

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**PORTSMOUTH HOUSING AUTHORITY**

**DECISION OF THE HEARING OFFICER**

**Appearances:** Leslie Nixon Esq., Attorney for the Claimant  
John K. Bosen Esq., Attorney for the Employer.

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid vacation time and sick time  
RSA 279:21 VIII unpaid overtime  
RSA 275:48 I illegal deductions

**Employer:** Portsmouth Housing Authority  
245 Middle St  
Portsmouth NH 03801

**Date of Hearing:** May 12, 2014 and September 15, 2014  
A pre hearing conference was also held

**Case No.** 47548

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on February 12, 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 28, 2014.

At the hearing on May 12, 2014 the claimant stated that he did not have enough information to go forward with the hearing. A Motion to Continue, for the hearing was granted.

During the review of documents needed for the hearing the claimant made several requests for a multitude of documents going back several years. To facilitate the process there was a scheduled pre-hearing conference to make sure the claimant had the necessary documents and that the employer had the requested documents. At the conference it was

decided to allow the claimant to go to the employer's work site where the documents were kept and to review the documents he felt he needed.

The Wage Claim started on September 15, 2014. The Wage Claim is for \$49,635.43 in overtime and \$10,285.90 in unpaid vacation time and sick time.

On August 30, 2004 the claimant started to work for the Portsmouth Housing Authority. He was notified of his wage structure and his benefits. He stated that his salary rose from a starting amount of \$60,000.00 to his last salary amount of \$101,000.00. The claimant was in charge of preparing the wage records for the agency.

The claimant said that he was determined to be an exempt employee but he often wrote his extra hours on his time sheets. The claimant stated that these time sheets were signed by several Executive Directors that he worked for over the years. The claimant stated that none of the Executives signed an approval of the overtime but they did sign the reports. The claimant never received any overtime while he was working for the employer.

The claimant said that his only request for the payment of overtime was a verbal request because of the hours he was working.

The claimant also provided testimony that he was in charge of the employee handbook and keeping the records of the employees' reading and signing the handbook.

The claimant said that he was aware of the policy on the pay out of vacation time and sick time. He said that he did not raise any issues while he was employed but when he received a pay out after retiring and was then asked to return a portion of the pay out, he realized that he was being treated differently than other people who retired. The claimant testified that he provided the final calculations for retirement and that is how he knows that there were payouts outside of the employee handbook. The claimant also said that he prepared his own record for pay out at his retirement.

The claimant further believed that he was entitled to a sick leave payout, even though he did not meet the criteria set down in the handbook. He stated that others got it so he should have the same benefit.

The employer gave testimony through the current Executive Director, Craig Welsh. The new Executive Director started his employment on December 27, 2012. At that time the claimant was in charge of finances, Human Resources, purchasing and technology.

The employer testified that the claimant was not entitled to overtime because his position was exempt from overtime. It is the duty of the Executive Director to approve any overtime and he never did this for the claimant. A review of the file shows that the claimant, at one time did ask for a bonus payment, but he was never paid overtime. The claimant use to write numbers on his time reports but they were never considered requests for overtime. The claimant was a salaried employee and he was paid the same amount every pay day.

The employer's testimony was that when the figures, supplied by the claimant and paid by the employer, when reviewed the errors were discovered and the claimant was asked to return the overpayments which he did.

The employer also said that the review of the files did show that several employees were overpaid upon retirement. For some it was so minor that they were not asked for the overpayment back. Where a large discrepancy was found the employee was asked to reimburse the employer for the overpayment. This is what happened with the claimant.

The claimant was paid his vacation time in accordance with the employee handbook that was in place on his retirement date. The claimant did not qualify for a payout of sick time because he had not worked the required years for this to be paid.

### **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

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 V Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due

This part of the law places issues such as vacation time and sick time into the category of wages when the time is due and owing,

RSA 279:21 VIII Those employees covered by the introductory paragraph of this section, with the following exceptions, shall, in addition to their regular compensation, be paid at the rate of time and one-half for all time worked in excess of 40 hours in any one week

This part of the law deals with the payment of overtime when it falls under the state law.

RSA 275:48 I No employer may withhold or divert any portion of an employee's wages unless

This section of the law spells out when and how deductions can be made from wages.

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 invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

The claimant is relying on what he says is a past practice. This does not hold up in a review of the employee handbook or the definition of an exempt employee. The claimant said that he prepared past payouts upon direction of an Executive Director. The new Executive Director has found the error in the calculations and asked that they be corrected and that

overpayments be returned. The fact that a past practice occurred does not mean that it has to continue and overrules the written policies.

The claimant made note of his hours worked but never said that he was entitled to overtime. He never asked for the payment of overtime until he retired. The position he held was an exempt position and the claimant never showed that such a position was paid overtime. The testimony shows that overtime can be approved by an Executive Director but there is no evidence that this was done for the claimant.

The claimant did not show that there was any violation of policy that led to his Wage Claim. The claimant did not show that he was not paid all vacation time due and the record shows that he was not entitled to a sick leave payout.

The Wage Claim is invalid.

#### **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 Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: October 14, 2014

TFH/slh