

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

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v.

**Atos It Solutions and Services, Inc.**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I - Unpaid Wages  
RSA 275:44 IV - Liquidated Damages

**Employer:** Atos It Solutions and Services

**Date of Hearing:** June 13, 2018

**Case No.:** 56973

**BACKGROUND AND STATEMENT OF THE ISSUES**

The employer is an international provider of a broad array of computer related services and consulting.

The claimant was employed as a computer Systems Technician Senior Specialist working in the company's IT Outsourcing unit.

The claimant argues, according to company policy, he is owed for periods of "on-call" (also referred to as "stand-by") that he performed while he was an employee of the company.

The employer holds the claimant never documented his on-call times as required and therefore they should not be obligated to pay for the "on-call" he performed.

On the basis of the claimant's assertions he is owed unpaid wages in the form of unpaid "on-call" and seeks liquidated damages, he filed a Wage Claim with the Department on March 30, 2018; a Notice of Wage Claim was forwarded to the employer on April 2, 2018. Hearing notices were forwarded to the parties on May 9, 2018; a request from the claimant to reschedule the Hearing was received on May 15, 2018; a Notice of Rescheduled Hearing was forwarded to the parties on May 24, 2018. Accordingly a Hearing was held at the Department on June 13, 2018.

The claimant requested attorney's fees and cost during their close at Hearing.

### FINDINGS OF FACT

The claimant worked for the employer from June 30, 2015 through August 14, 2017; the entire time the employer owned the IT Outsourcing unit. He earned \$21.96 per hour and paid biweekly.

The claimant worked for the IT Outsourcing unit's former owner in the same capacity with the same responsibilities including "on-call." The claimant continues with the current owner in the same position with the same responsibilities including "on-call." The current owner of the IT Outsourcing unit maintains the "on-call" policy of the employer; the claimant is paid for the "on-call."

On or about June 30, 2015 when the employer acquired the IT Outsourcing unit they informed the claimant he needed to maintain his "on-call" duties. The existence of the employer's "on-call" policy was not discussed or presented. He was not informed he would be compensated.

Neither party provided documentation demonstrating the claimant's acknowledgement of his pay or benefit arrangements with the employer.

In July 2016 the claimant learned the employer had a policy that provides \$10.00 per day Monday through Sunday and \$25.00 during holidays for "on-call." Subsequently the claimant placed numerous requests to the employer seeking the pay codes related to "on-call." The pay codes were necessary in order for claimant to submit his "on-call" time. The employer did not respond to the claimant's requests.

### DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that he is owed additional 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.

Prior to determining whether or not wages are owed to the claimant, it must first be determined if the employer's payment for "on call" in the current circumstances constitutes wages.

RSA 275:42 defines wages as:  
a means of compensation, ...including hourly health and welfare, and pension fund contributions required pursuant to a health and welfare trust agreement, pension fund trust agreement, collective bargaining agreement, *or other agreement adopted for the benefit of an employee and agreed to by his employer, for labor or services rendered by an employee (emphasis this writer's)*, whether the amount is determined on a time, task, piece, commission, or other basis of calculation.

According to RSA 275:42 the employer's payment for the claimant's "on-call" is considered to be wages, not "merely just a benefit" as the employer argued.

The employer argues, per policy, the claimant was responsible for submitting his “on-call” time record in order to be paid and failed to contact the appropriate company personnel that could assist him in doing so. The employer additionally maintains, since the IT Outsourcing unit has been sold, there is no way for the employer to pay the claimant.

RSA 275:49 requires employers to notify employees in writing as to the exact basis for employees’ pay and benefits if they happen to be offered. The employer has an on-call policy. The policy has a revision date of January, 2016; it states in-part: Employees “on-call” will be compensated for each day they are required to be accessible by Atos IT Solutions or customer and available for work. Employees ‘on-call’ status will be paid \$10 for each day (Monday through Sunday). An employee will also receive \$25 for each scheduled Atos holiday that the employee is required to be “on-call.”

No record of the claimant’s acknowledgement of the “on-call” policy, as required by RSA 275:49 and Lab 803.03, was submitted for the Hearing. The claimant credibly testified neither the policy, nor an explanation of the policy was ever presented to him by the employer. He credibly testified he received a directive following the employer’s acquisition of the unit to continue on with his on-call duties but he was never informed of the employer’s policy of paying him for “on-call.”

The claimant offered credible testimony that he made numerous unsuccessful attempts after learning of the policy to obtain the necessary pay codes from the employer in order to submit his on-call time.

A reasonable individual might assume that if an employer has a detailed policy regarding “on-call” then one would expect it to be an integral part of the services they offer their clients, and therefore the employer would be aware if personnel were following through with the service. The claimant was the only employee tasked with providing “on-call” at the IT Outsourcing unit.

The employer argues that their “on-call” policy requires employees to submit their on-call time. The relevant section of the policy reads in-part: “Employees are responsible for reporting ‘on-call’ / ‘stand-by’ time on their timesheets.” The policy does not specify any contingencies in the event “on-call” / “stand-by” time is not submitted. A plain English interpretation of the section is that the employee is assigned the task of reporting the time.

The Hearing officer finds the employer’s argument that they are not responsible to pay the claimant for “on-call” time after giving him a directive to be on-call then failing to inform him of their policy regarding on-call pursuant to RSA 275:49 to be unconvincing.

RSA 275:43 does not relieve employers from the responsibility for paying employees’ wages due, but not paid, prior to the sale of their business.

In the end, RSA 275:49 and Lab 803.03 assign the responsibility for accurate record keeping to the employer and RSA 275:43 requires employers to pay all wages due an employee on regular paydays designated in advance.

This Hearing Officer finds the claimant met his burden to prove by a preponderance of evidence he is owed wages in the form of unpaid “on-call” per the employer’s policy in the amount of \$10.00 x 764 Monday through Sunday days or

\$7,640.00, plus \$25.00 x 12 holiday days or \$300.00, combined \$7,640.00 + \$300.00 for a total of \$7,940.00.

The claimant seeks liquidated damages for the employer's failure to pay him for the "on-call" he performed.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them."

The employer's response for not paying the claimant the "on-call time" in the time frame required was due to the claimant's failure to submit his "on-call" record for payment.

The employer's policy does not require employees to submit their "on-call" time *in order* to be paid; it does not state that "on-call" payment is contingent upon submission of the time. The claimant was the only employee tasked with "on-call" at the IT Outsourcing unit and he was required to be on call at all times; it would not have been burdensome for the employer to determine the amount owed the claimant for "on-call."

The claimant credibly offered numerous occasions when he attempted to resolve the issue including obtaining the pay codes necessary to input and submit his on-call time; the employer chose not to respond to his requests. The employer chose not to follow their own policy regarding "on-call."

The employer gave the claimant a directive to continue on with the "on-call" as he had done for the previous owner.

The employer did not allege the claimant failed to perform his duties that included "on-call."

Whereas the employer knew that the claimant was performing his job duties which included "on-call" as directed by the employer, and as the employer was fully aware of their responsibility to pay the claimant for "on-call" per their policy, and as an international company has the financial resources to pay the claimant an extra \$10.00 per day and \$25.00 for holidays for "on-call" per their policy, this Hearing finds the employer willfully chose not to pay the claimant for the "on-call" he performed. This Hearing Officer finds the employer liable for liquidated damages.

The formula prescribed in RSA 275:44 IV for calculating liquidated damages uses 10 percent of the unpaid wages (\$7,940.00) or \$794.00 for each day the employer failed to pay the amount due, except Sunday and legal holidays. During the period from the claimant's last day of work August 14, 2017 to the filing of his Wage Claim April 24, 2018 there were two hundred fifty four days (254) days inclusive. Subtracting thirty-six (36) Sundays from the total (254 - 36 = 218) leaves two hundred eighteen days (218), then less eight (8) holidays during the period (218 - 8 = 210) leaves two hundred ten days (210). Two hundred ten (210) days multiplied by \$794.00 (\$794.00 x 210) equals \$166,740.00. This dollar amount exceeds the limit set forth in RSA:44 IV which is an amount equal to the amount of the unpaid wages (\$7,940.00).

Therefore, the Hearing Officer finds the employer liable for liquidated damages in the amount of \$7,940.00.

The claimant's request at Hearing for attorney's fees and costs is denied. RSA 275:51 V does not authorize this Department to award attorney's fees or costs. RSA 275:53 III allows "costs of the action, and reasonable attorney's fees", but by a "court of competent jurisdiction". The New Hampshire Department of Labor is an administrative agency and a part of the executive branch of government. The Department is not a "court of competent jurisdiction". Therefore, no fees or costs can be awarded through this decision.

### **DECISION**

Based on the evidence and testimony presented and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:42 considers "on-call" pay to be wages, and as the Department finds the claimant proved by a preponderance of evidence he is owed the claimed wages it is hereby ruled this portion of the Wage Claim is valid in the amount of \$7,940.00.

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the timeframe required by statute, it is hereby ruled that the employer is liable to the claimant for liquidated damages in the total of \$7,940.00 assessed at 10% of the unpaid wages due per day for each day of nonpayment past the statutory limit until equal to the amount of wages due it is hereby ruled this portion of the Wage Claim is valid in the amount of \$7,940.00.

The employer is hereby ordered to send a check to this department, payable to [REDACTED], in the total of \$7,940.00 + \$7,940.00 or \$15,880.00, less applicable taxes, with a statement of such deductions within 20 days of the date of this Order.

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Hearing Officer

Date of Decision: July 18, 2018

Original: Claimant

Cc: Atos It Solutions and Services, Inc.