


STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

  
v.  
Kyndryl  
CASE #101490

DECISION OF THE HEARING OFFICER

**APPEARANCES:** Claimant, self-represented  
Aimee Blanchard Parsons, Esq., representing the employer

**NATURE OF DISPUTE:** RSA 275:43, I — Weekly (unpaid wages)  
RSA 275:43, V — Weekly (unpaid vacation pay)  
RSA 275:43, I — Weekly (unpaid incentive pay)

**DATE OF HEARING:** June 27, 2022 (record closed on August 1, 2022)

**BACKGROUND AND STATEMENT OF THE ISSUES**

The wage claim was filed on March 17, 2022. The claimant alleged he was owed wages, vacation time due on separation, a new-employee referral fee, and comp time. The employer filed an objection. Claimant requested a hearing. The hearing notice was sent on June 6, 2022. The record was held open until August 1, 2022 for submission of written closing arguments.<sup>1</sup>

**FINDINGS OF FACT**

The following findings are based on the testimony of the claimant, employer's representative Jonathan Dietz, exhibits offered by both parties, and matters of record in the Department file. Both parties acknowledged under oath

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<sup>1</sup> After closings were submitted, the claimant objected that the employer's submission contained unspecified new evidence. In reaching a decision in the case, the undersigned hearing officer relied solely upon the testimony and exhibits admitted at the hearing and matters of record in the case. To the extent that either party's closing could be construed as misrepresenting or exceeding the evidence admitted at the hearing, any such material would have been disregarded by the undersigned hearing officer.

that their written submissions to the Department were true, and the factual allegations contained therein are treated as part of the testimony in the case.

Claimant is 59 years old and lives in Derry. After high school, he attended college and took courses in computer science. He has worked in the field of information technology since 1981. In 2019, he started working for IBM. IBM spun off the employer as a separate entity in or around September 2019 and claimant's employment was formally transferred to the employer in November 2021.

Claimant worked from home. He was a salaried employee, paid by direct deposit semi-monthly, at the middle and end of the month. His semi-monthly salary was \$6,875.00.

Claimant testified that, in or around March 2021, during a virtual company meeting, company officer Thomas Fahey thanked him and other salaried employees on his team for the long hours they had put in to complete various company projects. Mr. Fahey said the team members would soon receive "blue points" for their recent work; these could be used to purchase various items of value. Mr. Fahey further promised that, upon completion of an upcoming project, they would be able to claim comp time for the hours above 40 that they would be working. Claimant testified that, from June 1, 2021 to November 21, 2021, he worked an average of 80 hours a week, accumulating 1,000 hours of comp time, which he valued at \$79,330.00. He never received this promised payment.

The company had a program to encourage employees to refer qualified people to apply for jobs at the company. In the event a referred employee was hired and remained on the job for 30 days, the referring employee would receive a \$2,000.00 bonus—provided the referring employee was still employed by the company at the new employee's 30-day anniversary. In or around November 2021, the claimant referred a potential new hire to the company. The individual was eventually hired and started work on January 24, 2022. By that time, the claimant had already been terminated.

Claimant testified that he did not take any vacation time in 2021 and by the end of 2021, he had accrued 10 days of unused vacation time, which should have been rolled over into 2022 and paid out on his final paycheck. He admitted that he had planned to take the last week of 2021 and the first week of 2022 as vacation time; he testified, however, his immediate supervisor Bill Parker told him that he had to work those two weeks to respond to an industry crisis that the team had to deal with. Claimant said that, as a result of the conversation with Mr. Parker, he did not end up taking the planned vacation time and instead worked those two weeks. He testified that the evidence of his work during that period would be reflected in contemporaneous intra-company emails he sent and received, however, as of his termination date, he no longer had access to them.

Claimant's last day at work was January 31, 2022. On that date, he was terminated for violating company policies that are not at issue in this case. Claimant acknowledged that Mr. Dietz called him on the morning of January 31, 2022 to notify him that he was terminated effective immediately. He did not recall any discussion about what he would receive in his final paycheck.

The claimant received his regular pay for the first and second half of January 2022. On or about February 11, 2022, he received an additional check that showed gross earnings of \$6,576.92. This total was made up of \$5,625.00 described as regular salary and \$951.92 described as unused vacation pay for 1.5 days.

Jonathan Dietz, 55, of Longmont, Colorado, was the manager of the team that the claimant worked on. He testified that, during the telephone call when he told the claimant he was terminated, he explained that, in addition to his regular paycheck for the second half of January, the company was going to send the claimant a further payment. He said he did not characterize this as severance; he described it as a gesture on the part of the company to help the claimant out while he looked for another job.

Regarding the timing and amount of this final payment, Mr. Dietz explained that the payroll system allowed him to request a further check to be made out on a biweekly cycle rather than a semi-monthly cycle. Using claimant's imputed daily wage, the amount earned during the biweekly pay period ending February 11, 2022 came to \$5,625.00. Mr. Dietz explained that this is the amount the employer paid to the claimant as a gesture—even though he did not work whatsoever after January 31, 2022.

Salaried employees were required to submit regular time reports. Mr. Dietz said he had not personally reviewed claimant's time reports. He said that the claimant and others on the team did often work in excess of 40 hours a week, however, they were never instructed to limit their work hours to 40, or to report only 40 hours if they worked more than that.

The employer offered documentary evidence showing that the claimant requested a vacation during the last week of 2021 and the first week in 2022. Er-Exh. F, page 2. Mr. Dietz acknowledged that the claimant may have submitted these requests in advance and subsequently not taken the requested time off. However, if the claimant ended up not actually taking the time, he was required to correct the records after the fact. Mr. Dietz testified that there were no records showing that the claimant ever corrected the records to reflect that he had not taken the two weeks off.

Included in the employer's exhibits was a pay and contribution statement dated February 4, 2022. The statement listed \$5,625.00 as regular salary and \$951.92 as vacation pay for 1.5 days. Er-Exh. I, page 1. Another document,

Er-Exh I, page 2, explained how the 1.5 vacation-day figure was calculated: Claimant earned 10 vacation days per year. According to the document, claimant had no unused vacation days to carry over from 2021. For 2022 accruals, claimant was credited with working from January 1, 2022 through February 11, 2022, a total of 42 days. During this period, using the company's calculation method, claimant accrued 1.15 days, which was rounded up to 1.5 days, resulting in a payment of \$951.92 as vacation pay.

Employer's hearing exhibits also included a sworn declaration by Bill Parker, claimant's immediate supervisor. Er-Exh. 3. Mr. Parker denied that he told the claimant and other team members to limit the time they reported to 40 hours per week and denied that he ever told the claimant or other team members they would be paid comp time for working more than 40 hours per week. He stated that many team members managed to take vacations, but he did not make any specific statement as to whether the claimant took vacation time in 2021 or 2022.

### DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

Claim for unpaid wages. Claimant testified that his claim for unpaid wages was based on the information provided on the February statement describing final paycheck. Claimant testified that he had not been expecting further payment after January 31, 2022. However, he reasoned that if he was being paid after that date, he should have been paid through February 15, which was his regular payday under the semi-monthly pay cycle, in the amount of \$6,875.00. Thus, claimant argued, his final payment was short by \$1,250.00.

It was not contested that the claimant did no work for the company after January 31, 2022 and in fact was off-boarded from the company on the latter date. Salaried employees are entitled to receive their full salary for any pay period in which they perform any work, but not for a pay period in which they do no work. RSA 275:43-b, 1(a). The payment of \$5,625.00 on February 11, 2022 was a voluntary gesture on the part of the company; it did not represent wages for work done after January 31, 2022. Its denomination as "regular salary" on the February 4, 2022 pay and contribution statement was simply an artifact of the payroll system. Claimant's argument that the employer was required to pay him his regular bimonthly salary for the first half of February 2022 simply because it

chose to pay him a smaller amount after his termination is therefore found to be without merit.

Claim for unpaid vacation time. Claimant testified that he ended up not taking the planned two weeks off at the end of 2021 and beginning of 2022 because Mr. Parker needed him to work on an urgent issue that arose at the end of the year. Mr. Dietz had no personal knowledge on that matter and relied on company reports which he admitted were not actual timesheets certified by the claimant at the end of the periods in question. Mr. Parker, the claimant's immediate supervisor, may have had personal knowledge on this issue, however, he did not testify at the hearing and his declaration did not specifically address it.

The claimant had the burden of proving that he did not actually take the requested vacation time. It was not the employer's burden to prove the opposite. Nevertheless, it is found that the claimant's testimony that he ended up not taking the two weeks was credible and not rebutted by the employer. The fact that the claimant apparently did not correct the records prior to his termination is not dispositive under these circumstances. The employer testified that the claimant could have corrected the vacation records after-the-fact at any time, but this was disputed by the claimant. In any event, the claimant was terminated without notice on January 31, 2022 and his access to his company records was terminated as of that date. The company's regular payroll statements did not include a statement of his current unused vacation balance; that information was only included with the claimant's final payment statement dated February 4, 2022.

It is therefore found that the claimant proved that he was entitled to a separation payout for two weeks' unused vacation time accrued during 2021. The company only paid him for the 1.5 days he accrued in 2022. According to company policy, vacation payouts were capped at two weeks (10 days, or 80 hours). Er-Exh. G. To award the claimant for the full 10 days in addition to the 1.5 days for 2022 would result in an overpayment. Therefore, the payment for the 1.5 days accrued in 2022 is credited against the 10 days accrued in 2021:

Amount owed for 10 days/80 hours unused vacation time accrued in 2021	\$6,346.40
Amount paid for 1.5-days accrued in 2021	( \$ 951.92 )
Vacation payout owed to claimant	\$5,394.48

Claim for the new-employee referral. A bonus award, when due, is considered part of wages, pursuant to RSA 275:42, III. "When due" is a reference to contingencies specified in the description of the employers' bonus plan that the employee needs to meet in order to be eligible for the bonus. It is the claimant's burden to prove that the employer offered him such a plan and that he met the contingencies entitling him to receive the bonus.

By the express terms of the company's referral incentive program, the claimant had to be employed with the company when the new employee reached his 30-day anniversary. This occurred on February 24, 2022, by which time the claimant was no longer employed. Claimant's argument that he was not aware of the terms of the referral policy is not credited. It is therefore found that he failed to prove that he satisfied the contingencies entitling him to receive the bonus award.

Claim for comp time. Claimant was a salaried employee. RSA 275:43-b provides that

A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked....

Claimant's testimony that, notwithstanding his status as a salaried employee, he was promised additional payment in the form of comp time, is not credited. Had such a promise been made, it is found that Mr. Dietz, the overall team supervisor, would have known about it, and he denied that the company made such an offer. Although less weight is given to an out-of-court declaration, Mr. Powers' was quite clear and specific on this point in his declaration. The claimant failed to meet his burden of proof that he was entitled to comp time in addition to salary.

### DECISION

Based on the testimony and other evidence presented at the hearing, it is found that the claimant proved he was entitled to a separation payout for 10 days vacation pay from 2021, less the payment he received for 1.5 days accrued in 2022. The amount due to the claimant on this claim is \$5,394.48. His wage claim is **valid** to that extent.

The claimant's remaining claims for unpaid wages, a new-employee referral bonus, and comp time, are ruled **invalid**.

The employer is hereby ordered to send a check to the Department, payable to ██████████ in the amount of \$5,394.48 within 30 days of the date of this Order, less any applicable deductions.

August 15, 2022  
Date of Decision

  
George A. Stewart, Hearing Officer

GAS/nd