

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Estate Planners of New England LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 I unpaid commissions/bonus
RSA 275:43 V unpaid vacation pay (PTO)
RSA 275:48 I/II failure to maintain employer paid benefit

Date of Hearing: May 27, 2015

Case No.: 50072

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$1,442.31 in unpaid wages for one week's pay in 2015 because he should have received ten checks and only received nine. He asserts he is owed \$3,885.80 for commissions earned over the previous two quarters. He alleges he is owed \$4,615.38 for the balance of sixteen days of vacation/PTO pay he had accrued plus \$835.78 as the employer failed to maintain his health insurance coverage for one month.

The employer denies the claimant is due any further compensation. He argues the claimant has been paid all wages due. The claimant never received any commissions, but discretionary bonuses. The claimant did not accrue any vacation or PTO time. The employer had an informal vacation policy which allowed the claimant to take any time off he wished providing he had completed his work. The employer verbally notified the claimant in early January he would not be able to fund any bonuses or the health insurance after January 2015.

FINDINGS OF FACT

The claimant worked for the employer as a registered representative from May 2004 through February 26, 2015, when he resigned. He received a gross weekly salary of \$1,442.31.

The claimant argues he should have received ten paychecks in 2015 because the employer paid wages one week in arrears. He received nine paychecks in 2015.

The employer argues the claimant received wages on Wednesdays for the week ending the following Friday. At no time did the claimant receive wages in arrears. Payday had been Fridays but had been pushed back to Wednesdays at the request of the claimant.

The claimant's argument that he was paid in arrears appears to stem from a record he received from the employer regarding his final paycheck. The accounting record he received shows check number 9085 dated March 3, 2015 for a pay period of February 21 through 27, 2015, previously submitted.

The employer submitted a copy of check number 9085 from his financial institution. The check is dated February 25, 2015 and the check cleared the employer's financial institution on March 2, 2015. The employer submitted a paystub for check number 9085 which reflects a pay date of February 25, 2015 for the pay period of February 21 through 27, 2015.

The claimant's argument that he is due a tenth check for 2015 because he was paid in arrears, is not persuasive or credible. The claimant deposited the check on March 2, 2015, prior to the date he claims the check was written, March 3, 2015.

The employer previously submitted documentation to show the claimant had been paid for each week of 2015.

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed wages.

The claimant argues he is due \$3,885.80 in commissions for two previous quarters as he had always received a quarterly commission. He acknowledges there were times when the employer had to delay the payment for the commission, but he had always received it eventually. The claimant denies any recollection of a meeting in January 2015 discussing this issue.

The employer argues the claimant never received a commission but a discretionary quarterly bonus. Though the employer did not reduce the bonus program to writing, he had calculated the bonus by adding together the commission and the fee revenue the business received and paying the claimant 1.5% of the total. The employer continued to pay the claimant this bonus even as business declined. The employer did not pay any bonus for the final two quarters as the revenue received could not support the expenses of the business. He met with the claimant in January 2015 during which he notified the claimant he would no longer receive bonuses because of a decline in revenues.

RSA 275:49 I requires that an employer inform employees of the rate of pay, including bonus, at the time of hire. Lab 803.03 (a) requires that an employer inform employees in writing of the rate of pay, including bonus, at the time of hire and prior to any changes. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer had the opportunity to reduce the bonus program to writing but chose not to do so. The employer changed the bonus program after the bonus period had ended.

The Hearing Officer finds that the employer established a practice of paying a bonus and failed to notify the claimant, in writing, of any changes, prior to the changes effective date, as required by Lab 803.03 (a).

Therefore the Hearing Officer finds claimant proved by a preponderance of the evidence that he is owed the claimed commission/bonus in the amount of \$3,885.80.

The claimant argues he is due \$4,615.38 for sixteen vacation/PTO days he had accrued as of January 1, 2015. He alleges he would research various websites and industry standards to determine the number of vacation/PTO days he would receive each year.

The employer argues that no arrangement existed for the accrual or banking of vacation/PTO. He alleges the claimant could take time off as needed provided his work was up to date.

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 vacation 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.

Both parties agree no written documentation exists for any vacation/PTO policy.

The Hearing Officer finds that the employer's testimony that the claimant took time off as needed, rather than the claimant's position that he had a bank of vacation time, is persuasive and credible.

The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed vacation/PTO pay.

The claimant alleges he is due \$835.78 in health insurance payments for February 2015. The employer had always covered his health insurance, except that in 2014 the claimant became responsible for the increased cost over the previous year, going forward. The claimant denies any recollection of a meeting in January 2015 discussing this issue.

The employer provided credible testimony that he met with the claimant in January 2015 during which he notified the claimant he would no longer cover the cost of health insurance because of a decline in revenues.

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is due the claimed health insurance reimbursement. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed health insurance reimbursement.

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 that the claimant failed to prove by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that this portion of the Wage Claim 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 that the claimant proved by a preponderance of the evidence that he is owed the claimed commissions/bonus, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$3,885.80.

As RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:48 II holds an employer liable to an employee for lost medical insurance benefits if the employer fully pays for the benefit but fails to provide coverage, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer was responsible for the payment for February 2015, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$3,885.80, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: June 12, 2015

MJD/kdc