

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF LABOR  
CONCORD, NEW HAMPSHIRE

  
v.  
ADP  
CASE #62716

DECISION OF THE HEARING OFFICER

**APPEARANCES:** Claimant, self-represented  
Kevin Skelly, Esq., representing the employer

**NATURE OF DISPUTE:** RSA 275:43, I — Weekly  
RSA 275:43-b — Payment of Salaried Employees  
(unpaid wages/salary)

**DATE OF HEARING:** July 29, 2021

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant filed on May 16, 2021, alleging that he is owed his wages for eight days, totaling \$4,153.84. Notice of claim was sent to the employer on May 20, 2021. Claimant requested a hearing and a hearing notice was sent on June 30, 2021. Both parties participated remotely by telephone.

**FINDINGS OF FACT**

The following findings are based on the testimony of the claimant and employer's witnesses Marisa Hopkins and Al Crocco, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were true, and those statements are treated herein as part of the testimony in the case.

Claimant is 38 years old and lives in Exeter. His highest degree of education is some college. He has worked for 15 years in the field of professional employer organization/employee leasing. He was hired by the employer February 2020 as a sales executive for northern New England, overseeing eight sales representatives. He worked in employer's office in Salem until mid-March 2020; after that he worked out of his home due to COVID-19.

Claimant's annual salary was \$135,000.00. He was paid every two weeks. Pay periods ran from Monday to the second Sunday following, and the regular payday was the Friday following the end of the pay period.

Claimant testified that, in December 2020, he decided to take a new job in a different line of work. He drafted a letter to that effect, dated December 28, 2020. On the morning of December 28, 2020, a Monday, claimant called his boss Al Crocco on the telephone and verbally gave him his two weeks' notice. He told Mr. Crocco that his last day would be January 8, 2021. The conversation lasted about an hour. According to the claimant, Mr. Crocco told him that his departure would put the company in a bind because he had no replacement manager; he said Mr. Crocco said he could work the two weeks and be available to assist him with the reps in his territory. Regarding the formalities of resignation, Mr. Crocco told him not to do anything yet but wait until the next day for further instructions.

Claimant testified that, the next day, he had a short telephone conversation with Mr. Crocco and his sales team to let them know he was leaving the company. This was followed by a lengthy conversation with Mr. Crocco regarding the transition, ongoing deals, etc. He said Mr. Crocco told him not to initiate further contact with his sales reps but to "remain available." If he were contacted by his sales reps, he was to direct them to Mr. Crocco. He said that Mr. Crocco assured him he would be paid through January 8, 2021 and would also receive a payout of his unused vacation time.

Claimant testified that Mr. Crocco instructed him to access the company's online employee portal and complete a voluntary resignation form, listing his last date as January 8, 2021. Claimant did so. He also emailed the letter of resignation to Mr. Crocco. On the online resignation form and in the letter, he gave his last day of employment as January 8, 2021.

Claimant testified that he did no work for the company after December 29, 2020 but remained available in the event he had been needed. On the next regular payday, Friday January 8, 2021, he received two paychecks, one for his salary covering the pay period December 21, 2020–January 3, 2021; the other covering his unused vacation pay. The paystub accompanying his salary check indicated that his salary was pro-rated earnings of \$3,126.88 for eight days worked, up to and including December 9, 2020. The paystub also noted a holiday payment of \$521.15 for eight hours. Emp. Exh. G. It is understood that this was to cover the Christmas Day holiday.

Claimant emailed Mr. Crocco and HR director Mariza Hopkins and told them he was supposed to be paid through January 8, 2021:

They [HR service center] have my last day of employment incorrectly listed as Tuesday 12/29/20, where it should actually be Friday 1/8/21. Please see attached copy of my resignation letter and also copy of my receipt from the ADP system reflecting the same. I

understand, it is customary in sales driven organizations that when an employee gives their 2 weeks' notice, they are typically walked that same day and paid out the 2 weeks. As you can see from my letter and receipt I received, this was the case here as well and nothing was discussed otherwise during my voluntary term process.

Based on this, I am still owed pay from 12/30/20-1/8/21, which equates to 8 days' pay which is roughly \$4,153.00.

Er. Exh. H.

Ms. Hopkins replied via email that the claimant would not be paid for any days past December 29, 2020, because that was the last day worked:

I wanted to connect with Al prior to responding to your email, and I was in meetings most of the day yesterday. My understanding is your last day of work with ADP was on 12/29/20. As you probably recall in your leadership role, our practice is to pay associates through last day worked (not the resignation date). Al confirmed the two of you had a transition discussion and it was shared that 12/29 would be your last official day as an ADP associate.

As a result, you should have been paid through 12/29/20....

Er. Exh. H.

Claimant then filed the instant wage claim, seeking unpaid wages through January 8, 2021.

Alvin Crocco, 46, is the employer's vice president of sales for the New England region. He lives in Millis, Massachusetts. He testified that it was a shock to him when claimant called him on Monday morning December 28, 2020 and announced that he was resigning. He denied that the claimant mentioned anything about working through January 8, 2021. He talked with claimant for a while about it and realized that claimant's decision was firm. He told the claimant to be available the next day, December 29, 2020, for a call with the team and himself.

The call took place on the morning of December 29, 2020 and the team members were notified that the claimant was resigning. Mr. Crocco then talked with the claimant to review accounts and ongoing matters, as the upcoming month of January was typically the busiest time of year for the company. The call lasted about three and a half hours. He said he told claimant to complete the online voluntary resignation form, submit his expenses, and arrange to turn his company laptop and other company equipment he had. He denied that he told the claimant he would be paid through January 8, 2021 or indeed for any time past December 29, 2020. He also denied telling the claimant to "remain available" past December 29, 2020, explaining that if he had asked the claimant to remain available after the 29th, there would have been no need for him to spend so much time on the phone that day going over transitional issues.

Mr. Crocco acknowledged receiving the claimant's letter of resignation stating that his last day would be January 8, 2021. Er. Exh. D. He said he

received it shortly after the phone call ended. He also acknowledged seeing the voluntary resignation form that the complaint filed online, on which the claimant entered his termination date as January 8, 2021. Er. Exh. F. Mr. Crocco stated that the company never approved that date and that he edited the form to show the last termination date as December 29, 2020. The edited form showing a termination date of December 29, 2020 was approved by company headquarters. Er. Exh. E.

### 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).

With regard to the claim for unpaid salary, New Hampshire law generally requires that salaried employees "receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked," RSA 275:43-b, I. There are certain exceptions to this rule, including the following:

Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

RSA 275:42-b, II (emphasis added).

According to the letter from employer's HR manager Ms. Hopkins, the company's practice is "to pay associates through last day worked (not the resignation date)." RSA 275:50 provides that none of the laws regarding payment of wages, which term includes salary, may in any way be contravened or set aside by private agreement (with exceptions not applicable here). To the extent that the employer's practice is construed to permit an employer to prorate the salary of an employee who is terminated not of his own accord before the end of a pay period, it conflicts with the plain language of RSA 275:42-b, I and II.

Claimant did perform work during the pay period December 21, 2020–January 3, 2021. Claimant was not terminated for cause, so, unless he terminated of his own accord before the end of the pay period, he was entitled to be paid his regular salary, regardless of the fact that he did no work after December 29, 2020.

Claimant testified that he intended to work until January 8, 2021, and verbally informed his employer of that on December 28, 2020 and again on

December 29, 2020. His testimony on this point was corroborated by the resignation letter he sent to the employer on December 29, 2020, Er. Exh. D, and by his entry on the company's voluntary-resignation form, showing January 8, 2021 as the resignation effective date, Er. Exh. F. Mr. Crocco's testimony that the claimant never mentioned working past December 29, 2020 during either the initial telephone call on December 28, 2020 or the one on December 29, 2020 is not credited.

However, claimant's testimony that Mr. Crocco agreed to pay him up through January 8, 2021 is not credited. Mr. Crocco denied that he agreed to do so, and his denial was corroborated by his action of editing the voluntary resignation form to indicate a termination date of December 29, 2020. Such an agreement would have been contrary to the company policy, which appears to be consistent with New Hampshire law so long as it is limited to employees who terminate of their own accord or are terminated for cause before the end of a pay period. RSA 275:43-b does not require an employer to continue to pay an employee's salary after the final pay period in which he or she does any work—even if the employee is willing to do so.

Based on the foregoing discussion, it is found that the company declined the claimant's offer to work through to January 8, 2021 and decided instead to terminate him effective December 29, 2020. The claimant did not terminate of his own accord on December 29, 2020. That was the employer's decision and also its prerogative, given that the claimant was an at-will employee. However, terminating the employee before the end of the pay period did not relieve the employer of its obligation to pay the claimant his regular salary for the final pay period in which he worked.

Claimant's regular biweekly salary was \$5,192.31. His final salary paycheck was for \$3,126.88 plus \$521.15 holiday pay for December 25, 2021. Had this not been his final paycheck, it is understood that he would have received his regular biweekly salary and would not have been paid extra for Christmas Day; he just would have had that day off. The \$521.15 holiday payment is therefore treated as a credit against the amount he was owed for his final wages for the pay period ending January 3, 2021:

Regular earnings	\$5,192.31
Prorated earnings paid	( \$3,126.88 )
Holiday pay included	( \$ 521.15 )
Amount owing	\$1,544.28

To the extent that the claimant seeks to be paid through January 8, 2021, i.e., for the first half of the next pay period, the employer was under no obligation to do so.

**DECISION**

Having carefully reviewed the testimony and exhibits, and as RSA 275:43-b requires employers to pay full salary for any pay period in which a salaried employee performs any work, with exceptions not applicable here, it is found that the claimant proved that he was entitled to his full salary for the last pay period in which he worked. It is further found that the amount paid in her final paycheck was short by \$1,544.28. His claim is **valid** to that extent.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the amount of \$1,544.28, less any applicable payroll deductions, within 30 days of the date of this Order.

August 27, 2021  
Date of Decision<sup>1</sup>

  
George A. Stewart, Hearing Officer

GAS/cb

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<sup>1</sup> This decision replaces the one dated August 11, 2021, which is hereby reconsidered and vacated in response to the employer's Motion for Reconsideration dated August 19, 2021.