

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v

GUARANTEED RATE

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 279:21 VIII overtime pay

Employer: Guaranteed Rate, 3940 North Ravenswood, Chicago, IL 60613

Date of Hearing: March 19, 2015

Case No. 49685

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on January 7, 2015. 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 February 19, 2015.

The claimant testified that she worked for the employer for one and a half years. She was hired as a salaried employee but she was not exempt from overtime. Her written hiring agreement stated that she would receive time and one half pays for all hours worked beyond forty in a week.

The claimant testified that the employee handbook and the hiring agreement both made it clear that time and one half would be paid for all authorized overtime. The claimant further testified that she did not realize that she was only being paid one half times until after she left her position with the company. The Wage Claim for \$1,827.28 was filed after the claimant left her employ with the company.

The claimant worked in a position that was paid under a Fluctuating Work Week Method. Although the claimant was in a salaried position, she was not exempt from overtime pay. The overtime structure was based on the number of hours actually worked in a week. The more the hours went over 40 the less the overtime rate. There was also a policy in place clearly pointed

out that there were times, such as leave use, when the employee was being paid and the time was not counted towards actual time worked. Although the employee was a salaried employee, the hours worked were tracked for the purpose of paying overtime this time keeping process was tracked on line.'

The employer testified that the policy was clear. Any time the claimant worked beyond forty, actually worked, hours she was paid ½ time for the extra work. The employer did testify that there had been some questions raised by the language in the hiring agreement but the policy was in place and the claimant worked under that policy.

The employer testified that the claimant never challenged the policy or the amount of overtime wages she received while working.

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:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

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 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 deals with the payment of wages to an employee who is on a salary wage plan.

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:

(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.

This section of the law deals with the payment of overtime wages under the New Hampshire law.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and she did not meet this burden.

The claimant had a hiring agreement that stated she was a salaried employee and that she was going to work under a Fluctuating Work Week Method. Under this plan there was a method for paying approved overtime.

A review of the exhibits and the testimony shows that there is a very complicated method of being paid overtime. It appears that the more time the employee worked, the less the rate was to determine overtime pay. It is a very complicated system and should be clarified.

The claimant had the burden to show that there were wages due and owing and she did not prove that during the hearing. The claimant did not submit any document(s) to show when the overtime was worked and how much was due. There was only the total amount of the Wage Claim.

The employer was credible in their testimony that the claimant worked under this system for over a year and a half and never brought up the overtime issue. If she did not understand the process she should have questioned the policy that was in place.

Under the New Hampshire Law, a salaried employee does not get overtime pay. However, the employer can put a process in place that allows for a payment of premium pay in certain circumstances. This is what happened here. Because it was policy any of the premium pay earned became wages. However, the claimant did not show where and how she arrived at the figure cited in the Wage Claim.

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 she was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: April 14, 2015

TFH/kdc