

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Physical Apps LLC**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid severance

**Employer:** Physical Apps, LLC, 9 Emerson Ln., Hollis, NH 03049

**Date of Hearing:** April 20, 2015

**Case No.:** 49789

**BACKGROUND AND STATEMENT OF THE ISSUES**

This Department held a prior hearing on March 25, 2015, in which only the employer appeared. The claimant requested a rehearing based on an emergency situation and submitted proper documentation. The Department granted the request and this hearing followed.

The claimant asserts he is owed \$75,000.00 over a six month period in unpaid severance pay. He argues he should have received biweekly payments beginning the next pay day after his termination in September 2014. Pursuant to his amended employment contract with the employer signed by both parties on February 6, 2012, he is entitled to "6 months of severance after 36 months of employment, should PA [Physical Apps LLC] terminate your employment for less than gross negligence, willful misconduct or illegal conduct. This severance shall be paid every two weeks, or periodically consistent with past wages."

He denies the employer terminated his employment for gross negligence, willful misconduct or illegal conduct.

Secondarily, he argues that he is due \$75,000 for six months of severance because his annual salary was \$150,000. In a letter dated October 12, 2012, the Board of Managers agrees to "accrue and record on the balance sheet, the pro-rated two week portion of the annual compensation for the above mentioned persons [Rick Malagodi] at the annual compensation rates noted below, every two weeks starting on 10/1/12:

Rick Malagodi	\$150,000.
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He received a portion of the \$150,000 in a biweekly salary payments with the balance of the salary due accrued as deferred compensation. This deferred compensation was to be payable at a later date. In all instances, his compensation amount remained at \$150,000 annually.

The employer argues he terminated the claimant for gross negligence and willful misconduct. He provided a letter of termination dated November 20, 2014, which outlined the alleged gross negligence and willful misconduct. The letter also notes that this letter had been delayed from the actual termination in September 2014 at the request of the claimant's attorney. During this timeframe the parties had been trying to achieve an amicable resolution. They were not able to do so.

Because the claimant had been terminated for gross negligence and willful misconduct, pursuant to the amended employment agreement on February 6, 2012, the employer asserts that no severance pay is due.

He argues that even if the claimant were due severance, the amount would be based on the annual compensation of \$50,000, or \$25,000, pursuant to the October 12, 2012, Board of Managers decision.

The employer also argues that if the claimant were due severance, they would not be required to pay the severance because the amended employment agreement of February 6, 2012, states, "In the event the PA [Physical Apps LLC] does not have three times (3x) the severance amount in cash on hand during a pay period, the payment can be postponed until the 3x on-hand cash requirement is met, then payments would continue until complete. There is no limit to the amount of postponements resulting from the 3x cash limitation. A management-generated balance sheet shall be made available upon request strictly for evidencing the cash position of PA and this information shall be bound by the existing confidentiality agreement."

The employer further argues that at no point did they have available cash on hand of \$75,000, the required three times on-hand cash requirement. The employer admitted they had cash in their account of at least \$75,000.00 however, it was not "available" as it had encumbrances from the sources of the funding.

### **FINDINGS OF FACT**

The claimant worked for the employer from April 2011 through September 2014, when the employer terminated his employment.

In order for the claimant to be eligible for severance pay, pursuant to the amended employment agreement signed by both parties on February 6, 2012, the claimant would have to be terminated by the employer for reasons other than gross negligence, willful misconduct or illegal conduct.

Both parties agree the claimant completed greater than thirty-six months of employment to be eligible for six months of severance.

The employer admittedly did not provide a letter of termination to the claimant at the time of his termination in September 2014. The employer presented the claimant

with a termination letter dated November 20, 2014. This delay was the result of a request from the claimant's attorney "in hopes that an amicable resolution could occur." The employer offered no explanation as to why these issues were not discussed with the claimant prior to his termination or why a termination letter had not presented at the claimant's termination. The employer offered that a letter of termination had not been prepared after the claimant's termination because it would have been better for the claimant not to have a termination for cause letter placed in his file.

The termination letter dated November 20, 2014, outlines many reasons that the employer terminated the claimant's employment. At no time does the employer specify that the claimant had been terminated for gross negligence, willful misconduct or illegal conduct. At the hearing, the employer asserted that the reasons proffered for the claimant's termination rose to the level of gross negligence and willful misconduct.

The claimant persuasively rebutted each of the issues outlined by the employer for his termination, providing an alternate and more likely explanation for the behavior and providing credible testimony that the employer was incorrect in certain allegations.

The employer did not define gross negligence, willful misconduct or illegal conduct in the employment contract or elsewhere. This Department does not define these terms. The employer did not use these terms in the claimant's termination letter. The employer asserted the terms gross negligence, willful misconduct or illegal conduct in connection with the claimant's termination only after the filing of the wage claim.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that he was not terminated for gross negligence, willful misconduct or illegal conduct, and therefore is eligible for severance pay under the written policy of the employer.

The next issue is the amount of the severance pay to which the claimant is due.

The claimant argues his annual compensation was \$150,000. In October 2012, the Board of Managers decided to reduce the claimant's biweekly payments to an annualized \$50,000. The balance of the \$150,000, or \$100,000 was considered deferred compensation.

The employer argues the claimant's actual annual salary was reduced to \$50,000, payable on a biweekly basis. The balance of \$100,000 was treated as deferred compensation. The claimant did not pay taxes on the \$100,000. The employer converted the deferred compensation dollars to a note when the balance reached a threshold amount. The note had an expiration date if not paid by June 2015, and the claimant was no longer employed at that time, the note would be forfeited.

RSA 275:49 I requires that an employer inform employees of the rate of pay at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The last notification provided by the employer on October 12, 2012 outlined the claimant's salary in the amount of \$150,000.

The employer did not notify the claimant pursuant to RSA 275:49 and Lab 803.03 (a) that his salary amount had been reduced, in totality, to \$50,000.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that his payable salary is \$150,000, and therefore the severance pay for six months would be \$75,000.

The last issue for determination of the severance pay whether or not the employer had the sufficient cash on hand pursuant to the amended employment agreement dated February 6, 2012. The agreement reads, "In the event the PA [Physical Apps LLC] does not have three times (3x) the severance amount in cash on hand during a pay period, the payment can be postponed until the 3x on-hand cash requirement is met, then payments would continue until complete. There is no limit to the amount of postponements resulting from the 3x cash limitation. A management-generated balance sheet shall be made available upon request strictly for evidencing the cash position of PA and this information shall be bound by the existing confidentiality agreement."

The employer argues they did not have the \$75,000 (three times \$25,000) cash on hand at any point after the claimant's termination, based on a \$50,000 annual salary. Therefore, they certainly did not have the \$225,000 which would be required if the severance pay were to be calculated on a \$150,000 annual salary.

The employer also attempts to now differentiate between "cash on hand" and "available funds", stating that simply because cash existed in deposit accounts did not mean it was not available to pay severance pay. The employer received funds for a source which encumbered the funds for particular uses, which included wages, but not severance pay.

The agreement is ambiguous in that it does not specify the amount on which the three times (3x) requirement is based, whether the total of amount of the \$75,000 severance, or the biweekly payment amount of \$5,769.23 (\$75,000/13 biweekly payments).

The plain reading of this portion of the contract suggests that the three times (3x) cash on hand refers to the biweekly payment amount, and not the total amount of the severance. If the employer had intended for the three times (3x) cash on hand requirement to be based on the total of the severance due, they should have specified such in the contract. To base this requirement on the total severance payment raises a number of questions which cannot be answered in the contract on its face, such as does the employer reduce the three times (3x) on hand requirement after each subsequent biweekly payment?

The employer would need to have \$17,307.69 ( $\$5,769.23 * 3$ ) cash on hand on each biweekly pay day in order for the claimant to receive the severance payment for that pay period.

The employer admits they had the cash balances in the amount of \$347,028.00 on September 30, 2014, and \$249,768.00 on October 28, 2014, documentation previously submitted.

The employer's cash deposits, encumbered or not, were in excess of the three times (3x) requirement of the biweekly payment of \$5,769.23, or \$17,307.69.

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.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that the employer had the "cash on hand" funds required to meet the three times (3x) salary requirement. More than six months have elapsed since the time of the claimant's termination and the date of the hearing. The employer has not made any severance payments. Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence that the full severance of \$75,000 is now due.

### **DISCUSSION**

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met his burden in this claim.

**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 that the claimant proved by a preponderance of the evidence that he is owed the claimed severance/wages, it is hereby ruled that the Wage Claim is valid in the amount of \$75,000.00

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$75,000.00, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: May 14, 2015

MJD/kdc