

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

New England Diamond Gems

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid employee expenses
RSA 275:42 I/II employer/employee relationship

Employer: New England Gems, 17 Colonial Dr, Londonderry, NH 03053

Date of Hearing: March 14, 2017

Case No.: 54343

BACKGROUND AND STATEMENT OF THE ISSUES

This hearing was consolidated with the hearings of two other former employees of the employer. All testimony was considered for all three cases and individual decisions have been issued for each claimant.

The claimant originally asserted, through the filing of his wage claim, that he was owed \$3,881.00 for the unpaid balance of his stipend for his 2015-2016 contract and unpaid employee expenses.

At the hearing, he amended the claim to \$2,500 for the balance of the stipend for his contract and \$678.66 in unreimbursed employee expenses.

New England Diamond Gems denies the claimant was an employee. Further, they argue the claimant violated his contract and is not due any additional payments.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee of an employer or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-

A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The New Hampshire Supreme Court opined in Caswell v. BCI Geonetics, Inc. 121 N.H. 1048, that RSA ch. 275 is entitled "Protective Legislation," and we should construe it with that purpose in mind. Further, the definition of "employee" pertaining to this section is set forth in RSA 275:42 II:

"The term 'employee' includes any person suffered or permitted to work by an employer. For the purposes of claims for wages under RSA 275:51, any person in the service of another shall be conclusively presumed to be an employee, not an independent contractor, if it shall have been determined to be more likely than not that the relationship can be terminated summarily, with a right to no more than compensation already earned."

The Hearing Officer finds that the claimant was an employee of an employer, New England Diamond Gems (hereafter "the employer"), not an independent contractor, because the claimant does not meet the criteria in (e) or (f). The claimant did not hold himself out to be in business for himself and did not have any recurring business liabilities or obligations. The claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work. Further, he could be summarily dismissed with a right to no more than compensation already earned.

The parties do not disagree that the claimant performed the required work under the contract between the parties, nor that the claimant incurred employee expenses for the benefit of the employer, at their request.

The claimant argues the employer did not pay the balance of the stipend due under the contract, or \$2,500, for the August 2015 through July 2016 period, nor did they reimburse his hotel expenses of \$678.66.

The employer argues the claimant violated the terms of the contract, therefore, they are not required to pay the balance of the stipend nor the unreimbursed expenses.

Nothing contained within the contract, previously submitted, stated that breach of the contract would result in the withholding of payments.

Even if the contract had such language to withhold payments for a breach, this would be prohibited under RSA 275:50 Waiver Prohibited, which reads I. Except as provided in RSA 275:53, no provision of this subdivision may in any way be contravened or set aside by private agreement.

The payment under the contract is a stipend, rather than a traditional hourly or salary rate, but is still considered wages under RSA 275:42 III.

The Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed stipend balance in the amount of \$2,500.

Employee expenses, pursuant to RSA 275:57 Reimbursement of Employee Expenses reads, I. An employee who incurs expenses in connection with his or her employment and at the request of the employer, except those expenses normally borne by the employee as a precondition of employment, which are not paid for by wages, cash advance, or other means from the employer, shall be reimbursed for the payment of the expenses within 30 days of the presentation by the employee of proof of payment.

The Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed employee expenses in the amount of \$678.66.

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 stipend/wages, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,500.

As RSA 275:43 V considers the payment of employee expenses to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all employee expenses due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$678.66.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$3,178.66 (\$2,500 + \$678.66), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 27, 2017

Original: Claimant
 Claimant's Attorney
cc: Employer

MJD/das