

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

**v.**

**Clipper Harbor / Health Care Services Group, Inc.**

**DECISION OF THE HEARING OFFICER**

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

**Employer:** Clipper Harbor / Healthcare Services, Inc., 155 Jones Avenue  
Portsmouth, NH 03801

**Date of Hearing:** January 25, 2018

**Case No.:** 56520

**BACKGROUND AND STATEMENT OF THE ISSUES**

The current issue concerns a dispute between the parties as to the status of used, but unpaid vacation time.

The claimant worked as a cook aide for the employer, a provider of dietary services since its acquisition of the claimant's former employer in April 2017. She had worked in the same capacity for the former employer since February 28, 2008.

The claimant asserts she is owed for two days of vacation pay.

The employer holds that company policy prohibits the employee's use of vacation time during a period of notice, thus she is not due further wages.

On the basis of the claimant's assertion she is owed unpaid wages in the form of unpaid vacation time, the claimant filed a Wage Claim with this Department on December 15, 2017. The employer did not respond to the Notice of Wage Claim thus a Notice of Hearing was sent to the parties on January 5, 2018 and accordingly a hearing was held on January 25, 2018.

The claimant made a motion for liquidated damages at the Hearing; the employer declined the option to waive the fourteen (14) day prior notice specified in Lab 204.02.

This case was kept open until the end of business February 8, 2018 in order for the employer to comply with the Hearing Officer's request to submit a copy of the company's employee vacation policy both to the Department and the claimant. The claimant's comments, if any, were to be forwarded to this Department.

To-date the employer has failed to forward a copy of their vacation policy to this Department.

### **FINDINGS OF FACT**

The claimant worked for the employer from approximately April 2, 2017 through her last day of work, Thanksgiving, November 23, 2017.

The claimant earned \$14.50 per hour, with shift and weekend differentials, and paid biweekly.

On September 3, 2017 the claimant submitted a request to use two (days) of her accumulated vacation time, in the amount of fifteen (15) hours divided between November 22, 2017 and November 24, 2017.

The employer approved the request.

On November 17, 2017 the claimant gave notice that December 3, 2017 would be her last day as a full time employee and wrote she would like to remain on as a part time or per diem employee. She holds that she was not quitting, rather she would only be available part-time.

The claimant testified the employer did not specifically state, or otherwise have a practice, precluding employee's use of accrued vacation time during a period of notice.

The claimant used the two days (15 hours) of her accrued vacation time and was not paid for it.

The employer informed the claimant she was precluded from being paid vacation time during the period of notice per company policy.

On January 11, 2018 the claimant contacted the Department of Labor Inspection Division to ask for assistance with this matter. The employer acknowledged that on January 11, 2018 he spoke with a Labor Inspector.

### **DISCUSSION**

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that she is owed any 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.

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.

The claimant argues she is due wages in the amount of \$220.00 for fifteen (15) hours of vacation time she used with the employer's approval over two (2) days. The claimant also testified she based the claim amount on earning \$14.50 per hour. Fifteen (15) hours times this rate of pay (15 x \$14.50 = \$217.50) is actually \$217.50.

The claimant credibly testified she made repeated efforts to obtain her unpaid wages from the employer including, at one point enlisted the assistance of a wage and inspector from this Department.

The employer agrees the claimant's request was made and approved on or about September 3, 2017. However, he came to learn at some point that it was against company policy for employees to use their vacation time during a period of notice, so the employer did not pay her after she used the two (2) days.

The employer testified he informed the claimant she would not get paid prior to her using the days, but that he would none-the-less try to get her paid. The claimant asserts the employer's promises were promises to pay her, not promises to *try* to get her paid.

RSA 275:49 V requires the employer to make available to employees, in writing, or through a posted notice, employment practices and policies with regard to vacation pay. Lab 803.03 (f) (6) requires an employer to maintain on file a signed copy of the notification.

This Hearing Officer asked the employer if he had a copy of the claimant's signed acknowledgement of the company's vacation policy. He did not have one, and stated there might be one in his office.

The claimant stated she did not have a signed acknowledgement, and does not have memory of signing one.

Neither party submitted a copy of the company vacation policy for this Hearing.

The employer failed to follow through with their assurance to send a copy of the company's vacation policy to this Department by the end of business February 8, 2018.

The Hearing Officer finds the claimant's testimony credible that she requested to use her accrued vacation time sufficiently ahead of time and that the request was approved by the employer; she used the time and was not compensated, she made repeated attempts to obtain the funds from the employer including seeking assistance from this Department.

The Hearing Officer finds the employer's testimony unconvincing that the claimant was sufficiently informed she would not be paid for using her accrued vacation time, and notes the employer failed to follow through with an assurance made to this Hearing Officer they would forward a copy of their company vacation policy to this Department.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that she is owed additional wages in the form of unpaid vacation time in the amount of \$217.50.

## **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 time 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 owed the claimed wages in the form of vacation time, it is hereby ruled that this Wage Claim is valid in the amount of \$217.50.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$217.50, less applicable taxes, with a statement of such deductions within 20 days of the date of this Order.

Date of Decision: March 9, 2018

Original: Claimant  
cc: Clipper Harbor, 155 Jones Avenue, Portsmouth, NH 03801  
Attention: Elizabeth Mitchel Briggs