

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

██████████  
v.

DREAMSCAPES LANSCAPING AND DESIGN

CASE NO. 103043

DECISION OF THE HEARING OFFICER

**Appearances:** ██████████ the claimant appeared Pro Se.

Antonio Silva, the owner, and Sarah Tran, the office manager appeared on behalf of the employer

**Nature of Dispute:** RSA 275:43 I - Weekly, Unpaid Wages  
RSA 275:48 I – Withholding of Wages, Illegal Deduction From Wages

**Witnesses:** Mr. ██████████ the claimant  
Mr. Silva, the owner

**Employer:** Dreamscapes Landscaping and Design

**Date of Hearing:** September 26, 2022 (Record Held Open Until October 3, 2022)

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on July 19, 2022, asserting that he is due wages in the amount of \$479.50 for unpaid net salary.

The employer was notified by the Department of Labor (DOL) and filed an objection to the claim on July 25, 2022. A hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages on August 23, 2022 at 8:30 am. At this hearing before Hearing Officer James McClain, the claimant motioned for continuance based on a need to add RSA 275: 48 I as an issue. The employer would not assent to the issue being added at that time. Hearing Officer McClain sent a letter dated August 25, 2022 indicating that the claimant had shown good cause for the requested continuance, and it was granted. The hearing was then rescheduled for September 26, 2022 at 2:15 pm. The hearing was held at the DOL offices with the representatives of the employer appearing via telephone. The record was held open until October 3, 2022 to allow the employer to submit unaltered copies of the claimant's paystubs.

### FINDINGS OF FACT

██████████ (Mr. ██████████ is a ██████████ who was employed by Dreamscapes Landscaping and Design (Dreamscapes) from April of 2022 through June 25, 2022. He was performing work as a landscape laborer. He was paid \$20 per hour and received his paychecks weekly.

Dreamscapes is owned by Antonio Silva (Ms. Silva) and based in Merrimack, New Hampshire. Sarah Tran (Ms. Tran) acts as an office manager and handles payroll. The business has been operating for about 34 years. He does have an employee handbook in the shop. He had never discussed the policies in the handbook directly with Mr. ██████████

Mr. ██████████ had a suspended driver's license due to back child support. Mr. Silva gave Mr. ██████████ an advance on his pay of \$590 to get his license reinstated. The two men had a verbal agreement that money would be withheld from ██████████ paychecks until the full amount had been paid back. Mr. ██████████ had \$100 taken out of his paychecks on June 17 and 24 2022, as well as July 1, 2022. He had \$190 held from his paycheck on July 8, 2022. He gave Mr. Silva \$100 on June 5, 2022. He also had \$250 dollars taken out of his paycheck on June 10, 2022, but Mr. Silva gave him \$60 in cash on that day as well. These deductions and payments equal \$780.

On or about June 24, 2022 Mr. ██████████ and ██████████ another Dreamscapes employee, were driving in a company vehicle to Berlin, New Hampshire for a job. For jobs like this, Dreamscapes typically paid their employees from the time they left the shop in Merrimack. The two men had been in the truck for about two hours when it was pulled over due to an expired inspection sticker. Mr. Silva was aware of the failed inspection which was due to a bad exhaust manifold. He had been having a difficult time getting it fixed due to parts shortages. Mr. Silva believed he told both employees about the letter in the glovebox which indicated that he still had time to fix the failure, however this was not given to the police on this date.

Furthermore, during the traffic stop it was noted that neither Mr. ██████████ nor Mr. ██████████ had an active driver's license. Given this, the police would not allow them to continue to the jobsite. Mr. ██████████ contacted Mr. Silva and was advised to wait at the gas station where they were. Mr. Silva came and picked up Mr. ██████████ and Mr. ██████████ about four hours later. Neither employee was paid for the time they were waiting to be picked up. Mr. Silva was not aware that Mr. ██████████ license was suspended and also believed that the paperwork had cleared for Mr. ██████████ to be able to drive.

Mr. Silva had been using Paychex to handle his payroll needs, but they made some mistakes with issued paychecks, and he terminated his agreement with them. Ms. Tran then began handling the payroll for the business directly. However, the computer program she was using kept deducting a state income tax despite Mr. ██████████ living in New Hampshire which has none. Mr. Silva stated that they would try to override this and add the money back into the checks, but this did not always work out. The deducted taxes were simply crossed out on Mr. ██████████ and the other employees' paystubs.

Following Ms. Tran's difficulties, Mr. Silva hired an accountant to handle all of the bookkeeping and payroll.

Mr. Silva was reportedly a kind employer who would regularly buy his employees coffee, lunch, or even cigarettes when they were without the means to do so. He also very often hired people with troubled pasts in order to give them a second chance.

Mr. Silva agreed to send unaltered copies of Mr. ██████████ paystubs to the DOL. However, he explained that he would need extra time as only his accountant had access to them. Mr. Silva was advised the record would be held open until October 3, 2022 to give him time to do so. Mr. Silva agreed to this as he had a plan to meet with her on October 1, 2022.

### DISCUSSION AND CONCLUSIONS

On October 3, 2022, Mr. Silva e-mailed the DOL and advised he had not been able to meet with his accountant as she was sick. Mr. ██████████ objected to this as he argued it was simply a delay tactic and there was no valid reason why he would not be able to get electronic copies of the paystubs. The objection was sustained, and the record was closed.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed unpaid wages. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The claimant argued that the time he was stuck on or about June 24, 2022 was not his fault and he should not be penalized for it. The claimant further argued that he lived in New Hampshire the entire time he was employed at Dreamscapes and should not have had income taxes deducted from his paycheck. The claimant finally argued that there was no written agreement regarding the advance for his child support lien and that money should not have been taken out of his checks. Building on this, the claimant argued that he overpaid the advance on his pay and is owed \$190 back from the employer.

The employer argued that he felt justified in holding back the pay for the hours on or about June 24, 2022 because Mr. ██████████ was not working. The employer further argued that he did not deduct state income taxes from Mr. ██████████ paycheck. The employer also argued that while there was no written agreement on the payment advance, he does still believe he was owed repayment.

The claimant's argument that the time he was stuck on or about June 24, 2022 was not his fault and he should not be penalized for it is persuasive. Mr. Silva sent two employees to a job several hours away in a truck with a failed inspection. He also sent the employees knowing that at least one of them had an issue with his driver's license. The employer failed in their duty to make sure that the company vehicle could legally be

taken to the job through no fault of Mr. ██████████. Given this, it is reasonable for him to pay the claimant for this time.

The claimant's argument that he lived in New Hampshire the entire time he was employed at Dreamscapes and should not have had income taxes deducted from his paycheck is also persuasive. The State of New Hampshire does not have an income tax. Furthermore, the employer did not furnish the paystubs which he claimed would show that no state income taxes were withheld. This was despite being given extra time to produce them for the DOL. Therefore, Mr. ██████████ is owed the money withheld from his paychecks as state income tax.

The claimant's argument that there was no written agreement regarding the advance for his child support lien and that money should not have been taken out of his checks is not persuasive. While RSA 275: 48 I requires agreements such as this to be in writing<sup>1</sup>, the claimant did acknowledge the agreement at the hearing. Given this acknowledgement of the agreement, it would unfairly benefit the claimant to require the employer to refund the advance.

However, the claimant's argument that he overpaid the advance on his pay and is owed \$190 back from the employer is persuasive. While the claimant did acknowledge the agreement to payback the advance on his wages, he paid the employer back \$780 on a \$590 advance. To ignore this would unfairly benefit the employer.

### DECISION

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<sup>1</sup> "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."

Based on the evidence and testimony presented, the claimant has showed by a preponderance of the evidence that net wages were due for \$479.50 in wages owed due to state income taxes being withheld and the four hours on or about June 24, 2022. The claimant has also shown by a preponderance of the evidence, that he is owed \$190 as a refund for the overpayment of the agreed upon wage advance. The claimant's request for payment of unpaid wages and illegal withholding is approved.

Therefore, the employer is ordered to send a check in the amount of \$669.50 to this Department payable to ██████████ for the unpaid wages to this Department within 30 days of the date of this order.

This wage claim is found to be **valid**.

  
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Timothy G. Fischer  
Hearing Officer

Date of Decision: October 31, 2022

TGF/nd