

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Bedford Cosmetic & Restorative Dentistry LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43 unpaid fringe benefit and unpaid vacation pay

Employer: Bedford Cosmetic & Restorative Dentistry LLC, 360 Rte 101 Unit
12A, Bedford NH 03110

Date of Hearing: September 14, 2016

Case No.: 53008

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts she is owed \$2,235.80 in unpaid salary because the employer failed to pay her full salary each pay period; \$736.00 for a fringe benefit of a "wellness check"; and \$48 in unpaid vacation pay.

The employer argues the claimant was an hourly employee, not a salaried employee, and was paid all wage due for hours worked. He states he was committed to paying his employees for a full week even if they did not work it, but they were not salaried. The wellness check effectively paid employees in advance for not taking sick time, not retroactively for not having used sick days. He also notes they did have a change in vacation time being awarded based on anniversary date to calendar year. He feels he has paid her honestly, fairly and generously.

FINDINGS OF FACT

The claimant worked for the employer from 2008 through January 15, 2016, when she was terminated. Her initial rate of pay was \$21.50 per hour, which increased a number of times with a final rate of \$23.00.

The claimant argues she was a salaried employee because she received the same pay check every week, which changed to biweekly at some point. The employer made deductions from her pay check for hours or days not worked, which is not allowed by RSA 275:43-b.

The claimant's older pay stubs, between 2012 and July 2014, do show "salary" in the pay line. It appears the employer changed payroll companies and pay stubs going

forward simply reference dollars paid with no reference to hourly or salary. The previously submitted pay checks do not show the same payment every week.

The employer argues the claimant was an hourly employee from the time of hire through her termination. He does not have any salaried employees.

The parties agree upon hire the claimant was told she would receive an hourly rate of \$21.50. She also received wage increases in hourly rate increments.

The employer admits he did not know he was required to put employee's rates of pay in writing at hire or upon any changes, as required by RSA 275:49.

The employer provided credible and persuasive testimony that the claimant was paid on an hourly basis, not a salary basis. Further, he was committed to paying a full weekly salary even if employees were not busy, so there were weeks in which she received a full week of hourly wages even if she did not work a full week. However, over time, he did pay for only time worked.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed salary.

The claimant argues she is due a one week of a "wellness benefit" due after her separation of employment in January 2016. She argues she would have received this benefit on her anniversary date of April 7, 2016.

The employer argues this benefit is a prepayment of sick days for the upcoming year and she did not make it to her anniversary date. It is not a payment for not using sick days for the prior year.

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. 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 failed to maintain on file a signed notification; however the claimant did state she was aware there were three separate handbooks during her employment.

The most recent handbook, previously submitted, reads, in relevant part, "**As a wellness incentive, employees will be paid in advance for 4 sick days. This check will be processed on the employee's anniversary date."

and:

Under the Termination of Employment section, "Employees who are terminated or who leave voluntarily will be paid for wages through the day of termination. There will be NO pay for personal, *sick or holidays*¹ accrued prior to June 30."

The handbook notifies the claimant that of the policies and practices regarding the wellness incentive, specifically that the benefit is processed on the anniversary date as a prepayment for the upcoming year, not an accrual for the year completed.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed wellness benefit under the written policy of the employer.

The claimant now asserts she is owed vacation time in the amount of either \$106.15 for a semimonthly accrual or \$134.43 for a pay period accrual.

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.

The employer failed to maintain on file a signed notification; however the claimant did state she was aware there were three separate handbooks during her employment.

The most recent handbook, previously submitted, reads, in relevant part, "If employee leaves prior to midyear the vacation is forfeited."

The Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she is due the claimed vacation pay under the written policy of the employer.

DISCUSSION

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

DECISION

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-b requires that a salaried employee received their salary, in full, for any pay period in which they perform any work, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is invalid.

¹ Text as it appears in the employer's handbook.

As RSA 275:43 V considers sick pay/wellness incentive 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 she is due any sick pay/wellness incentive, 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 she is due any vacation pay, it is hereby ruled that this portion of the Wage Claim is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: September 27, 2016

Original: Claimant
cc: Employer

MJD/das