

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

**v.**

**River Wharf Hospitality**

**Case No.: 101264**

**DECISION OF THE HEARING OFFICER**

**Appearances:** [REDACTED] Claimant, via Microsoft Teams

Neil Scibelli, COO - Employer

Michele Merkey, staff accountant - Employer

**Nature of Dispute:** RSA 275:43 I – Weekly, Unpaid Wages

RSA 275:43-b – Payment of Salaried Employees, Unpaid Salary  
(removed)

RSA 275:43 V - Weekly, Unpaid (Vacation Pay/ Sick Pay/ Personal  
Day Pay) PTO

**Date of Hearing:** April 27, 2022

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns the employer's alleged failure to pay the claimant all the wages due to him. Specifically, the claimant asserts that he is owed for 11 hours vacation and 4 paid holidays.

The claimant filed a Wage Claim with the Department on March 2, 2022, for \$1,961.54 in unpaid vacation and holiday wages. A Notice of Wage Claim was forwarded to the employer on March 2, 2022. The employer filed an objection March 14, 2022. The hearing request date was March 14, 2022. Hearing Notices were forwarded to the parties on March 30, 2022.

Regarding RSA 275:43-b, the parties acknowledged that the claimant had been paid his full salary for his last pay period and the issue was removed by the parties' consent.

**FINDINGS OF FACT**

The following findings are based on testimony and matters of record in the Department file.

The claimant worked as executive chef for the employer from July 8, 2021 to February 15, 2022, a period of 7 months and 1 week. The claimant's offer of employment indicates that the claimant was to be paid \$3,076.93 biweekly, was guaranteed a quarterly bonus of \$4,000.00, was entitled to 3 weeks' vacation per year with 1 week eligible to be used after 6 months and 6 paid holidays: New Year's Day, Memorial Day, July 4<sup>th</sup>, Labor Day, Thanksgiving and Christmas. The claimant's biweekly salary, based on 80 hours, equates to \$38.46 per hour.

The claimant submitted pay stubs that showed hours worked, bonus pay, and vacation pay. The employer submitted the claimant's time cards. The employer testified that the employer bore responsibility for verifying and approving the claimant's time cards.

The employer testified that although the claimant's pay stubs were all approved by the employer, the claimant had made fraudulent time entries and alleged that the claimant had therefore stolen from the employer. No evidence was produced to corroborate this assertion.

Under questioning from the hearing officer, the employer acknowledged that their payroll system tracked vacation time and bonuses but not paid holidays. The employer testified that they could not verify the claimant's hours but paid him the hours he entered into the system. The employer acknowledged *again* that the employer bore final responsibility for approving timecards, verifying hours and issuing paychecks. The employer attempted to testify that a former employee had mistakenly failed to track the claimant's holiday pay.

The employer's representatives testified that the employer had a paid time off policy, but that holiday pay was not considered paid time off. The policy allows one week vacation after six months of employment and the policy allowed for payment of unused paid time in the event of termination other than for cause. There is nothing in the record that suggests the claimant was terminated for cause.

The claimant requested 11 hours vacation pay and 5 holidays for a total of 51 hours. The employer acknowledged that the claimant was not paid his vacation time. The employer argued that the claimant was only eligible for 4 holidays because he was hired after July 4 and terminated before Memorial Day. The employer's representatives testified that it was *their belief* that the claimant was paid for the 4 holidays.

At this point the hearing was concluded.

### **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.

RSA 275:43 V considers vacation and holiday pay to be wages, when due, if a matter of employment practice or policy, or both.

The employer has a paid time off policy. Although the policy was not introduced into evidence, the parties acknowledged that the policy allows for payment of vacation and holiday paid time off upon termination for other than cause. The claimant was not

terminated for cause. The employer did not refute any of the claimant's testimony. The employer acknowledged that the claimant was not paid his vacation time.

The employer bore final responsibility for approving timecards and issuing checks. The employer testified that although bonus pay and vacation pay were tracked, holiday pay was not. The employer attempted to testify that although the employer made a mistake in failing to track the holiday pay, the claimant was paid for the holidays. The employer attempted to allege criminal fraud against the claimant in written and oral testimony.

The employer's testimony is not credible. If the claimant had committed fraud, the employer did not explain exactly what fraud had been committed and how it was committed. The employer did not explain why they paid the claimant if they believed he had committed fraud.

After reviewing the testimony, the claimant has provided persuasive evidence that he is entitled to receive payment for unused vacation and holiday time. It is found that the claimant has 11 hours of unused vacation time that he was not allowed to use. It is found that the claimant is entitled to 4 days holiday pay at 8 hours per day.

The claimant's hourly rate was \$38.46. The claimant is entitled to 43 hours pay at \$38.46 per hour. The claimant is entitled to \$1,653.78.

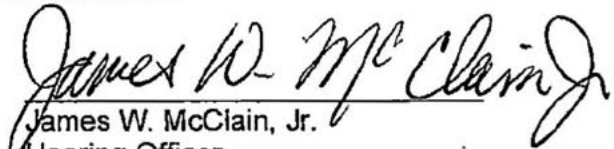
### DECISION

Based on the testimony and evidence presented, and as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers vacation pay, sick pay, and personal days' pay to be wages, when due, if a matter of employment practice or policy, or both, this Department finds that the claimant proved by a preponderance of the evidence that he was not paid for 11 hours of unused vacation time and 4 holidays.

It is hereby ruled that the Wage Claim is **valid in part** in the amount of \$1,653.78.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the amount of \$1,653.78, less any applicable taxes, with a statement of such deductions within 30 days of the date of this Order.

Date of Decision: May 17, 2022

  
James W. McClain, Jr.  
Hearing Officer

Original:            Claimant  
cc:                    Employer

JWM/nd