

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



**v.**

**MacMulkin Chevrolet, Inc.**

**DECISION OF THE HEARING OFFICER**

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

**Employer:** MacMulkin Chevrolet, Inc., 3 Marmon Drive, P.O. Box 568X  
Nashua, NH 03061

**Date of Hearing:** December 20, 2017

**Case No.:** 56311

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns a dispute between the parties as to the status of unpaid vacation and personal time upon separation. The claimant went to work for the employer as a service technician. The claimant asserts he is owed \$2,150.00 from accumulated vacation and personal time.<sup>1</sup>

On the basis of the claimant's assertion he is owed unpaid wages in the form of unpaid personal and vacation time, the claimant filed a Wage Claim with this Department on November 6, 2017; a Notice of Wage Claim was forwarded to the employer on this same date. The employer's objection to the wage claim was received by this Department on November 13, 2017 and forwarded to the claimant this same date. The claimant requested a Hearing on November 22, 2017 and accordingly a hearing was held on December 20, 2017.

**FINDINGS OF FACT**

The claimant began working for the employer in January 2009; he resigned his position in the middle of September 2017.

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<sup>1</sup> The claimant amended his claim at hearing from the \$250.00 originally noted on his Wage Claim.

At resignation the claimant was earning \$26.00 per hour and eligible for a performance bonus of an additional \$6.00 per hour.

The claimant had accumulated seven (7) vacation days and five (5) personal days at separation. The claimant calculated their value to be \$2,150.00.

The employer holds the claimant was not eligible for a payout of his accumulated personal and vacation time consistent with the company's policy and thus he is not due any further wages.

The claimant holds he was unfamiliar with the status of his accumulated time upon separation because he was not given a copy of the handbook during his employment.

The employer testified employees are notified of policies and benefits upon hire and he is confident employees are notified when any changes are made and employee handbooks are made available.

The employer maintains an employee policy handbook; the last revision was in November 2015.

### **DISCUSSION**

The claimant holds he was not informed by the employer regarding the status of his accumulated vacation or personal time upon separation, that he never was given a copy of the employee handbook. He holds further that the language in the employer's current handbook states terminated employees are not eligible for accumulated vacation and personal time. He argues he resigned and was not terminated; therefore he should be eligible to receive his accumulated personal and vacation time.

The claimant testified he obtained a copy of the employee handbook after he left the company.

The employer testified their employee handbook was readily available in various offices in the workplace. He attested there was employee sign-off acknowledgments for the employer's policies for each employee obtained at hire and he is confident that notices were sent to employees with their paychecks at the time the policies were modified.

The claimant acknowledged it is likely handbooks are available at the workplace.

When asked by the Hearing Officer if he had read the employee handbook, the claimant responded by saying he had no memory of doing so and he never had the need to.

The Hearing Officer asked the claimant if he understood how he came to be eligible to earn personal and vacation time. He accurately described the conditions set forth in the employer's policy. The claimant was able to accurately recall the accrual of vacation (one (1) week after one (1) year; two (2) weeks after two (2) years and three (3) weeks after eight (8) years) and personal time (two (2) days after one (1) year then one

(1) day every six months thereafter). He testified he came by this information from the handbook he acquired after leaving the company and it was “verbal, from everybody.”

The claimant further argues because he *earned* (italics for emphasis) the vacation and personal time it follows he is owed the time.

RSA 275:43 V states that 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** [emphasis added].

Earned time only becomes wages “when due.” “When due” is a reference to the contingencies specified in employers’ policies.

The claimant notes the employer’s hand book specifically states that an employee’s termination makes him / her ineligible to their accumulated time. The claimant argues he left on his own accord and he understands “terminated” to mean dismissal; so therefore, he argues, he is eligible to receive his accumulated vacation and personal time.

The employer defines their use of the word “terminate” on page 16 of the December 1, 2006 Employee Handbook; it is there the employer explains that either the employee or the employer can *terminate* (italics for emphasis) the employment relationship.

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. This statute allows an employer to determine their policy concerning vacation, including **if** any payment is due at the employee upon separation.

Both parties agree as to the amount of vacation and personal time the claimant accrued at the time of his leaving the company.

The employer testified that all employees sign written acknowledgements upon hire. The claimant testified he does not remember doing so. Evidence of such was not submitted.

The employer also testified that minor modifications were made to the employee handbook in November 2015 and he is confident employees were given notices that accompanied employee pay checks at the time. The claimant testified he does not remember seeing the notice. An example of the notice was not submitted.

Save the employer’s testimony, without tangible evidence it is unclear the employer is in compliance with RSA 275:49. However, if they aren’t, it doesn’t necessarily mean the claimant would have proved he is owed additional wages.

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that he is owed the additional wages. 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 Hearing Officer finds that the claimant did not meet this burden. The claimant did not provide convincing evidence or testimony that the employer promised him, or did he provide evidence that other employees in a similar situation receive their accumulated vacation and personal time at termination.

Therefore, the Hearing Officer finds the claimant fails to prove by a preponderance of the evidence that he is owed additional wages in the amount of \$2,150.00.

### **DECISION**

Based on the testimony and evidence presented, and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43 V considers the payment of vacation and personal time 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 evidence that he is due additional wages in the amount of \$2,150.00, it is hereby ruled this Wage Claim is invalid

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David M. Zygmunt  
Hearing Officer

Date of Decision: January 18, 2018

Original: Claimant

cc: MacMulkin Chevrolet, Inc., 3 Marmon Drive, P.O. Box 568X, Nashua, NH  
03061

Attention: Arthur St. Denis, Operations Manager

DMZ/nm