

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

DARRELL MCILWAIN STATE FARM AGENCY

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:43 I unpaid commission

Employer: Darrell McIlwain, State Farm Agency, 177 Shattuck Way, Ste. A, Newington, NH
03801

Date of Hearing: February 2, 2017

Case No.: 54422

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 7, 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 January 5, 2017.

The claimant testified that she worked for the employer for twelve weeks and she thought she was a salaried employee. Her wage plan was salary plus commission. The claimant said that her salary was \$500.00 per week and that during her employment she did not earn any commissions. She was paid on a bi-monthly pay schedule.

The claimant testified that during her employment she should have earned \$6,000.00 for the twelve weeks. She further testified that she was only paid \$4,198.24 and the Wage Claim is for the balance of \$1,801.76.

The employer testified that the claimant worked for eleven weeks and was an hourly employee. The claimant was paid for all hours worked. There was an employee handbook in place and it was known to the claimant because she signed for the handbook. The employer further testified that there were charges for certain fees for certifications to sell insurance. These fees were to be paid back by the employee if the employee did not work for a certain amount of time. The employer testified that the claimant could have been charged for these fees but this never happened.

The employer testified that the claimant was not paid when she took time off and that is why the amounts of the checks were different. The employer maintains that all wages have been paid and that the claimant was never a salaried employee.

FINDINGS OF FACT

275:43 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 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. This section of the law also places commissions into the category of 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 dictates how a salaried employee is to be paid and when changes can be made to the established salary.

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 did not establish that she was a salaried employee. It was clear from the credible testimony of the employer that the company did not have any salaried employees. It was clear from the testimony and the exhibits that the claimant was hourly and there was no testimony on the actual hours worked.

The employer was credible in testifying that all hours had been paid. The employer and the claimant both agreed that there were no commissions earned during the claimant's employment with the employer. It is the finding of the Hearing Officer that the claimant was an hourly employee and that all wages have been paid.

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: February 27, 2017

Original: Claimant
cc: Employer
TFH/das