

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

FITZ VOGT ASSOCIATES

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 V unpaid vacation time

Employer: Fitz Vogt, 889 Elm St, Manchester, NH 03101

Date of Hearing: October 7, 2015

Case No. 51388

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on August 7, 2015. 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 September 18, 2015.

The claimant testified that he worked in a Cook's position. He was an hourly employee and punched a time clock. The claimant further testified that he did work with an employee handbook and that he was aware of the provisions of the handbook and had signed it in acknowledgement of having received and reviewed it. He also stated that any time there were changes to the handbook, he was notified and signed off on the changes.

The claimant testified that the employer lost their contract with the nursing home where the claimant worked. The claimant stated that he received a notice of the loss of the contract on April 1, 2015. The contract ended on June 30, 2015.

The claimant testified that he had a total of 77.73 hours of accrued vacation time as of June 30, 2015. The claimant believes that this time is due to him because the rules say that the time is lost if you terminate your position. The claimant maintains that he did not terminate his position he lost it when the employer lost the contract with the establishment where he worked.

The claimant further testified that he was not able to take the time off after April 1, 2015 because of the need to continue his work for the people of the nursing home. The claimant also testified that when other people call out of work, he was often called to fill in for these people.

The claimant has filed the Wage Claim for \$1,094.44 in unused accrued time.

The employer testified that the claimant worked under their personnel policies and that he was aware of the policies. On June 30, 2015 the claimant and other employees in the same situation were terminated because the contract was at an end. The employer testified that when the contract was not renewed the new holder of the contract did not assume any personal debts of the previous contract holder. At that point all accrued leave was lost if not used.

The employer further testified that the claimant, between May 1, 2015 and June 30, 2015, used the most accrued time of any employee. The employer further testified that the policy was in place and that it was strictly followed in the past. There was a "use it or lose it" policy and it was known to the employees.

The employer testified that the claimant was a hard worker and the claimant was hired by the new contract holder with the nursing home. The signed handbook was in place and it was followed to the intent of the section. On June 30, 2015 the claimant's employment was terminated and the signed policy was followed. The employer maintains that all wages were paid to the claimant.

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:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

This is the section of the law that mandates the 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 an issue such as vacation time into the category of wages when the time is due and owing.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, 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.

There is no doubt that the claimant was a dedicated employee and an asset to the employer. However, the written policy was in place and was known to the claimant. The written policy was clear and upon termination the time, if not used, was lost. The claimant had a break in service, a termination, on the last day of his employment with this employer. It is true that the new employer hired the claimant but they did not take on his accrued leave.

It is very apparent that the claimant was a good and dedicated employee. However, the written policy was followed in this case. 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 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 the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: November 2, 2015

TFH/kdc