

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE


V

PROVAN AND LORBER, INC.

DECISION OF THE HEARING OFFICER

Appearances: Mark D. Wiseman Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid sick time
RSA 275:43 V unpaid holiday
RSA 275:44 IV liquidated damages

Employer: Provan & Lorber Inc., 53 Maple Street, PO Box 389, Contoocook, NH 03229-0389

Date of Hearing: July 17, 2014

Case No. 47908

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on April 4, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on June 19, 2014.

The claimant testified that he started to work for the employer in March of 1996. He was notified of his lay-off and his exit date was February 27, 2014. In July of 2010 the claimant received a memorandum from the Chief Executive Officer of the employer. This memorandum stressed the deep financial problem in the company and the claimant was notified that his salary was to be reduced by 20%. The memorandum also stated that vacation time, sick time and holiday pay was "frozen". The policy that was in place at the time of the lay-off did not allow a pay out of unused sick time and the time was not allowed to accrue from year to year. The claimant stated that because the leave was "frozen" he accrued the leave because he was not allowed to take any of the accrued leave. The claimant believes that the State Law allows for the leave to be continued and be paid out upon separation.

The claimant did say that the employees did receive a week's vacation time paid at the full rate before the 20% reduction in salary. The claimant also stated that he was paid his full amount of vacation time upon separation. This pay out was also calculated at the pre 20% wage reduction.

The claimant's position is that the "freeze" kept everything in an accrual mode and they should be paid out when service ends. He believes that the "freeze" negated any policy as to the accrual or the payout of leave. He maintains that he is due 34 holidays and sick time at a rate of 40 hours per year from July of 2010 until February of 2014. The claimant did say that the payout of Sick Time was consistent with the employee manual but again, the "freeze" negated the policies in the manual.

The employer testified that the financial stress of the company made the employer put in place the Memo of July 16, 2010. Knowing that there was a financial hardship on many of the employees, the employer kept track of those going over the maximum of 120 hours of vacation time. These employees were paid a week of vacation time at the original wage structure.

There was no carry over of sick leave and no employee was ever paid for the time upon separation. Any employee with vacation time was paid the full amount upon separation. The claimant received his time at the rate in place prior to the 20% cut in wages.

The employer stated that the word "frozen" meant that all of the designated benefits were halted. The claimant never challenged this position while he was employed and he received a payment when he went over the 120 hours of maximum leave accumulation. In subsequent writings the employer used the word "suspended" instead of "frozen". The employer feels that they have paid all wages due and owing. It was the decision of the employer to pay out any accrued vacation time at the rate of pay before the salary decrease.

The claimant is also seeking liquidated damages because the employer did not pay out all that was due upon separation. The claimant feels that the employer was willful and did not have good cause for their actions.

FINDINGS OF FACT

RSA 275:43 I. Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

803.01 (a). Pursuant to RSA 275:43, I and II, every employer shall pay all wages due to his/her employees within 8 days, including Sundays, after the expiration of the workweek on regular paydays designated in advance. Biweekly payments of wages shall meet the foregoing requirement if the last day of the second week falls on the day immediately preceding the day of payment. Payment in advance and in full of the work period, even though less frequently than biweekly, also meets the foregoing requirement.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:43 V. Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, 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.

This part of the law places issues such as sick time and holidays into the category of wages when the time is due and owing.

RSA 275:44 IV reads: "If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10% of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition."

A claimant can ask for the Hearing Officer to rule on a request for liquidated damages. The damages can be up to the amount of the Wage Claim if the Hearing Officer finds that the employer was willful and did not have good cause for their action(s).

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there are wages due and owing and he did not meet this burden.

On July 16, 2010 the employer notified all of the employees that wages were to be reduced by 20% and that many of the accrued leave and holidays would be "frozen". This directive was in place when the claimant was laid off on February 27, 2014.

A review of the employee's written policy shows that sick leave cannot be carried over from year to year and that any accrued amount is not paid out upon separation from employment. The employer did pay for accrued vacation time when an employee was near the maximum of 120 hours. This resulted in the claimant receiving a week of pay at the rate of pay prior to the "freeze". The employer also paid out all vacation time upon separation. This too was at the rate of pay prior to the "freeze".

The claimant holds the idea that the "freeze" held all accumulations in a line item that had to be paid. He believes that the handbook was superseded by the memo that was issued. This is not the finding of the Hearing Officer. It is found that the employer did change their handbook and they did it in writing. It is also found that the employer had the right to go over the intent of the memorandum and they did so in the payment of accrued vacation time.

The Wage Claim is invalid. All wages have been paid.

There is no finding for liquidated damages.

DECISION AND ORDER

As RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer willfully and without good cause fails to pay wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

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 the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

/s/

Thomas F. Hardiman
Hearing Officer

Date of Decision: August 8, 2014

Original:

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cc:

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Mark D. Wiseman Esq., Cleveland, Waters and Bass PA

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