

BEFORE THE
STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

KEVIN M. GOLUCH, Employee

Hearing No. 90-402576 MM

Involving the account of

R J L CONSTRUCTION AND
PACE REALTY SERVICE, Employer

SEE ENCLOSURE AS TO TIME
LIMIT ON FURTHER APPEAL.

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Pursuant to the timely petition for review filed in the above-captioned matter, the Commission has considered the petition and all relief requested. The Commission has reviewed the applicable records and evidence and finds that the Appeal Tribunal's findings of fact and conclusions of law are supported thereby. The Commission therefore adopts the findings and conclusions of the Appeal Tribunal as its own.

DECISION

The decision of the Appeal Tribunal is affirmed. Accordingly, the employe's services for the employer constitute "employment" for unemployment compensation purposes and all of his wages with the employer in the applicable base period are chargeable for unemployment benefit purposes.

Dated and mailed

May 23, 1991

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/s/

Kevin C. Potter, Chairman

/s/

Carl W. Thompson, Commissioner

/s/

Pamela I. Anderson, Commissioner

MEMORANDUM OPINION

The employer states in its petition for Commission review that the employe's services for the employer were excluded from the definition of employment under section 108.02 (15)(k)7., Stats. Under section 108.02 (15)(k)7., Stats., the definition of employment does not include services performed by an individual for a person as a real estate agent or as a real estate salesperson, if all such service performed by such individual for such person is performed for a remuneration solely by way of commission. The employe worked for the employer selling time share agreements for resort complexes. In order to qualify for the real estate salesperson exclusion three criteria must be met. The person must be a real estate agent licensed by the state, and remuneration is solely by commission, and the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed, and such contract must provide that the individual will not be treated as an employe with respect to such services for federal tax purposes.

The first requirement is that the person must be a real estate agent licensed by the state. A real estate agent is not defined in Chapter 108, Chapter 452 or any other chapter in the statutes. Since a real estate agent is not specifically defined in the statutes, it should be defined for purposes of applying section 108.02 (15)(k)7. by using the common definition of an agent. Under section 990.01, Stats. all words or phrases not specifically defined, shall be construed according to their common and approved usage. In Black's Law Dictionary, an agent is defined as a representative whose functions it is to bring about a contractual obligation. The employe's functions in this case were to bring about contractual obligations in time share estates. Under section 707.02 (24), Stats., time share means a time share estate or a time share easement. Clearly an agent whose functions it is to bring about a contractual obligation in a time share is involved in the sale of an interest in real estate. Therefore, the employe was a real estate agent as provided in section 108.02 (15)(k)7.

The employe is also required to be a real estate agent licensed by the state. A time share salesperson is required to obtain a certificate of registration under section 452.025, Stats. What constitutes a real estate license is not defined in the statutes. Black's Law Dictionary defines a license for a trade or business as an authority or permission to do or carry on some trade or business which would otherwise be unlawful. The certificate of registration required of time share salespersons meets this definition of a license.

The second criteria requires that the employe is paid solely by commission. The evidence and testimony clearly establishes that the employe was paid solely on the basis of commission. The final criteria requires that the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed, and that such contract provides that the individual will not be

treated as an employe with respect to such services for federal tax purposes. In this case, the employe did perform the services pursuant to a written contract with the employer. However, nothing in the contract provides that the employe will not be treated as an employe with respect to such services for federal tax purposes. Therefore, it has not been established that the employe has satisfied all three criteria to qualify for the exemption from the definition of employment as provided under section 108.02 (15)(k), Stats.

The employer contended at the hearing that the employe worked in an excluded employment as an independent contractor under section 108.02 (12), Stats. However, the evidence at the hearing did not establish that the employe was free from the employer's control or direction over the performance of his services, or that he performed services in an independently established trade, business or profession in which he was customarily engaged. Therefore, he did not work as an independent contractor. The evidence indicates that the employe performed services for the employer as an employe during the applicable base period.

cc: Attorney Mark Poker
O'Neil, Cannon & Hollman