

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

Cambridge Research & Development, Inc.
CASE #62748

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Ken Steinberg, representing the employer

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(unpaid salary) (withdrawn at hearing)

DATE OF HEARING: July 8, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on May 21, 2021, alleging that he earned hourly wages for February 2021 up through his termination on March 26, 2021, totaling \$18,387.10. He acknowledged receiving a payment on March 26, 2021 of \$9,000.00, which he credited towards the wages due, leaving a balance of \$9,387.10. The employer filed an objection on June 7, 2021. Attached to it was a Separation Agreement and Release purporting to bear signatures of David Hall and the employer's CEO, and releasing the employer from any liability for claims such as the present one. Claimant requested a hearing and the notice of hearing was sent on June 16, 2021.

The parties participated remotely by teleconference under a standing order of the Department, necessitated by COVID-19.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's representative, 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.

The claimant is 56 years old and lives in Hollis. He has a bachelor of science degree in mechanical engineering from the University of New Hampshire, awarded in 1986. Prior to working for the employer, he did technical sales, business development, and ran his own business. Overlapping much of this work, he was a manufacturer's representative for 20 years.

Claimant started working for the employer in 2015. He and the company's CEO were acquainted as friends. At first, claimant worked as an independent contractor. Commencing around February 2020 and coinciding with the company's receipt of a government SBIR (Small Business Innovation and Research) grant, claimant became a regular employee. His title was business development manager.

Claimant worked from home and occasionally met with the employer's CEO to discuss business. He was paid \$75.00 per hour, on a semi-monthly basis. Because the federal grant funds were released monthly, the claimant received his payments in arrears on a monthly basis. By way of example, claimant submitted paystubs for March 30, 2020–April 14, 2020 and April 15–29, 2020. Both paystubs showed a pay date of May 7, 2020. Each paystub showed claimant worked 68 hours and had gross earnings of \$5,100.00. Claimant also submitted a W-2 form for 2020, showing total earnings of \$99,000.00 in 2020.

Claimant testified that he turned in monthly time sheets. He did not submit any time sheets as exhibits; he said he no longer had access to them.

Claimant testified that the employer's CEO notified him in a video conference on March 26, 2021 that he was terminated, effective that day. the termination came as a surprise to him, and no reason was given. He testified that the CEO offered to pay him \$5,000.00 in exchange for his signing a Separation Agreement and Release. He assumed that the \$5,000.00 was intended to pay for the partial month of March. He refused that amount as it was too small, considering he worked through March 26. The CEO then offered him \$9,000.00. Still believing this amount was for March, claimant agreed and signed the Separation Agreement and Release.

Claimant testified that he received the \$9,000.00, accompanied by two paystubs, one for January 30–February 14, 2021 and the other for February 15–28, 2021. Each paystub showed that the claimant worked 60 hours and earned \$4,500.00 during the corresponding pay period. Claimant did not receive any further payment from the employer.

Ken Steinberg, 57, is the founder and CEO of the Nashua-based employer. He started the business as a limited-liability company in 2005 and incorporated it in 2017. During 2020–2021, he had up to four employees, two currently. He testified that he terminated the claimant because the CEO and his partner were not satisfied with the claimant's level of engagement and the results

he was producing. He testified that the claimant had his own business interests ongoing at the same time. He had asked the claimant to take on some additional projects and the claimant refused. He said he had not warned the claimant that he would be terminated if his level of engagement did not improve.

The CEO testified that in 2020, the claimant had not always turned in his timesheets and did not turn in any time sheets for February and March 2021. However, the CEO did not sanction the claimant for this. "It was not about time sheets, it was about the level of engagement," he explained.

The CEO said that the company had no records documenting the claimant's time-worked during February and March 2021.

Regarding the telephone conference when claimant was terminated, the CEO denied that he told the claimant that his initial offer of \$5,000.00 and subsequent offer of \$9,000.00 constituted payment for March 2021. He pointed out that the Separation Agreement and Release, which the claimant signed, had no such limitation. He testified that the \$9,000.00 was a negotiated amount; hence the information on the claimant's final two paystubs regarding time periods and hours worked could not be relied upon; it was put there purely for accounting purposes.

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. Here, it was the claimant's burden to prove that he worked the hours claimed in February and March 2021 and was not paid the full amount due.

The employer's CEO questioned whether the claimant actually worked the hours claimed in February and March, highlighting the fact that the claimant did not produce any time sheets. However, the employer presented no documentary evidence to challenge the claimant's testimony, and did not contest the claimant's testimony that he was fired without warning or threat of disciplinary action.

Claimant's rate of pay, \$75.00 per hour, was not contested. Claimant testified that he worked the full month of February through the 26th of March, 2021. He did not provide a day-by-day or week-by-week breakdown of his hours worked. He explained that his claim for total earnings of \$18,387.10 included \$10,050.00 (implying 134 hours worked) for February 2021 and \$8,337.10 (about 111 hours) for March 2021. Claimant's W-2 for 2020 showed total earnings of \$99,000.00; accepting claimant's testimony that he started as a regular employee in February 2020, this would imply average monthly earnings over the 11 months

in 2020 of \$9,000.00 (120 hours/month). The sample paystubs the claimant submitted showed that he made \$10,200 (136 hours) in the month of April 2020. Thus, the claimant's documentary evidence tended to support his testimony as to the hours he worked in February and March 2021.

In this regard, Department administrative rule Lab 803.03 (g) provides that:

Pursuant to RSA 279:27 and RSA 275:49, VI, every employer shall keep a record of hours worked by all of its employees except for [salaried employees]. Said records shall be preserved and stored for a period of no less than 3 years.

Compliance with this rule gives an employer a ready means of resolving good-faith disputes such as the present one. But an employer's failure to follow this rule does not relieve the claimant of his burden of proving his claim. In particular, non-compliance (or absence of evidence of compliance) does not give a claimant carte blanche in a claim for unpaid wages.

However, based on the claimant's testimony, his documentary evidence, and the employer's testimony that the claimant's "level of engagement" was the issue, rather than the time sheets, it is found that the claimant sustained his burden of proving that he earned the wages claimed. Even assuming the employer was rightfully disappointed with the claimant's on-the-job performance, this did not provide a lawful basis for withholding claimant's wages after-the-fact. Employers are allowed to withhold wages under specific circumstances set forth in RSA 275:48, I; poor performance is not one of them.

The employer's primary defense to the claim was the Separation Agreement and Release, wherein the claimant purported to release the employer from liability for claims such as the present one. That defense is unavailing, because RSA 275:50 provides that none of the laws regarding payment of wages may in any way be contravened or set aside by private agreement (with exceptions not applicable here).

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$9,387.10.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the amount of \$9,387.10, less any applicable taxes, within 30 days of the date of this Order.

July 27, 2021
Date of Decision

GAS/cb


George A. Stewart, Hearing Officer