

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

TECH 20

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:44 IV liquidated damages

Employer: TECH 20, PO Box 7464, Gilford, NH 03247

Date of Hearing: September 28, 2015

Case No. 50868

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on July 1, 2015. The notice was sent to the employer and there was an objection to the Wage Claim. 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 September 9, 2015. The claimant is seeking unpaid salary and liquidated damages.

The claimant testified that he worked for the employer for seven weeks. He was a salaried plus commission employee and paid weekly. His wage plan was for \$1,000.00 per week and a 3% commission on sales. The pay period was from Sunday to Saturday. The claimant testified that he was terminated on June 24, 2015, a Wednesday.

The claimant testified that he was terminated for cause. He stated that he could not meet the expectations of the employer. He was not paid for his last week of salary. He believes that the employer was willful and did not have good cause for not paying him so he is also seeking liquidated damages in the amount of \$1,000.00. The Wage Claim is for \$2,000.00.

The employer testified that the claimant was hired as a landscape manager. He was to run the landscape portion of the business. The claimant hired two employees, set up an office and purchased a landscape program. The employer testified that they paid for the program and the claimant set up a payment plan but did not inform the employer. The employer said that although they paid for the entire program, there was still a payment due when the claimant left the company.

The employer testified that they had a check for two days of wages at their office. They said the claimant could pick up the check when he returned the program, purchased by the company and any other company property that he had in his possession.

The employer further testified that the claimant chose to leave his employment and was not terminated by the employer.

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 clearly spells out when and how a salaried employee is to be paid and when and how salary can be prorated.

RSA 275:44 IV If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition.

This section of the law allows for a claimant to seek liquidated damages up to the amount of the Wage Claim when the Hearing Officer finds that the employer was willful and did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that the Wage Claim is valid in part and invalid in part. The claimant has the burden to show that there are wages due and owing and he did prevail in this request for unpaid wages.

The claimant was credible in his testimony that he worked a part of the last week of employment. He worked two or three days but he worked. The claimant was also credible in his testimony that he was relieved of his duties with the company.

The employer did not prevail in their position that the claimant left the job on his own and that they only owed the two days worked in the last week. The employer also stated that the two days of wages was at their office and could be picked up when certain property of the employer was returned.

The employer cannot withhold wages if there is no signed agreement that the employee allowed for deductions to be made. The program was purchased by the company and if there is an outstanding amount of payments to be made on the program, the employer can address this in another forum. The issue of money to be paid on the program, if any, and by whom, cannot be addressed in the context of this hearing or its resulting decision.

It is apparent to the Hearing Officer that the employee was right to feel that he had been terminated. Because of this, the employee is entitled to his full salary for the last week of work.

It is also found that the request for liquidated damages is invalid. Although the decision is against the employer, there is no finding that the employer was willful and did not have good cause for their action. The employer felt that the claimant abandoned his position and that he left the employer with debt that they had already paid and the claimant did not pay it in full as requested. These areas of concern do not rise to the standard of being willful and the employer felt they had good cause for their action.

The request for liquidated damages is invalid.

DECISION AND ORDER

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

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 \$1,000.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$1,000.00, less any applicable taxes, within 20 days of the date of this Order.

Thomas F. Hardiman
Hearing Officer

Date of Decision: October 21, 2015

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