

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Rockingham County

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid longevity pay
RSA 275:44 IV Id

Employer: Rockingham County, 119 North Rd. Brentwood NH 03833

Date of Hearing: April 16, 2015

Case No.: 47978

BACKGROUND AND STATEMENT OF THE ISSUES

PROCEDURAL ISSUES PRIOR TO THE APRIL 16, 2015 HEARING

The claimant originally filed a wage claim asserting he was owed \$1,800 in unpaid longevity pay for 2011, 2012, 2013 and 2014, plus liquidated damages in the amount of \$14,002.80 because the employer failed to pay the \$1,800.00 in longevity pay and his final wages of \$24,405.58 within the timeframe required by law.

The employer paid the claimant \$750.00 for the 2014 longevity pay which he agreed was paid, retaining the claim of liquidated damages for this amount because the employer did not pay in the timeframe required by law.

This Department held a pre-hearing conference for this case on July 8, 2014. The Department, in error, issued a Decision as a result of the pre-hearing conference that determined this Department did not have jurisdiction over these claims.

The claimant appealed the Decision from the pre-hearing conference to Superior Court. This Department filed a Motion to Stay the proceedings in Superior Court, pending a hearing on the issue of jurisdiction with this Department. The Superior Court granted the motion and this Department held a hearing solely on the issue of jurisdiction.

After a hearing on the jurisdictional issue was held on November 12, 2014, this Department found that the New Hampshire Department of Labor had jurisdiction over the Wage Claim. The employer did not appeal the jurisdictional decision.

The Department filed a Motion to Stay the proceedings before the Superior Court, pending a hearing on the Wage Claim before this Department. The Superior Court granted the motion, which resulted in this hearing being held.

THE APRIL 16, 2015 HEARING

The claimant asserted that he is now owed:

- \$12,202.80 in liquidated damages because the employer failed to pay his final wages within seventy-two hours of his separation as required by RSA 275:44 II because he provided more than one pay period's notice of his intention to retire, calculated at 10% per day for each of the five days past the statutory requirement, excluding Sundays and legal holidays, that the employer failed to pay the wages;
- \$750.00 in liquidated damages because the employer failed to pay his 2014 longevity pay within the statutory requirement, calculated at 10% per day for the statutory limit of ten days, excluding Sundays and legal holidays, that the employer failed to pay the wages;
- \$293.75 for his 2013 longevity pay as the employer failed to pay the prescribed amount according to his years of service and the written policy;
- \$293.75 in liquidated damages because the employer failed to pay his 2013 longevity pay within the statutory requirement, calculated at 10% per day for the statutory limit of ten days, excluding Sundays and legal holidays, that the employer failed to pay the wages;
- \$286.27 for his 2012 longevity pay as the employer failed to pay the prescribed amount according to his years of service and the written policy;
- \$286.27 in liquidated damages because the employer failed to pay his 2012 longevity pay within the statutory requirement, calculated at 10% per day for the statutory limit of ten days, excluding Sundays and legal holidays, that the employer failed to pay the wages;
- \$288.80 for his 2011 longevity pay as the employer failed to pay the prescribed amount according to his years of service and the written policy; and
- \$288.80 in liquidated damages because the employer failed to pay his 2011 longevity pay within the statutory requirement, calculated at 10% per day the statutory limit of ten days, excluding Sundays and legal holidays, that the employer failed to pay the wages.

The claimant argued that he informed the employer by letter on Feb 18, 2014 (inadvertently dated Feb 18, 2013) of his upcoming retirement effective April 1, 2014, and approximately six weeks after the notice, the employer paid his final wages on April 10, 2014, the next regular biweekly pay day after the April 1, 2014 retirement. This final pay check was in the amount of \$24,405.58 gross. He claims that the employer should be held liable for liquidated damages for failing to pay his wages within seventy-two hours as prescribed in RSA 275:44 II, as he provided greater than one pay period's notice of his intention to end employment.

He also argued the employer failed to pay his longevity pay for the years 2011, 2012 and 2013 at the correct years of service rate. He had achieved twenty years of service for the payment of the 2011, however, the employer continued to pay his longevity payment at the fifteen years of service rate from 2011 through 2013. He

sought the balance of the correct payment and to hold the employer liable for liquidated damages.

He further argued the employer did not pay his 2014 longevity payment within the timeframe required by statute, RSA 275:44 II, and should be liable for liquidated damages. The employer paid the 2014 longevity payment on May 4, 2014. The employer did pay the longevity pay at the correct rate based on years of service, \$750.00.

The employer argued they did not willfully withhold any payments from the claimant, therefore, no liquidated damages can be assessed. They paid the claimant his final wages on the next regular payday after his separation, and noted that the claimant did not copy payroll or human resources with the February 18, 2013 (2014) retirement letter.

They argued that the claimant was required to prove he was retiring in order to receive the 2014 longevity payment, and that the delay in sending the longevity payment to the claimant occurred because the New Hampshire Retirement System took an extended period of time to verify the claimant had indeed retired. Once they received verification, they issued a check on May 4, 2014.

Regarding the longevity payments of 2011, 2012 and 2013, the employer argued they were bound by the doctrine of status quo to continue to pay the longevity pay at the rate in effect on August 31, 2011, the date that the Teamsters Union was selected by the employees of Rockingham County Department of Corrections as their representative for purposes of collective negotiations and settlement of grievances. They argue the claimant had not reached twenty years of service by December 2010, the last accounting of years of service for longevity payments, prior to August 31, 2011.

The employer further argued they did not believe this Department had jurisdiction over this claim.

The employer voiced numerous objections throughout the course of the hearing to documentation submitted by the claimant regarding personnel issues with Ms. Young. The Department noted each of the numerous the objections, but allowed the documentation to be submitted.

FINDINGS OF FACT

The claimant worked for the employer from March 1991 through April 1, 2014, when he retired. At all relevant times, the claimant was a Sergeant with the Rockingham County Department of Corrections.

The claimant provided the employer with a letter of intent to retire on February 18, 2014, which he inadvertently dated February 18, 2013. He noticed his intent to retire effective April 1, 2014, an approximate six week notice. The employer paid his final wages on the next regular biweekly pay day after April 1, 2014, or April 10, 2014. His final pay check was in the amount of \$24,405.58 gross.

The employer agreed that they are familiar with the New Hampshire labor laws and attended training on these laws.

The employer received a copy of the claimant's February 18, 2014, letter, noticing his intent to retire effective April 1, 2014. The employer's argument that the claimant did not copy payroll or human resources on this letter is not persuasive. It is not the employee's responsibility to route all correspondence through the employer's hierarchy.

The Hearing Officer finds the claimant's final wages were due within seventy-two hours (RSA 275:42 II) of his retirement on April 1, 2014, or April 4, 2014, as he provided the employer with more than one pay periods notice of his intent to end employment. On April 7, 2014, the claimant notified Katherine Nikitas (Deputy Finance Director), Linda Stilkey, Jayne Jackson, Adele Duchesneau, Steve Church, HRFinance Payroll Group, Jeff Padellaro and Bill Bouslely, via email, of the requirements of RSA 275:44 II. The employer failed to pay the claimant all wages due within the required timeframe. The employer paid the final wages due on April 10, 2014, the next regular pay day, or five days later than allowed by statute.

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" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The employer was aware that the claimant had provided a six week notice of intent to retire. The employer was aware of the wages due. They were aware of New Hampshire labor laws and they were informed by the claimant of the requirements of RSA 275:44 II. They had the financial ability to pay the claimant.

The Hearing Officer finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer was aware of the obligation, had the financial ability to pay and chose not to pay within the required timeframe. This portion of the claim is valid in the amount of \$12,202.80, calculated at 10% per day for each of the five days the employer withheld the \$24,405.58 payment.

The claimant also sought liquidated damages on the 2014 longevity payment of \$750.00. The claimant argued that the employer failed to pay the wages due within seventy-two hours of his retirement, or April 4, 2014. The employer argued they were not able to pay the longevity payment to the claimant until they had received notification from the New Hampshire Retirement System that the claimant had in fact retired through the system, and not simply resigned. Therefore, they were not willful in failing to remit payment to the claimant for this benefit.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding any fringe benefits, including longevity pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275: 49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer's written policy regarding longevity pays states:

"6-11 LONGEVITY PAY.

Each full-time and part-time employee who has completed the required number of years of employment by December 31 shall be entitled to longevity payment in the first payroll in December of each year according to the following schedule:

- | | |
|----------------------|---------|
| A. Five years | \$150 |
| B. Ten years | \$300 |
| C. Fifteen years | \$450 |
| D. Twenty years | \$750 |
| E. Twenty-five years | \$1,000 |

6-12 LONGEVITY PAY AT RETIREMENT.

Each full-time and part-time employee who is retiring under Social Security and/or NH Retirement System and leaving employment with the County shall be eligible for Longevity Pay at the time of the employee's separation. This shall be calculated as of the employee's employment date. Payment shall be issued with the final check. "

The employer properly noticed the claimant of the policy regarding the fringe benefit of longevity pay.

The payment of this benefit is considered wages pursuant to RSA 275:42 III and 275:43 V. The payment of these wages was due on April 4, 2014, or seventy-two hours from the claimant's retirement date, as he provided more than one pay periods notice of his intent to end employment. The employer instead chose to pay this benefit on May 4, 2014. The employer's argument that they had to receive proper notification from the New Hampshire Retirement System prior to paying out the longevity pay to a retiring employee is not persuasive. Nothing in the written policy of the employer notifies the claimant that this payment could be delayed pending notification from The New Hampshire Retirement System. The employer could have noticed the claimant of this requirement and they chose not to do so. The policy in fact notifies the claimant that this payment will be provided with their final check.

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" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The employer was aware of their written policy regarding the longevity payments. They were aware of the obligation to pay the longevity payment for 2014. They had the financial ability to pay the claimant. They failed to follow their own written policy.

The Hearing Officer finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer was aware of the obligation, had the financial ability to pay and chose not to pay within the required timeframe. This portion of the claim is valid in the amount of \$750.00, calculated at 10% per day for each of the ten of the thirty days, the maximum statutory limit, that the employer withheld the \$750.00 payment.

The claimant argued he did not receive his correct payment for longevity payments for 2011, 2012 or 2013. The employer paid these longevity payments at the rate prescribed in the written policy for an employee with fifteen years of service, rather than the correct bracket of his twenty years of service. The employer does not dispute that the claimant achieved twenty years of service for the 2011 longevity payment.

Instead, the employer argues that they were bound by the doctrine of status quo to continue to pay the longevity pay at the rate in effect at the time that the Teamsters had been designated and selected by a majority of the employees of Rockingham County Department of Corrections as their representative for purposes of collective negotiations and settlement of grievances, on August 31, 2011. They continued to use employee's years of service accruals as of December 2010, as that was their last date of accounting prior to the bargaining agent's agreement of August 31, 2011. They did acknowledge that employees who were retiring were paid at the correct rate of years of service for their longevity pay.

The employer paid the claimant longevity payments as follows:

- \$461.20 for 2011
- \$463.73 for 2012
- \$456.26 for 2013

These payments were greater than the fifteen year level of \$450, but not at the correct twenty year level of \$750.00 per year beginning in 2011.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding fringe benefits, including longevity pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees' expenses, pension and all other fringe benefits, including longevity pay, per RSA 275:49. Lab 803.03 (c) Pursuant to RSA 275:49, every employer shall inform his/her employees in writing of any change to such employees' rate of pay, salary or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer admitted that they did not notify any of their employees that the written policy regarding longevity payments would change as a result of the August 31, 2011, agreement. The employer assumed it was the Teamsters' responsibility to notify the County's employees.

The employer's argument that the doctrine of status quo prevents them from making any changes to the benefits after a bargaining agent has been signed is not persuasive. The status quo doctrine does not preempt state statute. The employer failed to notify employees of any changes to the longevity payment policy as required by RSA 275:49 and Lab 803.03 (b), (c), and (f)(6). Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed longevity payments under the written policy of the employer, as follows:

- \$288.80 for 2011

- \$286.27 for 2012
- \$293.75 for 2013

The claimant argued the employer should be liable for liquidated damages on the failed longevity payments of 2011, 2012 and 2013.

The employer acknowledged the claimant reached twenty years of service for the December 2011 longevity payment, the December 2012 longevity payment, and the December 2013 longevity payment. They were aware of their own written policy regarding longevity payments. They were aware they had not notified their own employees of any changes to the written policy regarding longevity pay. They were aware of New Hampshire labor laws. They had the financial ability to pay the claimant.

The Hearing Officer finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay him all wages due in the time required because the employer was aware of the obligation, had the financial ability to pay and chose not to pay within the required timeframe. This portion of the claim is valid in the amount of \$868.82, calculated at 10% per day for each of the ten days, the maximum statutory limit, that the employer withheld the \$868.82 payment.

The employer's final argument that this Department does not have jurisdiction is not relevant. The Department held a hearing on jurisdiction and issued a Decision. As the employer failed to appeal, that Decision is a final order.

DISCUSSIONS

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met his burden in this claim.

DECISION AND ORDER

Based on the testimony and evidence presented, 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 timeframe required by statute, and as this Department finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay his final wages due in the timeframe required by statute, it is hereby ruled that the employer is liable to the claimant for liquidated damages in the total of \$12,202.80, assessed at 10% of the unpaid wages due per day for each day of the five days of nonpayment past the statutory limit.

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 timeframe required by statute, and as this Department finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay his 2014 longevity pay due in the timeframe required by statute, it is hereby

ruled that the employer is liable to the claimant for liquidated damages in the total of \$750, assessed at 10% of the unpaid wages due per day for each day of nonpayment past the statutory limit until equal to the amount of wages due.

As RSA 275:42 II and 275:43 V considers longevity pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant prove by a preponderance of the evidence that he is due the claimed longevity pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$868.82 (\$288.80 + \$286.27 +\$293.75).

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 timeframe required by statute, and as this Department finds that the claimant proved by a preponderance of the evidence that the employer willfully and without good cause failed to pay his 2011, 2012, and 2013 longevity pay due in the timeframe required by statute, it is hereby ruled that the employer is liable to the claimant for liquidated damages in the total of \$868.82, assessed at 10% of the unpaid wages due per day for each day of nonpayment past the statutory limit until equal to the amount of wages due.

The employer is hereby ordered to send a check to this Department, payable to Harold Whitehouse, in the total of \$14,690.44 (\$12,202.80+\$750.00+\$868.82+\$868.82), less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: May 14, 2015

MJD/kdc