

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

EXETER SUBARU

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid bonus/wages
RSA 275:43 V unpaid sick leave
RSA 275:43-b unpaid salary
RSA 275:48 I/II illegal deductions

Employer: Exeter Subaru, 37 Portsmouth Avenue, Stratham, NH 03885

Date of Hearing: February 7, 2017

Case No.: 54428

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 9, 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 19, 2017.

The claimant testified that he was hired by the employer on February 15, 2016. He testified that his hiring plan was for \$550.00 per week and a 1% commission on gross profits. He was told that it was almost automatic to move up after an initial review by management.

The claimant testified that he was told several times that he was not approved to move up in the pay scale by a management review. The claimant testified that he was never counseled on what to do to improve and was never put on a corrective action plan of any kind.

The claimant testified that when he gave his notice to the employer he was asked why he was leaving and he mentioned the lack of progress in moving up in the wage plan. He said he was told it was because he did not wear the provided uniform and that he needed to refine his sales abilities. The claimant said this was the first he heard of these issues.

The claimant feels that he is owed \$6,000.00 in commissions lost by not being promoted. He also feels that he is due a \$500.00 bonus for the month of October and that during his employment he was docked for two days of sick time in the amount of \$220.00.

The employer testified that the claimant signed the wage plan he was working under and that it was very clear that any advancement was with the approval of management. The claimant did not meet the requirements for advancement in the wage plan. The employer did state that issues were addressed with the claimant during the course of his employment.

The employer did testify that there was a dress code in place and there were uniforms provided. However, the claimant was allowed to dress appropriately and not wear the uniform until he was fully trained. The employer also stated that the claimant expressed concerns over the schedule during the course of his employment.

The main issue about the salary/wage package was that it was depended upon the approval of management in order to move up in the plan. The claimant never received this approval.

FINDINGS OF FACT

RSA 275:43 I

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 V

Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This part of the law places an issue such as sick leave under the category of wages when the leave is 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 section of the law deals with the rules governing a salaried employee. It spells out when salary has to be paid and when it can be stopped.

RSA 275:48 I/II

I. No employer may withhold or divert any portion of an employee's wages unless:

(a) The employer is required or empowered to do so by state or federal law, including payroll taxes.

(b) The employer has a written authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee as provided in regulations issued by the commissioner, as provided in subparagraph (d) or for any of the following:

(1) Union dues;

(2) Health, welfare pension, and apprenticeship fund contributions;

(3) Voluntary contributions to charities;

(4) Housing and utilities;

(5) Payments into savings funds held by someone other than the employer;

- (6) Voluntary rental fees for non-required clothing;
 - (7) Voluntary cleaning of uniforms and non-required clothing;
 - (8) The employee's use of a vehicle under RSA 261:111, III;
 - (9) Medical, surgical, hospital, and other group insurance benefits without financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded;
 - (10) Required clothing not covered by the definition of uniform;
 - (11) Legal plans and identity theft plans without financial advantage to the employer when the employee has given his or her written authorization and deductions are duly recorded; and
 - (12) For any purpose on which the employer and employee mutually agree that does not grant financial advantage to the employer, when the employee has given his or her written authorization and deductions are duly recorded. The withholding shall not be used to offset payments intended for purchasing items required in the performance of the employee's job in the ordinary course of the operation of the business. Nothing in this subparagraph shall prohibit a charitable organization from withholding from an employee's wages a voluntary contribution to such charitable organization.
- (c) The deductions are pursuant to any rules or regulations for medical, surgical, or hospital care or service, without financial benefit to the employer and openly, clearly, and in due course recorded in the employer's books.
- (d) Upon an employee's written request, an employer may deduct the following items from the employee's wages, provided that the employer shall provide a written itemized accounting of such requested deductions to the employee at least once per month:
- (1) Voluntary contributions into cafeteria plans or flexible benefit plans, or both, as authorized by section 125 or section 132 of the Internal Revenue Code.
 - (2) Voluntary payments by the employee for the following:
 - (A) Child care fees by a licensed child care provider.
 - (B) Parking fees.
 - (C) Pharmaceutical items, gift shop, and cafeteria items purchased on site of a hospital by hospital employees.
 - (3) Voluntary installment payments of legitimate loans made by the employer to the employee as evidenced by a document that includes the following:
 - (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
 - (4) Voluntary payments for the recovery of accidental overpayment of wages when the following conditions are met:
 - (A) The recovery is agreed to in writing.
 - (B) The deduction for the overpayment begins one pay period following the date the parties execute the written agreement.
 - (C) The written agreement specifies:
 - (i) The date the recovery of the overpayment will begin and end.
 - (ii) The amount to be deducted, which shall be agreed upon by the employer and the employee but which shall, in no event, be more than 20 percent of the employee's gross pay in any pay period.
 - (iii) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
 - (5) Voluntary payments for the recovery of tuition for non-required educational costs paid by the employer for the employee to an educational institution when the specific deduction is

authorized in writing prior to the deduction as evidenced by a document that includes the following:

- (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (6) Voluntary payments for the employee's use of a health or fitness facility that is sponsored by the employer for the benefit of its employees and that is located within the employer's facility or workplace, or operated by a private health and fitness facility that offers discounted memberships of 50 percent or more to all employees of the employer, as evidenced by a document that includes the following:
- (A) The time the payments will begin and end.
 - (B) The amounts to be deducted.
 - (C) A specific agreement regarding whether the employer is allowed to deduct any amount outstanding from final wages at the termination of employment.
- (e) The employee requests in writing that deductions may be made for contributions to a political action committee from the employee's wages.
- (f) The employer has a written request from the employee, made at the time of the original request without coercion or pressure, that authorizes the employer to deduct from the employee's final wages at the termination of employment any amount the employee may owe for voluntary payments for vacation pay, paid time off pay, earned time pay, personal time pay, annual pay, sick pay, sick dependent pay, and bereavement pay made pursuant to a written employment policy as required by RSA 275:49, III, when the payments have been requested and paid to the employee in advance of eligibility.

II. If an employer making a deduction of an employee's wages under paragraph I fails to make any payment relative to such deduction on the employee's behalf, and such employee loses any benefit or fails to meet an obligation caused by such failure, the employer shall be liable for such lost benefit or failed obligation. For any benefits provided to an employee paid for entirely by the employer without employee deductions, if the employer fails to make timely payments for such benefits and the employee loses any benefit or fails to meet any obligations caused by such failure, then the employer shall be liable for such lost benefits or failed obligations. The employer shall also be liable for any cost incurred by the employee caused by the employer's failure to make such payments.

This part of the law spells out when and how deductions can be made from wages.

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 meet part of this burden.

The claimant is not due any commissions which could have resulted from potential promotions that did not occur, nor is he owed a bonus payment of \$500.00. Specifically, he was hired under a wage plan and was only required to be paid according to those conditions. The claimant knew the conditions that he was under and there is no finding that these conditions were not met. The process to move forward in the wage plan(s) was dependent on management signing off on the process. This did not happen and so the claimant was being paid under his hiring wage plan.

The employer was credible in their testimony that the claimant was not up to the desired standards but the fact remains, it was strictly a management prerogative as to whether or not an employee advanced.

The Wage Claim is valid in the issue of an illegal deduction from wages for the use of sick time. Both parties admitted that the claimant held a salaried position and that he was docked for the use of two days of sick time. The law requires that a salaried employee be paid for any pay period in which time is worked. The testimony shows that the claimant never took a full pay period off, so as a salaried employee the sick days should not have been deducted from his wages.

The Wage Claim is valid in the amount of \$220.00.

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 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 \$220.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$220.00, less any applicable taxes, within 20 days of the date of this Order. All other parts of the Wage Claim are invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 3, 2017

Original: Claimant

cc: Employer

TFH/das