

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**The Community Oven Inc**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages/bonus  
RSA 275:43 V unpaid vacation pay  
RSA 275:43-b unpaid salary

**Employer:** The Community Oven Inc., 845 Lafayette Rd, Hampton, NH 03842

**Date of Hearing:** October 6, 2016

**Case No.:** 53338

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$1,000 in unpaid salary for the pay period ending July 3, 2016, as she appeared to work on June 29, 2016, and was forced to take a two week vacation. She also alleges she is due \$2,000 in unpaid vacation pay as she accrued one week June 1, 2015 and a second week June 1, 2016. She further asserts she is due \$900 in unpaid bonus for June 2016.

The employer argues the claimant did not work during the pay period ending July 3, 2016, as she was suspended without pay on June 29, 2016. They initially argued that the claimant did not earn a bonus for June 2016 as it is based on profit and performance. They then argued she received her bonus payment on July 1, 2016, anyway, even though she was not entitled to it. They argue the vacation time does not carryover from year to year and is a "use it or lose it" policy and therefore no payment is due.

**FINDINGS OF FACT**

The claimant worked for the employer from November 2013 through June 2016. She was a salaried employee receiving \$1,000 gross on a weekly basis, for a pay period of Monday through Sunday. Her last shift worked was during the pay period ending June 26, 2016, but she did appear at her next regularly scheduled shift on June 29, 2016, at which time she performed miscellaneous tasks until she attended a previously scheduled meeting with Mr. Pine to discuss "work issues". At the meeting, the employer suspended the claimant for two weeks for her to "think about her job" and whether she wanted to do it.

The parties disagree as to whether the suspension was with or without pay.

The claimant did not receive payment for this pay period and seeks her regular \$1,000 gross salary as due.

The employer argues though she appeared for work on a regularly scheduled day and did do miscellaneous tasks, that she was not performing work and is not due any salary for the pay period as she was suspended without pay. They further argue she was specifically told not to continue working after arriving to work and prior to the meeting on June 29, 2016.

RSA 275:43-b Payment of Salaried Employees. –

I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

(a) Any pay period in which such employee performs no work.

(b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.

(c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.

(d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.

(e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

II. Employers may prorate salary to a daily basis when a salaried employee is hired after the beginning of a pay period, terminates of his own accord before the end of a pay period, or is terminated for cause by the employer.

III. The employer may offset any amounts received by a salaried employee for jury duty or witness fees or military pay for a particular pay period, against the salary due for that pay period pursuant to a written bona fide leave plan, practice or policy.

Lab 803.02 Prohibitions.

(d) No employer shall prorate a salary to a daily basis in accordance with RSA 275:43-b, I, (b) and the Fair Labor Standards Act for a disciplinary suspension unless the action is a direct result of a safety violation made by such employee as required in 29 U.S.C. sec. 201 et seq. of the Fair Labor Standards Act.

The employer's argument that they suspended the claimant without pay in accordance with RSA 275:43-b is not persuasive as the suspension was not given to the claimant in writing at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice, nor was it the result of a safety violation pursuant to 29 U.S.C. sec. 201 et seq. of the Fair Labor Standards Act as required by RSA 275:43-b and Lab 803.02 (d).

The claimant appeared at work for a regularly scheduled shift and did perform work prior to meeting with the employer on June 29, 2016.

According to the employer, the claimant's restaurant keys appeared at the restaurant "a couple of days" after the meeting, which he "kind of took that as perhaps she might not come back". However, he hoped she would take the two week suspension to think about her job and come back. The claimant maintains the employer terminated her employment July 11, 2016.

Therefore, the Hearing Officer finds the claimant proves by a preponderance of the evidence she is due her full salary for the pay period ending July 3, 2016, in the amount of \$1,000.

The claimant argues she is due \$2,000 for two weeks of unpaid vacation she had accrued on June 1, 2015 and June, 1 2016.

The employer argues the vacation time did not accrue and was a "use it or lost it policy."

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 provided notice to the claimant that she would receive "A week of paid Vacation" on the agreement executed as of June 1, 2015. The employer did not have any written policy regarding the practices and policies regarding vacation pay.

The employer does not have a written policy, nor any other written mechanism which would inform the claimant that she would not be paid for vacation time at termination. Because there is no written notice to specifically inform the claimant that she would forfeit vacation pay at termination, the Hearing Officer finds that the claimant earned, and is now due, the claimed vacation pay, in the amount of \$2,000.

The claimant argues she is due approximately \$900 in unpaid bonus payments for the month of June 2016.

The employer initially argued that the claimant did not earn a bonus for June 2016, as it is based on profit and performance, and they had issue with her performance. They then argued she received her bonus payment on July 1, 2016, anyway, even though she was not entitled to it.

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 notified the claimant of the existence of the bonus policy in the June 1, 2015, job offer, stating, "Monthly Bonus dependent on profit for the month." Nothing in this written statement discusses any criteria for bonus other than profit.

The employer's argument that the claimant received her June 2016 bonus on July 1, 2016, is not persuasive as the claimant provided credible and persuasive testimony and evidence, previously submitted, that the July 1, 2016, bonus payment was for the May 2016 bonus.

The employer provided credible testimony that the claimant did not always receive a bonus. The employer did not elaborate on the reasons that bonus was not provided.

The Hearing Officer finds the claimant did not prove by a preponderance of the evidence that the employer had a profit for June 2016; therefore, she fails to prove any bonus payment is due.

### **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.

The claimant met this burden in her claim for unpaid salary and vacation pay.

She failed to meet this burden in her claim for unpaid bonus.

### **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-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 proved by a preponderance of the evidence that he was not paid all wages/salary due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$1,000.

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 proved by a preponderance of the evidence that she is due the claimed vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,000.

As RSA 275:43 I requires that an employer pay all wages, including bonuses, due an employee, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she was not paid all wages/bonuses due, 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 \$3,000 (\$1,000 + \$2,000), less any applicable taxes, within 20 days of the date of this Order.

---

Melissa J. Delorey  
Hearing Officer

Date of Decision: October 25, 2016

Original: Claimant  
cc: Employer

MJD/das