

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

HOPE'S DINER

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary

Employer: Hope's Diner, 127 Plaistow Road, Plaistow, NH 03865

Date of Hearing: February 19, 2014

Case No. 47177

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 16, 2013. The notice was sent to the employer on December 17, 2013. There was no written objection to the Wage Claim. The Notice of Hearing was sent to both parties on January 15, 2014. The employer was represented at the hearing.

The claimant testified that she worked for the employer from the end of August of 2013 until November 16, 2013. She worked as a cook and a waitress. Her rate of pay was \$4.00 an hour plus tips. She worked four weeks as a waitress and the rest of the time as a cook.

The claimant stated that she was due 66 hours at the \$4.00 rate and she is also seeking the \$500.00 that was held back by the employer at the start of her employment. The Wage Claim is for \$764.00.

The employer provided testimony that they do have two checks for 68 hours at the rate of \$4.00 per hour. They have no records of tips for the claimant. The employer also had no record of the \$500.00 being withheld. At another hearing the supervisor for the claimant was coming in for a hearing and both side agreed the Hearing Officer could ask about the \$500.00 withheld.

Ms. Joanne Moynihan did say that the \$500.00 was withheld when she was the supervisor and running the Diner.

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 275:43-b: Payment of Salaried Employees. –I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

This part of the law spells out the manner a salaried employee is to be paid.

It is the finding of the Hearing Officer, based on the testimony and the written submissions presented for the hearing, that the Wage Claim is valid. The claimant has the burden to show there are wages due and owing and she met this burden. The claimant did testify credibly with back up assurance that the \$500.00 was withheld and not paid at the end of the claimant's employment.

The claimant is also due 66 hours at the \$4.00 per hour rate as a waitress. This is two hours less than reported by the employer but the claimant seemed to be more aware of her work time.

The employer did say that they owed the claimant for 68 hours but there were no records. The Wage Claim is valid in the amount of \$764.00.

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 she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$764.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$764.00, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 19, 2014

Original: Claimant
cc: Employer

TFH/all