

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

ADAM VAILLANCOURT ROOFING

DECISION OF THE HEARING OFFICER

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

Employer: Adam Vaillancourt Roofing, 45 Emerson Road, Milford, NH 03055

Date of Hearing: November 7, 2016

Case No.: 53911

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on September 8, 2016. 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 October 21, 2016.

The claimant testified that he worked for the company for over four months. He was working under a wage plan that paid him, a \$1,000.00 draw on commissions per week, \$250.00 per day for managing projects, an hourly rate of \$25.00 per hour while working on jobs and an eight percent commission on sold projects. The claimant further testified that there was no time clock in place.

The claimant testified that there were two separate written wage proposals but neither one was signed by the claimant. He further testified that the hourly rate appeared on several checks and then at some point in time it was no longer on the checks.

The claimant testified that he accepted the pay checks without questioning his concerns about the pay structure. In addition, the claimant testified that the \$25.00 per hour for working on projects was a verbal agreement only.

The employer testified that the claimant was paid the \$25.00 for the first two paychecks because he was in the training program. The history of the checks received reflects the payment of \$25.00 per hour for the training period and that amount did not show up in future checks.

The employer also said that the claimant was changed from a salary of \$1,000.00 to a weekly draw of \$1,000.00 against his commissions. This change was made when it was decided to have the claimant concentrate on sales as opposed to doing the installation work. The employer did testify that the claimant received a \$250.00 management fee when he went to a job site to supervise and review the work of the sub-contractors.

The employer further stated that the claimant was paid in accordance with the wage plan and he never challenged the amount of the pay for the reporting period. The employer also testified that the company never recovered any overpayment on a draw when the commission was less than the draw.

The employer believes that all wages have been paid in full.

FINDINGS OF FACT

275:43 1 Weekly. –

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 section of the law mandates that an employer pay an employee all wages due at the time the wages are due and owing. This section of the law also places an issue such as commissions under wages when the commissions are due and owing.

275:43-b Payment of Salaried Employees. –

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 governs the rules and procedures of dealing with a salaried employee.

279:21 Minimum Hourly Rate

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 part of the law governs the payment of overtime where the time is not controlled by federal regulations.

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 he did not meet this burden.

The Hearing Officer finds that the overtime provisions are governed by Federal Law and therefore not subject to the New Hampshire overtime provisions.

It is also found that the \$25.00 per hour was of limited duration and a verbal commitment. The hourly rate was for the training period and the payment of the hourly rate is reflected in the paychecks. At a certain point this wage factor stopped and the employer was credible in their position that it was for a limited basis only.

The commissions and salary were recorded based on sales and the jobs the claimant worked. The payouts for the paychecks reflect this practice and the claimant accepted the wages paid to him until such time as he left the employ of the company.

The claimant did not prove that there were wages due and owing and so 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.

Thomas F. Hardiman
Hearing Officer

Date of Decision: November 30, 2016

Original: Claimant

cc: Employer

TFH/das