (2) The Sales Representative agreed that upon his termination of their Agreement, he could not act as an employee, servant, agent, independent contractor, partner, officer, advisor or in any capacity whatever for any corporation, association, or person of any kind performing any function for any cemetery within a ten-mile radius of Springhill Memory Gardens, Inc. for a period of six months.
- (3) During the term of their Agreement and for a period of one year from the termination of their Agreement, the Sales Representative further agreed that he would not hire, employ or otherwise engage in any business activity, except that of the corporation, Springhill Memory Gardens, Inc., in a cemetery business with any other agent, employee, servant or independent contractor, of Springhill Memory Gardens, Inc.

Clearly, the service performed by the Sales Representatives was neither outside the usual course of business of Springhill Memory Gardens, Inc., nor was the service exclusively performed by the salespersons, with the exception of Ronald C. McHugh, performed outside all of the places of business of Springhill Memory Gardens, Inc.

Lastly, the employer failed to meet the statutory requirements of Section 20(g) (6)(iii). The employer submitted no documented evidence, except as pertaining to Ronald C. McHugh, to support their assertion that the salespersons performing services for their corporation were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question.

The Special Examiner will find that the employer has satisfied the statutory requirements of Section 20(g) (6) (i)(ii)(iii) only as it pertains to Ronald C. McHugh.

The Special Examiner will also find that the employer, Springhill Memory Gardens, Inc., has not satisfied the statutory requirements of Section 20(g) (6) (i)(ii)(iii) of the Maryland Unemployment Insurance Law, with respect to all other individuals listed in the Field Auditor's Report.

Therefore, with the exception of Ronald C. McHugh, the Special Examiner will affirm the Agency's Review Determination #6922.

DECISION

Services performed by Ronald C. McHugh in the performance of his duties as a Sales Manager. and/or salesperson, during the calendar years 1985 and 1986, are held to be exempt from covered employment within the meaning of Section 20(g) (6) (i)(ii)(iii) of the Maryland Unemployment Insurance Law. Regarding this individual only, Agency Review Determination #6922 will not apply.

Services performed by all remaining individuals listed in the Field Auditor's Report, covered by Agency Review Determination #6922, in the performance of their duties as salespersons for Springhill Memory Gardens, Inc., are held to be within covered employment, within the meaning of Section 20(g) (6)(i) (ii)(iii) of the Maryland Unemployment Insurance Law. Therefore, wages earned by these individuals must be treated by the Department of Economic and Employment Development as wages in accordance with relevant statutory requirements of the Maryland Unemployment Insurance Law.

Therefore, with the aforementioned exception of Ronald C. McHugh, the Agency's Review Determination #6922 is affirmed.



Mark R. Wolf
Special Examiner

MRW: kbm

Hearing Dates: June 26, 1990, September 13, 1990 & October 26, 1990

COPIES MAILED TO:

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