

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

PETER MacDONALD

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:42 I/II employer/employee relationship

Employer: Veteran Resort-Chapel, 101 Steppingstone Rd., Lee, NH 03861

Date of Hearing: April 21, 2015

Case No. 49764

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on January 22, 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 March 31, 2015. The Wage Claim was filed for \$10,337.50 in unpaid wages. There is also an issue of the employer/employee relationship.

As was explained at the hearing, the issue of the employer/employee relationship has to be addressed because if there is no relationship, the Wage Claim process is not the proper forum to address the money issue.

The claimant testified that he worked for the employer from September 4, 2013 until December 1, 2013. He testified that he had a verbal agreement for a wage of \$25.00 per hour. There are no written agreements, the claimant filed his own taxes and he performed no other work for any employer during this period of time. The claimant did testify that there were some cash payments made and that one check was written to his attorney for a legal matter.

The employer testified that there is no employer/employee relationship and he as an individual never hired the claimant. The employer stated that he is part of a church group that caters to military disable veterans with special emphasis placed on combat veterans. The Veteran Resort-Chapel is the registered name of the business.

The employer testified that the claimant was referred to the Veteran Resort-Chapel by Easter Seals because the claimant was living in his van on the street. The move to the Chapel's property gave the claimant a place off the street and also established a mailing

address. The testimony further showed that the claimant did some volunteer work on a new homeless shelter the Veteran Resort-Chapel was building. The claimant was given some cash, from church funds, to help with some needed incidentals and then there was a check issued to a lawyer to help retain the lawyer for the claimant.

The testimony showed that the claimant was asked to leave the property because of some incidents.

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 275:42 I/II The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person, except employers of domestic labor in the home of the employer, or farm labor where less than 5 persons are employed.

II. "Employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

This is the part of the law that sets out the criteria for the employer/employee relationship.

The parties were told at the start of the hearing that there was a finding that there was no employer/employee relationship than the Wage Claim process was not the proper forum to resolve the situation.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that there is no employer/employee relationship. The claimant has the burden to show that this relationship exists and he did not meet this burden. The claimant was provided a service by the Veteran Resort-Chapel and he did help as a volunteer in the building of the new structure. The claimant was volunteering and did not have any type of hiring agreement or any promise of wages to be paid. The claimant's first contact with Veteran Resort-Chapel was a request from Easter Seals to take the claimant in and keep him from having to sleep in his vehicle on the streets.

The minister from the Veteran Resort-Chapel was credible in his testimony that there was an attempt to help the claimant and there were several financial gifts and a check for legal services given to the claimant. None of these happenings are significant in the establishment of the employer/employee relationship.

The age Claim process is not the proper forum to resolve any of the problems brought up in this hearing. The Wage Claim is invalid.

DECISION AND ORDER

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted

from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Wage Claim is invalid as there is no employer/employee relationship.

Thomas F. Hardiman
Hearing Officer

Date of Decision: May 14, 2015

TFH/kdc