

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

LAWN DAWG, INC.

DECISION OF THE HEARING OFFICER

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

Employer: Lawn Dawg, Inc., 39 Simon St., Unit 16, Nashua, NH 03060

Date of Hearing: October 20, 2016

Case No.: 53491

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on July 25, 2016. 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 21, 2016.

The claimant testified that she worked for the employer for about eighteen months. She was employed as a staff accountant and there was a written policy and procedure manual in place. The claimant testified that she worked under an annual leave policy that was in place as of January 1, 2016. At that point in time all annual leave could be rolled over from the past and as of the new date, the employee was given a lump sum of leave and there was no more accrual process.

The claimant maintains that the new annual leave policy had different language than the sick leave policy. The sick leave policy made it clear that the time would not be paid out upon separation of service. The claimant maintains that the annual leave policy did not have this language but did have the written statement that it was a "use it or lose it" intention. The claimant believes that the lack of a payout statement in the annual leave policy shows that the time can be paid out upon separation.

The employer testified that there are two separate accounting banks in their leave process. The sick leave policy is not in question in this Wage Claim. The employer testified that accrued time is not paid out.

The employer maintains that the annual leave policy is very clear. If you do not use the time, you lose the time. The employer testified to the fact that there is not language about it not

being paid out, and that the past practice of the company was to not pay out any accrued vacation time upon separation.

FINDINGS OF FACT

RSA 275:43 I

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 an 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 she did not meet this burden.

The claimant is trying to extend the language of the sick leave policy as the guiding language of the vacation policy. They are two separate provisions of the policy and procedure manual. One section does not govern the other and you cannot put the language of one into the intent of another section of the rules.

Additionally, and perhaps more importantly, the Hearing Officer finds that the “use it or lose it” provision in the vacation time policy is clear. If you do not take off the time for approved purposes, you will lose the time if not used. When the claimant left the employ of the company she had leave time on the books that had not been used. This time is lost upon separation.

The employer was also credible in their testimony that the past practice of the company was to never pay out the accrued time. The claimant did not challenge this practice with any evidence or testimony that the time had been paid out in the past.

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 she is due any vacation pay, it is hereby ruled that the Wage Claim is invalid.

Thomas F. Hardiman
Hearing Officer

Date of Decision: November 7, 2016

Original: Claimant

cc: Employer

TFH/das