

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Reliable Restoration & Recovery LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages and commissions
RSA 275:43 V unpaid Paid Time Off (PTO)

Employer: Reliable Restoration & Recovery LLC, 333 Pleasant St, Epping, NH 03042

Date of Hearing: May 18, 2107

Case No.: 55003

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserted, through the filing of his wage claim, that he was owed \$7,414 in unpaid commissions and PTO.

At the hearing, he clarified he was seeking \$2,538.24 for 96 hours of PTO at a rate of \$26.44 per hour; unpaid commissions of \$1,098 for 2014, \$1,424 for 2015, \$2,935 for 2016 and \$1,003 for 2017.

The employer denies the claimant is due any further commissions, and has been overpaid for commissions. He also denies the claimant is due any further PTO payments under their written policy.

FINDINGS OF FACT

The claimant worked for the employer on a full time basis from October 27, 2014 to March 3, 2017, when he resigned. He received a weekly base salary and worked under two separate commissions plans during his employment.

The claimant argues he did not receive all the commission to which he was entitled during the entirety of his employment: \$1,098 for 2014, \$1,424 for 2015, \$2,935 for 2016 and \$1,003 for 2017.

The employer argues that the claimant received not only all the commissions which he earned, but was overpaid by \$1,175.37, Defendant's Exhibit #1.

The original commission plan signed October 28, 2014, states, in relevant part, "There will be 1% commission paid on all gross sales of Reliable Restoration &

Recovery. Any new business generated by me to Reliable Restoration & Recovery will be a commission of 3%.”

Exemptions are listed for established house accounts.

The parties executed a new commission agreement on February 5, 2016, which states, in relevant part, “1% paid on gross amount of full collected (paid in full) receivables on a monthly basis and 3% on New Business generated by Tom Stevens and fully collected on a monthly basis. All equipment must be picked up and accounted for prior to payment of commission.”

The Hearing Officer finds that the claimant testified as credibly, not more credibly, than the employer. The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was not paid for all commissions earned. The Hearing Officer finds that the claimant failed to meet that burden of proof as his story is only as credible as, not more credible than, the employer's. The claimant, therefore, fails to prove by a preponderance of the evidence that he is owed the claimed commissions.

The claimant argues he did not receive payment of his 96 hours of PTO upon separation, pursuant to the written policy of the employer.

The employer argues the claimant is only due two days of accrued hours under the written plan. He credibly testified the claimant used one half of a PTO day, or four hours. They are producing a check for one and one half days', or twelve hours, of PTO time to be sent to the claimant.

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/PTO 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 properly noticed the claimant of the written policy regarding PTO pay.

The written policy regarding PTO reads, in relevant part, “PTO is granted on January 1st of every calendar year.” “The granting of PTO is as follows: Full-time employees {regularly scheduled 40 hours per week or 1.0 full time equivalent (FTE)} receive 12 days (or 96 hours) of PTO.” “If the employee's employment is voluntarily terminated from employment, any accrued unused PTO leave will be paid the employee in their final paycheck.”

The written policy notices the claimant in two areas that PTO is granted, specifically on January 1st, and in the amount of 96 hours. The policy provides only one reference to “accrued, unused” PTO in the discussion regarding any payout of leave upon separation.

Nothing in the written policy states an accrual system is in place or how PTO leave is accrued. The totality of the policy notices that the PTO is granted in its entirety of the 96 hours on January 1st.

The Hearing Officer finds the employer failed to properly notify the claimant that the vacation pay was accrued, specifically stating in multiple areas the time was instead granted. Because the written policy does not specifically notify the claimant that the time is accrued, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is entitled to ninety-six hours of PTO pay as of January 1st.

The claimant used one half day, or four hours, of PTO pay. The claimant notified the Department that he had received payment of \$317.30, gross, representing twelve hours of PTO pay.

The remaining balance of eighty hours ($96 - 4 - 12 = 80$ hours) of PTO pay, or \$2,115.33, at \$26.44 per hour is found to be due and owing to the claimant.

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 failed to prove by a preponderance of the evidence that he is owed the claimed wages/commissions, 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 proved by a preponderance of the evidence that he is vacation pay, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$2,115.33.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$2,115.33, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: June 7, 2017

Original: Claimant
cc: Employer

MJD/das