

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE


V

CHEESESTEAK FACTORY

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages

Employer: Cheesesteak Factory, C/O Tim Ferris, 1 Fairway Drive Apt. #111
Derry, New Hampshire 03038

Date of Hearing: April 8, 2014

Case No. 47369

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on January 16, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on March 10, 2014.

The claimant testified that he worked for the employer at a rate of \$8.50 per hour. The wages due are \$3,485.00. He stated that he had many contacts with the employer about being paid for his work. At one time he worked with the employer's brother and he did not have a problem getting paid. He said that his hours were recorded in a notebook and he was paid cash. The claimant said that he never filled out any forms for the federal taxes.

In April of 2013 the brother of the owner left to go to Florida. It was at this point in time that the claimant had difficulty in getting paid. The claimant said that he is owed wages for September, October, and November and until December 5, 2013. He quit the job at that point in time and the owner asked for him to return. He did go back and was paid for time worked after that date. He said he had a set schedule of Thursday, Friday, Saturday and Sunday although he would work extra days if requested.

The employer testified that the claimant never asked for wages. He said that sometimes the claimant would work on a Saturday to help out. There are no records of the claimant

working. There is no paperwork at the start of employment to show the claimant was an employee. The business is now closed and there is an ongoing process to declare bankruptcy although it is not complete yet.

The employer, in his written objection said the claimant could not accept wages because of federal regulations for a foreign student. He often gave the claimant rides and had the claimant stay at his house, at times.

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.

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is valid. The claimant has the burden to show that there are wages due and owing and he met this burden. It is clear to the Hearing Officer that there was an employee/employer relationship. The facts were hard to comprehend but it is clear that the claimant did work for the employer. The claimant said that he recorded his time and the employer has that book.

It is also clear that the claimant had conversations with the owner's brother about the work day and the hours to be worked. The claimant was credible in his testimony that when the brother was working, the wages were paid on a regular basis. Once the brother left the job, the payment of wages was just not done. The payment started after the claimant quit the job and was asked to come back.

The employer made different claims as to why the claimant was not paid. The written objections cited the regulation the claimant was under as a foreign exchange student studying in the United States. Then there were issues with the assistance the employer gave the claimant to help out with the educational process the claimant was enrolled in. Finally there was testimony that the claimant did not work a schedule he only helped out when requested. The fact remains that the employer has the burden to keep the records and show the records. This was not done. Sometimes the claimant was paid in cash and other times not paid at all.

It is hard to determine the facts of this claim because they are all over the board. The issue comes down to credibility of the parties in their explanation of the facts. It appears that the claimant was in a position to work for the employer and did so. It also appears that the claimant was working steadily until the brother of the owner left the employ of the company. The Wage Claim is valid in the amount of \$3,485.00.

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 by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$3,485.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$3,485.00, less any applicable taxes, within 20 days of the date of this Order.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: April 18, 2014

Original: Claimant
cc: Employer

TFH/clc