STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[redacted]

V

Frederick A Farrar Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation pay
RSA 275:48 I/II illegal deductions

Employer: F.A. Farrar Inc, 15 Avon St, Keene, NH 03431

Date of Hearing: October 15, 2015

Case No.: 51187

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed $9,563.78 as follows:

- $6,705.18 in profit sharing;
- $1,087.00 for unpaid vacation pay, sixteen hours from 2014 and thirty-two hours from 2015;
- $1,771.60 in unpaid wages because the employer deducted one and one half hours per week for smoke breaks; and
- $178.26 that the employer deducted for AFLAC premiums from his final paycheck.

The employer denies the claimant is due any wages.

The profit sharing program is administered by a third party. They provided the claimant with the distribution paperwork for the profit sharing plan, administered by Altigro Pension Services Inc.

The claimant accrued, over 2014, eighty hours of vacation pay, for which he was paid in full, documentation previously submitted. He was terminated on July 5, 2015. He had been paid for forty-eight hours of vacation pay, but had only accrued 35.4 hours of vacation pay. Therefore, no vacation pay is due to the claimant.

The employer argues that though the company has a no smoking policy, the claimant needed to take smoke breaks. The parties agreed, in writing, to deduct one and one half hours per week for smoke breaks.

The employer pays the AFLAC premium on the first of each month. They then recoup the premium on a weekly basis from the claimant over the course of the following month. As the claimant was terminated on July 5, 2015, the employer had already paid the claimant's premium for July. They deducted the remainder of his weekly premiums from his final pay check, in the amount of $178.26. The policy remained in effect until the end of July 2015.

FINDINGS OF FACT

The claimant worked for the employer from August 5, 2008 until his termination on July 5, 2015.

The claimant argues his profit sharing balance is showing $1,117.53 for one year only, November 1, 2013 through October 31, 2014, and as he worked there for six years and ten months, the amount in the profit sharing should be six times that annual figure, or $6,701.18. He had received the distribution paperwork from the employer, but has not sent it to the appropriate company for processing.

The employer argues that the statement the claimant is using is the most current annual statement. The employer's fiscal year runs November 1 through October 31. The profit sharing plan is a federally approved plan administered by Altigro Pension Services Inc and invested by Morgan Stanley. The balance of the account is kept by Altigro. The employer had not made any contributions in recent years as they have not been profitable. The profit sharing balance is also on a vesting schedule. The employer did not know whether or not the claimant was fully vested for the balance showing on the statement.

The claimant misunderstood the recent annual statement showing November 1, 2013 through October 31, 2014, to mean that he had not participated in the plan prior to November 1, 2013.

The claimant did not present testimony or evidence to show the profit sharing balance is incorrect.

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

The claimant also alleges he is due $1,087.00 for sixteen hours of unpaid vacation pay from 2014 and thirty-two hours of unpaid vacation pay from 2015.

The employer argues that the claimant accrued eighty hours of vacation pay for 2014, for which he was paid in full, documentation previously submitted. The employer terminated the claimant on July 5, 2015. At that time, the claimant had been paid for forty-eight hours of vacation pay, but had only accrued 35.4 hours of vacation pay. The claimant ended his employment having used more vacation pay than he had accrued.

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.

The employer properly noticed the claimant of the written policy regarding vacation pay.

The written vacation policy states, in relevant part, "The company will pay vacations in accordance with years of service as follows: 2. After five years of service – 10 Paid Vacation Days. Vacation days are accrued throughout the calendar year, and may not be taken in advance without supervisor approval. Vacation days cannot be accumulated year to year."

The employer provided documentation, previously submitted, that the claimant had accrued and received payment for eighty hours of vacation pay in 2014.

The employer provided documentation, previously submitted, that the claimant had accrued 35.4 hours and received payment for forty-eight hours of vacation pay in 2015.

The claimant understood the vacation policy to mean that he accrued vacation hours throughout the calendar year and then on the following January 1, had the vested balance of vacation days to use.

The employer's policy states that they will pay vacations commensurate with the number of years of service at a certain level. Those vacation days are accrued, at the appropriate accrual rate, during the calendar year for use during that same calendar year. Vacation days cannot be rolled over from year to year.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed vacation pay.

The claimant asserts he is owed $1,771.60 because the employer deducted one and one half hour from his total hours worked each week for smoking breaks.

The employer argues that though the company has a no smoking policy and a no break policy. However, the claimant needed to take smoke breaks. The parties reduced an agreement to writing for the deduction of one and one half hours per week for smoke breaks, though in reality they had agreed to a twenty minute per day deduction. The claimant credibly testified he signed the agreement because he felt he did not have any other options.

RSA 275:43 requires an employer to pay an employee for all time worked on designated pay day. 29CFR785.18 incorporated by LAB 803.04, states, "Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time".

RSA 275:50 states that no provision of this subdivision may in any way be contravened or set aside by private agreement, except as provided in RSA 275:53.

The Hearing Officer finds the employer cannot make arbitrary deductions for breaks of any kind that must be considered work time.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed wages in the amount of $1,771.60.

The claimant also argues he is due $178.26 in AFLAC premium which the employer deducted from his final wages upon separation.

The employer pays the AFLAC premium on the first of each month. They then recoup the premium on a weekly basis from the claimant over the course of the following month. As the claimant was terminated on July 5, 2015, the employer had already paid the claimant's premium for July. They deducted the remainder of his weekly premiums from his final pay check, in the amount of $178.26. The policy remained in effect until the end of July 2015.

The claimant authorized the weekly deduction for the AFLAC insurance.

The Hearing Officer finds that the claimant authorized the employer to deduct the weekly AFLAC premium from his wages for the insurance, and that the employer was justified in deducting this premium from the claimant's final check for the remainder of July 2015 because the claimant receive the benefit of this deduction.

The Hearing Officer finds that the claimant fails to prove by a preponderance of the evidence that the employer illegally deducted insurance premium from his wages.

DISCUSSION

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 the claim for hours deducted from his weekly totals for smoking breaks.

The Hearing Officer finds the claimant failed to meet his burden in the claims for profit sharing, vacation pay, and the deducted AFLAC premiums.

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 proved 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 valid in the amount of $1,771.60.

As RSA 275:42 III considers profit sharing to be wages, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any profit sharing, it is hereby ruled that this portion of the Wage Claim is invalid.

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 I allows an employer to make deductions with the claimant's written consent, and as the Department finds that the claimant failed to prove by a preponderance of the evidence that the employer made illegal deductions from his wages, 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 $1,771.60, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey
Hearing Officer

Date of Decision: Ocotber 28, 2015

MJD/kdc