

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

XCube Research & Development Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:43-b unpaid salary

Employer: XCube Research & Development Inc, 18 Chatham Cir, Wellesley MA
02485

Date of Hearing: February 7, 2018

Case No.: 56193

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$65,100 in unpaid salary from January 2017 through August 28, 2017, when he was terminated by the employer. He also seeks \$10,500 in unpaid vacation pay due upon separation.

Satish Jha argues he was the CEO of the company, but he has been terminated and is no longer associated with the employer. He did opt to remain as the employer representative for the hearing.

The employer denies the claimant is due any wages as he did not work. He has no evidence of time sheets or completed projects. He never answered calls or returned messages.

FINDINGS OF FACT

The claimant was a founding member of the employer in March 2010. He was originally the Chairman of the Board of Directors and President of the corporation. He hired Satish Jha in January 2017 as the CEO and Mr. Jha replaced the claimant as Chairman of the Board of Directors. The claimant remained President of the corporation and became the Secretary of the Board of Directors. He received a semi-monthly salary of \$4,200. He argues he is an employee in addition to these roles. Mr. Jha terminated the claimant's employment on August 20, 2017.

The New Hampshire Supreme Court, in W. Bradford Caswell v BCI Geonetics Inc. 121 NH 1048, opined "The question in this case is whether an officer of a corporation is an "employee" within the context of a back pay claim under RSA ch. 275. We hold that he is." and "Nowhere does RSA 275:42 V bar one in the position of the

plaintiff [vice president and officer of the corporation] from being an employee for purposes of pay or hours protection under RSA ch. 275. We find no ambiguity in the use of the word "employee" and accordingly answer the question in the affirmative."

Caswell is distinguishable from the instant case because he did not have any ownership of the corporation, as the claimant does. Neither party presented any case law on this issue of a corporate officer who has an ownership in the corporation and who is also an employee. Therefore, the Hearing Officer finds the claimant is an employee for the context of this claim.

The claimant argues the last regular salaried pay check he received was January 19, 2017, for the first semi-monthly period of January 2017. He seeks payment from January 16, 2017 through his termination on August 20, 2017.

The claimant provided credible testimony that he worked each pay period between January 16, 2017 and August 20, 2017, and did not receive all of his salaried wages. He did receive \$7,000, in two separate payments of \$5,000 and \$2,000 in June 2017.

The employer's argument that the claimant did not complete time sheets, provide evidence of completed projects, answer calls or return messages, is not persuasive that he did not perform any work.

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. It also allows employers to make deductions to a salaried employee's wages under certain circumstances, but none of those exceptions apply to the facts of this case.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due salary for the period of January 16, 2017 through August 20, 2017.

The claimant miscalculated the amount of the claim for unpaid salary. The claimant received a \$4,200 salary for a semi-monthly pay period and did not receive his regular salary for fifteen pay periods between January 16, 2017 and August 20, 2017, totaling \$63,000. The claimant received payments totaling \$7,000, leaving a balance of \$56,000.

The claimant is found to be due \$56,000 in unpaid salary.

The claimant argues he is due \$10,500 in unpaid vacation pay due upon his separation. He provided credible testimony that the vacation policy granted five weeks per year and pays up to the balance of ten days. He seeks his balance of two and one half weeks of vacation pay.

The employer argues he is not due any vacation pay as he did not work.

The employer's argument that the claimant did not perform work and therefore is not due any vacation pay is not found persuasive.

The claimant's own testimony provided that the policy allows for a payment of up to ten days of vacation, not the two and one half weeks he is claiming.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding vacation pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

As the founder and employee of the company, the claimant provided that he was notified of the policy and practice of the employer, though he did not have the written policy. It is not clear whether a written policy exists.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due two weeks, or ten days, of vacation pay.

The claimant received \$4,200 for a semi-monthly pay period and is eligible for two weeks, or ten days, of vacation pay.

A \$4,200 semi-monthly salary annualized is \$100,800 ($\$4,200 * 24$ pay periods). Two weeks, or ten days, of the annualized salary is \$3,876.92 ($\$100,800/52$ weeks = \$1,938.46. $\$1,938.46 * 2$ weeks = \$3,876.92).

The claimant is found to be due \$3,876.92 in unpaid vacation pay.

The parties have additional issues which extend beyond the jurisdiction of this Department and are being litigated separately.

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 RSA 275:43-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$56,000.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$3,876.92.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$59,876.92 ($\$56,000 + \$3,876.92$), less any applicable taxes, within 20 days of the date of this Order.

Date of Decision: February 16, 2018

Original: Claimant
cc: Employer