

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

NH Exteriors, Inc.

CASE #63297

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented, failed to appear
Richard Speed, Ph.D., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages) (satisfied before hearing)
RSA 275:43, V — Weekly (unpaid holiday pay)
RSA 275:43, V — Weekly (unpaid PTO pay)
RSA 275:43, V — Weekly (unpaid sick pay)

DATE OF HEARING: December 2, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on August 16, 2021, alleging that he was a telemarketing manager for the employer's home improvement company operating out of Suncook; he alleged that he was eligible to receive holiday pay, sick pay, and personal time off and did not receive these benefits: His claim was for \$1,216.00, amended August 20, 2021 to add \$65.00 in unpaid wages.

Notice of claim was sent to the employer on August 26, 2021. The employer filed an objection on August 30, 2021. The claimant requested a hearing and a hearing notice was sent on October 15, 2021. Before the hearing, a partial payment was made of net \$24.01, gross \$26.00, for two hours at \$13.00/hr. The claimant accepted the payment in satisfaction of the wage portion of his claim.

At the appointed hour for the hearing, the claimant failed to appear. Fifteen minutes later, he still had not appeared or contacted the Department. The notice of hearing was mailed to the claimant at the address he provided on

his wage claim. The notice was not returned undelivered. It was determined that the claimant had received proper notice of the hearing. The hearing proceeded in his absence, pursuant to Department Administrative Rule Lab 203.04.

FINDINGS OF FACT

The following findings are based on the testimony of the employer's witness, George Jobel, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, the employer's witness acknowledged under oath that the employer's written submissions to the Department were true and accurate to the best of his knowledge and belief, and those statements are treated herein as part of the testimony in the case.

George Jobel, 66, of Concord, is the employer's telemarketing manager. He supervised the claimant, who was a telemarketer. Claimant worked for the employer from September 2019 to March 2020, when he was laid off due to COVID-19. He was rehired again in May 2020 and worked at the company until August 16, 2021. The claimant worked from home some of the time and at the company's office some of the time.

Weekly pay periods ran from Sunday to Saturday, with paydays the following Thursday. The employer kept track of claimant's hours by means of an online punch-in/punch-out system. Claimant did not keep regular hours. Some weeks he worked less than 37.5 hours, some weeks more.

The employer did not provide benefits to part-time employees. It did provide benefits to full-time employees. Benefits included holiday pay, personal time off, and sick pay. According to company policy, to qualify for full-time status with benefits, an employee must work 13 consecutive weeks of at least 37.5 hours, and must maintain that level of hours afterwards, with the exception of excused absences.

Starting in August 2020, the claimant attempted to qualify as a full-time employee and to become eligible for benefits. He submitted to the Department a hand-written note purporting to show that, over the course of 13 weeks starting August 3 and ending October 26, he worked more than 37.5 hours each week.

Mr. Jobel denied that claimant ever worked 13 consecutive weeks of at least 37.5 hours during the course of his employment. In response to the claimant's hand-written documentation, the employer submitted paystubs covering the fourteen weekly pay periods from July 26, 2020 to October 31, 2020. The paystubs showed that the longest unbroken period of at least 37.5 hours was 12 weeks, not the required 13.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was owed unpaid holiday pay, sick pay, and personal time off. 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).

RSA 275:43, V in pertinent part, provides that personal days, holiday pay, and sick days, "when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due." "When due" is a reference to contingencies specified in the employer's policy that the employee must meet in order to be eligible for the benefit in question.

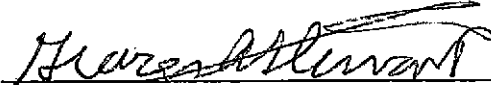
It was not contested that the employer offered such benefits to full-time employees who achieved that status by working at least 37.5 hours for 13 consecutive weekly pay periods and maintained those hours afterwards. The issue was whether the claimant ever did that.

Having failed to appear for the hearing, no weight is given to the claimant's hand-written record of hours he claimed to have worked. No reason was found to question the accuracy of Mr. Jobel's testimony or the supporting exhibits. The employer's evidence showed that claimant never qualified for full-time status and hence never qualified for benefits.

DECISION

Based on the testimony and documentary evidence, it is found that the claimant did not work the required minimum of 37.5 weeks for 13 unbroken weeks, and thus never qualified for benefits of holiday pay, sick time, and personal time off. Thus he was not entitled to payment for holidays, sick days off, or personal time off. His wage claim is therefore respectfully ruled **invalid**.

December 10, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb