

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

V

CENTURION INSURANCE GROUP

DECISION OF THE HEARING OFFICER

Appearances: Peter G. Callaghan Esq., Attorney for the Employer

Nature of Dispute: RSA 275:43 I unpaid commissions
RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation time
RSA 275:43-b unpaid salary

Employer: Centurion Insurance Group
PO Box 959
Hanover, NH 03755

Date of Hearing: August 27, 2014

Case No. 48294

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on June 12, 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 July 28, 2014.

The claimant testified that she worked for the employer for over two years. She went in to give her employer a two week notice of resignation and was told that she would have to give four weeks if she wanted to receive her accrued vacation time. The employer also said that if the claimant was going to work for a direct competitor she would be let go immediately. The claimant said that she needed time to think this over and she left for lunch. The claimant stated that she decided to go to work for a competitor in the same area and so she felt she had been terminated and did not go back to the employer. She believes that she is due \$1,318.75 in accrued vacation time.

The claimant is also seeking commissions on several accounts that she was working on at the time she was discharged. Two of the accounts had not been "bound" and one was being

billed on a quarterly basis. The claimant said that she had done most of the work on these accounts and feels that the commission is due to her. The claimant stated that the entire Wage Claim was for \$13,880.91.

The employer testified that there was an employee handbook in place that stated the company policies on vacation time with a resignation and how commissions were to be distributed.

In the case of the vacation time payout, the policy was clear and a person holding the same position as the claimant was required to give a four week notice. The claimant gave a written two week notice and so the time was not due to be paid out.

The employer said that the claimant was told that if she went to work for a non-competitor and gave the four week notice, she would be paid her vacation time. If the claimant chose to work for a direct competitor she would be in violation of the "non-compete" clause of the employment agreement. In such a circumstance the claimant would be discharged immediately. The claimant did not return from lunch so the decision was made to terminate her services. The claimant did go to work for a direct competitor.

The claimant also felt that she was due her commissions on several accounts but did admit that the accounts had not been invoiced as the handbook requires. The claimant felt that these accounts could have been finished if she was allowed to work out her final two weeks.

The claimant also felt that there was one account that was paid out quarterly and she had received the first two commissions. She feels that she is due the final two quarters even though she left her employment with the employer.

The claimant also stated that her understanding of the "non-compete" clause was that she could not solicit any business with clients she had worked with at the employer's business. She said she intends to honor this commitment.

The employer testified that the company followed the employee handbook in the payout of vacation time. The claimant was aware of the provisions dealing with vacation time and did not follow the criteria set up for the payout of vacation time. Both sides agree that it is common industry practice to terminate when a non-compete is not followed. The claimant said that if she were going to a direct competitor, she would not return from lunch and she did not do so. The claimant said that this was a termination; the employer said that it was an enforcement of the written procedures and a long standing practice in the industry.

The employers provided testimony that two of the clients, dealing with the claimant, did not have an invoice and were not in place at the time the claimant left the employ of the company. This is in accordance with the company practice of paying on a bound insurance coverage package. Prior to the policy being bound there is an issued order to bring the policy to that point. One of the policies was ordered to be bound on May 21, 2014 and the other on May 29, 2014. The claimant did not come back to work after lunch on May20, 2014.

The employer maintains that the claimant went to work for a competitor, in direct violation of the non-compete clause she was working under. The claimant was also not paid for

quarter 3 and quarter 4 of one policy because the payment was to be made after the claimant left employment.

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.

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Commissions are also considered wages when the commissions 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 an issue such as vacation time into the category of wages when the time is due and owing.

RSA 275:43-b: Payment of Salaried Employees. –I. 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; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.
- (e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. 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.

III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

This section of the law spells out when and how a salaried employee is to be paid.

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 she did not meet this burden.

The claimant worked under written rules and regulations that were known to her. The claimant was aware of the fact that she had to give a four week notice of her resignation and yet she gave a written two week notice. The claimant said that she was fired but that is not a finding. The claimant told the employer that if she were going to work for a direct area competitor, she would not return from lunch. She did not return from lunch.

The policy is also clear on the payout of commissions and the claimant worked under this policy for almost three years. The claimant knew when and how a policy was set for payment of commissions. The claimant did not reach a position on two of the claims to warrant a commission. The third claim was for a quarterly payment and the claimant was not working for two of those quarters. The first two she was paid as required.

The employer was credible in their testimony that the policies were in place and they followed those policies. The parties differ on the intent of a “non-compete” clause but that is not factored into this Wage Claim. The claimant is seeking wages outside of the written policies. The Wage Claim is invalid.

DECISION AND ORDER

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 she was not paid all wages due, it is hereby ruled that the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: September 8, 2014

Original: [REDACTED]
cc: Centurion Insurance Group
Peter G. Callaghan, Esquire

TFH/klt