

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

**V**

**ACTION ENERGY SERVICES**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 279:21 VIII unpaid overtime

**Employer:** Action Energy Services, 1087 Broadway, Revere, MA 02151

**Date of Hearing:** June 30, 2014

**Case No.** 47810

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on March 21, 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 May 29, 2014. Both parties were telephonic for the hearing. The Wage Claim is for \$3,850.00 in unpaid wages and overtime.

The claimant testified that he worked for the employer from September of 2013 until March of 2014. The claimant filled out time sheets and he has pay stubs to show that he was not paid for the hours worked. The claimant said that the issue of 154 hours not paid was brought up with the Chief of Operations and his mother, also an employee of the company. The claimant also said that he tried to bring up the issue at other times but the employer would not answer his calls and he was unable to leave messages.

The claimant did not know how much time he had earned for vacation time and did admit that he took some time off that has not been paid and is part of the Wage Claim. The claimant did say that he used 40 hours of vacation and it was without pay.

The employer maintains that they are a Massachusetts company and all work was done in that state. The claimant only lived, for a short time in New Hampshire. The employer stated that the entire company did over \$500,000.00 in business and that the claimant's division, if taken on its' own did not. However, the division was a part of the "whole" company.

The employer stated that the claimant did not raise these issues with the employer and the employer was in shock when the claimant just left his job. They said that there was no indication of any problems.

### **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 279:21 VIII. Unless otherwise provided by statute, no person, firm, or corporation shall employ any employee at an hourly rate lower than that set forth in the federal minimum wage law, as amended. Tipped employees of a restaurant, hotel, motel, inn or cabin, who customarily and regularly receive more than \$30 a month in tips directly from the customers will receive a base rate from the employer of not less than 45 percent of the applicable minimum wage. If an employee shows to the satisfaction of the commissioner that the actual amount of wages received at the end of each pay period did not equal the minimum wage for all hours worked, the employer shall pay the employee the difference to guarantee the applicable minimum wage. The limitations imposed hereby shall be subject to the following exceptions:.

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:

- (a) Any employee employed by an amusement, seasonal, or recreational establishment if:
  - (1) It does not operate for more than 7 months in any calendar year; or
  - (2) During the preceding calendar year, its average receipts for any 6 months of such year were not more than 33- 1/3 percent of its average receipts for the other 6 months of such year. In order to meet the requirements of this subparagraph, the establishment in the previous year shall have received at least 75 percent of its income within 6 months. The 6 months, however, need not be 6 consecutive months.
- (b) Any employee of employers covered under the provisions of the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. section 201, et seq.); provided however, employers that pay any delivery drivers or sales merchandisers an overtime rate of compensation for hours worked in excess of 40 hours in any one week shall not calculate such overtime rate of compensation by the fluctuating workweek method of overtime payment under 29 C.F.R. section 778.114.

**Source.** 1949, 310:1, par. 25. 1953, 232:1, par. 25. RSA 279:21. 1955, 288:1, par. 25. 1957, 311:1. 1959, 275:1. 1963, 203:1. 1967, 440:10. 1971, 494:1, 2; 552:1, 2. 1973, 350:1. 1977, 234:1. 1983, 267:1. 1985, 83:1. 1986, 63:1; 64:1. 1989, 86:1, 4. 1990, 198:3. 1995, 94:7, XXI. 1997, 226:5. 2007, 24:1. 2008, 327:2, eff. Jan. 1, 2009. 2010, 284:1, eff. July 8, 2010; 284:2, eff. Dec. 31, 2011. 2011, 204:1, eff. Aug. 21, 2011; 204:2, eff. Dec. 31, 2011 at 12:01 a.m.

This part of the law deals with overtime issues and how the premium time is paid.

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 stated that he did take days off as vacation time but he was not sure if those days had been accrued. The non payment of these days is a part of the Wage Claim. The claimant did admit that instead of 154 hours due, the number had been reduced to 114. The claimant said that he brought his time questions to the Chief of Operations and the Chief's mother who was also a company employee.

The employer stated that the claimant did take some unearned time and was not paid for the time. They also said that the claimant did not raise the missing hours with the employer. The employer was caught by surprise when the claimant left his position. The employer was not aware of any problems.

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.

/s/

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: July 15, 2014

Original: Claimant  
cc: Employer

TFH/cag