

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Groundhog Landscaping & Property Management Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 279:21 VIII unpaid overtime

Employer: Groundhog Landscaping & Property Management Inc, PO Box 1513,
Londonderry, NH 03053

Date of Hearing: February 28, 2017

Case No.: 54471

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of his wage claim, that he was owed \$4,210.79 for the balance of the November 2016 commission; \$800 in commission for fall 2016 cleanups; and \$1,278.75 in unpaid overtime. At the hearing, he amended the claim for overtime to \$1,417.50.

The employer denies the claimant was not paid properly for all time worked.

FINDINGS OF FACT

The employer hired the claimant March 21, 2016, as an outside sales representative. His position changed in scope and pay arrangements over his employment. The claimant performed outside sales for the employer between March 21, and August 29, 2016, for which he received a base salary and commissions. Between August 29 and December 2, 2016, he performed manual labor for which he received an hourly rate and overtime on a fluctuating work week basis. He also participated in upselling campaign as an inside sales representative for fall cleanups and snow removals between October 6 and mid-October, 2016.

The claimant argues he is due overtime pay for the period of March 21 through August 29, 2016, while he was an outside sales representative. He agreed he received overtime wages for the period of August 29 through October 6, 2016, for his manual labor hours. He also conceded that he did not work any overtime hours for the remainder of his employment.

The employer argues the claimant was an exempt salaried outside sales representative between March 21 and August 29, 2016, therefore, he is not entitled to overtime pay.

RSA 275:43-b requires that an employer pay a salaried employee their full salary for any pay period in which the employee performs any work.

RSA 279:21 Minimum Hourly Rate. – Unless otherwise provided by statute, no person, firm, or corporation shall employ any employee at an hourly rate lower than that set forth in the federal minimum wage law, as amended. Tipped employees of a restaurant, hotel, motel, inn or cabin, or ballroom who customarily and regularly receive more than \$30 a month in tips directly from the customers will receive a base rate from the employer of not less than 45 percent of the applicable minimum wage. If an employee shows to the satisfaction of the commissioner that the actual amount of wages received at the end of each pay period did not equal the minimum wage for all hours worked, the employer shall pay the employee the difference to guarantee the applicable minimum wage. The limitations imposed hereby shall be subject to the following exceptions:

I. These limitations shall not apply to employees engaged in household labor, domestic labor, farm labor, nor to outside salesmen, nor to employees of summer camps for minors.

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.

The employer paid the claimant the full \$675 noticed salary for the period of March 21 and August 29, 2016.

The claimant is not subject to the requirements of RSA 279:21 VIII because this section of the statute only applies to employees who are covered by the introductory paragraph of this section. He is specifically exempted from this statute under RSA 279:21 I because he was employed in outside sales during the period for which he is claiming overtime wages.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed overtime wages.

The claimant argues he is due \$4,210.79 in unpaid commissions for November 2016. He received \$5,467.91 on November 11, 2016, and argues he is due the balance claimed, based on the list of services performed by the company. He also argues he is due \$800 in commissions for fall 2016 sales.

The employer argues the claimant received payment for all the services he sold. The claimant is using a list of total services scheduled to be performed, which is not indicative of all services sold. There are many services performed which are free applications to a customer, and are not subject to a commission payment. Further, not all of the services sold by the claimant actually occurred. Customers cancelled or suspended services during the course of the summer. There is no commission policy in place for fall clean up or snow removal solicitations, only an hourly rate.

The employer provided credible testimony and evidence that the claimant had been paid the proper commissions on all applicable sales. The claimant's documentation was an exhaustive list of services scheduled to be performed, not services for which commissions were owed or actually performed.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed commissions.

It is noted that the employer did not comply the requirements of RSA 275:49, by failing to properly notify the claimant in writing, of his rate of pay upon hire, and subsequent changes. However, the claimant did understand the periods of time for which he received salary and commissions and the time he worked for an hourly rate.

DECISION

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 that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed commissions, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 I requires that an employer pay all wages due an employee and RSA 279:21 VIII requires an employer to pay time and one half of an employee's regular rate of pay for all time worked in excess of forty hours, and as this Department finds that

the claimant failed to prove by a preponderance of the evidence that he is owed the claimed unpaid overtime wages, it is hereby ruled that this portion of the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 21, 2017

Original: Claimant
cc: Employer

MJD/das