

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

ABLE RESTORATION, INC.

DECISION OF THE HEARING OFFICER

Appearances: John P. McGee, Jr. Esq., Attorney for the claimant

Nature of Dispute: RSA 275:43 I unpaid commissions
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages
RSA 275:43 I unpaid wages

Employer: Able Restoration Inc., 170 Oak Hill Way, Brockton, MA 02301

Date of Hearing: February 12, 2014

Case No. 47030

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on November 19, 2013. There was a notice sent to the employer and there was a payment made and an objection filed. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties and there was a request to add liquidated damages and attorneys' fees to the Wage Claim.

The employer objected to liquidated damages being an issue at this hearing. The Hearing Officer upheld the objection and so liquidated damages and attorney's fees will not be a part of this Wage Claim. The Wage Claim is for \$12,500.00 in commissions.

The employer stated that they withdrew the defense of an employment agreement. In April of 2013 the claimant did have commissions due. In July of 2013 the company sent a "good faith" check to the claimant. This check was drawn from a separate account than the company account. This was the same month that the claimant left the employ of the company. There was also a check that did not clear the bank and the company's representative did not know why this happened. This caused another check to be issued. The employer does not believe there are any commissions due to the claimant.

The claimant testified that he was employed with the company for four years as a Project Manager. Prior to April of 2012 his wage package was a set salary and a commission by project. At that point in time the employer changed the commission practice because the claimant had employees working for him and he could not assign himself projects.

The claimant stated that he had several meeting with management about the commission status and the expense reimbursement. In a meeting in July of 2013 the claimant was told that he would have the expenses due as soon as possible and that his bonus/commission was to be paid. He was then paid the "good faith" check until the full commission could be paid.

The employer did state that they never knew the true figure of what was owed to the claimant. There had been problems with the Quick Books program. The employer submitted documents on the day of the hearing and because of Claimant's objections and the hearing rules, these documents are not considered.

The claimant maintains that the employer had enough time to review records and to speak about the commission plan and any proposed changes.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

This part of the law allows for the claimant to seek liquidated damages up to the amount of the Wage Claim, when the Hearing Officer finds that the employer was willful and/or did not have good cause for their action(s).

It is the finding of the Hearing Officer after the written submissions and the testimony presented for the hearing, that there is a valid Wage Claim. The issue of liquidated damages has been withdrawn from consideration in this hearing.

The claimant has the burden to show that there are wages due and owing and he met this burden. The claimant was in a position of trust with the company and when something was not right, the claimant met with the managing authority to set the record straight. It was from these meetings/communications that the claimant was issued a "good faith" payment until the questions he had were straightened out.

The employer provided testimony that there were problems with the record keeping by the employer. The employer was represented by a consultant, a former employee, who was not present at the time the claimant is seeking commissions. There was a lack of ability to address the situation and there was no testimony regarding the meetings the claimant participated in with the upper management of the company.

Because the employer is charged with keeping wage records and because the commission plan was a part of the claimant's wage plan, it is found that the claimant has the accurate figure for this hearing. The claimant brought the figures to the company and was paid a partial payment ("good faith"). The employer was unable to bring accurate figures to the hearing and so the Wage Claim is valid in the claimant amount of \$12,500.00.

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 Hearing Officer finds that the claimant proved that he was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$12,500.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$12,500.00, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 18, 2014

Original: Claimant
cc: Employer

John McGee, Jr., Esq.
Law Office of Flynn & McGee PA
PO Box 507
Portsmouth, NH 03802-0507

Page 4

TFH/all