STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[redacted]
v.
Deborah Nitzschke
CASE #101074

[redacted]
v.
Deborah Nitzschke
CASE #101083

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimants, self-represented

John Prendergast, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)

RSA 255:43, I — Weekly (unpaid bonus)

RSA 275:44, IV — Employees Separated from Employment before Pay Days (liquidated damages)

RSA 275:42, II — Definitions (employee/employer relationship)*

DATE OF HEARING: June 14, 2022 (record closed June 28, 2022)

BACKGROUND AND STATEMENT OF THE ISSUES

The claimants filed individual wage complaints against the employer on February 12, 2022. Each advanced two claims. one for an unpaid bonus and the other for liquidated damages. The employer objected and the claimants requested a hearing. The cases were consolidated and the hearing notice was sent on May 25, 2022.

FINDINGS OF FACT

The following findings are based on the testimony of the claimants and the employer, claimants' consolidated exhibits, employer's exhibits, and matters of

* Issue resolved prior to the hearing. See May 12, 2022 email to parties from Sarah F. Fuller, Hearings Administrator.

record in the Department file. Each witness acknowledged under oath that her written submissions to the Department were true and accurate to the best of her knowledge and belief, and those statements are treated herein as part of the testimony in the case.

Claimant [redacted] is 45 years old and lives in Antrim. She attended college but does not have a degree. She studied business management. Prior to working for the employer, her prior jobs were property and casualty insurance agent, IT supervisor, supervisor of a road crew, and office administrator for small businesses. She started working for the employer's financial services business in 2014. She was hired as an administrative assistant and was later promoted to financial paraplanner. Her final rate of pay was $28.40 per hour. Cl-Exh. 33.

Claimant [redacted] is 62 and lives in Peterborough. She has a high school diploma. Her prior work included eight years as a commercial over-the-road truck driver, seven years running an outpatient lab at a hospital, and blood collection for the American Red Cross. She started working for the employer on December 16, 2019 as an administrative assistant. Her final rate of pay was $22.26. Cl-Exh. 23.

The employer Deborah Nitzschke is 55 and lives in Henniker. She is a certified financial planner with 27 years of experience. She ran her financial services business as an independent franchisee of Ameriprise Financial, Inc. She sold the business in January 2022.

From December 2019 on, the employer had two employees, Ms. [redacted] and Ms. [redacted] They worked in the company's offices in Henniker until March 2020 and the COVID pandemic. After that, Ms. [redacted] and Ms. [redacted] worked remotely from their homes. Both were supplied with the necessary computer and office equipment to continue doing their jobs.

On or about October 1, 2021 both claimants gave notice that they were resigning. Cl-Exh. 7. At the time, the employer was attempting to find a buyer for her business. She negotiated with the claimants to have them stay on with the company until she sold it. On October 11, 2021, the claimants and the employer reached a verbal agreement. Ms. [redacted] testified that, in addition to giving them an immediate hourly raise of three dollars, the employer offered each of them a $5,000 bonus if they would stay on through the busy period in December 2021, and an additional $5,000 if they would stay on until the sale was completed. The claimants accepted the offer and continued working until January 26, 2022, when the employer ceased doing business.

Claimants were paid by direct deposit on a biweekly basis. Pay periods ran from Wednesday to Tuesday; payday was the following Friday. The last day of work was January 26, 2022. Claimants received their final paychecks on

February 4, 2022, which was the next regular payday. Ms. [redacted] received $5,249.90 in hourly earnings; Ms. [redacted] $6,024.60.

In addition to their regular hourly wages, the final paychecks included an additional amount, for Ms. [redacted] $2,300.00 and Ms. [redacted] $3,000.00. On Ms. Jimenez's paystub, the additional amount was designated as "bonus." Cl-Exh. 34. (No paystub was submitted for Ms. [redacted]

That same day, February 4, 2022, both claimants complained via email to the employer that they were not paid the full amount of their respective bonuses and also that they did not receive their final pay within 72 hours of their last day at work. Cl-Exh. 36–37. In her email, Ms. [redacted] described the terms of the bonus agreement:

> Per our agreement on October 11th, [redacted] and I agreed to continue to work for the practice until it was sold, in exchange for an immediate raise for each of us, and an additional raise (independent of annual review raises) in the beginning of December after the building sold and/or a bonus payout at the end of our employment. The total additional payout. beyond the initial raise was to be between $5,000 to $10,000 each, dependent upon our fulfilling our regular employment duties until the sale of the practice was complete. According to the notes from that conversation, the amount paid would be dependent on how long we stayed, with the minimum length being through the first two weeks in December when the busy season for the practice began to wrap up, the full amount to be due if we stayed to the end.

Cl-36, Er-Exh. 27.

On February 7, the employer responded to Ms. [redacted] as follows:

> I received your email. I can understand that you may have delayed taking on a new employment position as a result of the transition. Therefore, it is my intention to pay your bonus up to the $5,000.00 range that we discussed. In order to complete this I will require a release that our compensation agreement has been fulfilled.

Cl-Exh. 39. Er-Exh. 30.

Ms. [redacted] responded as follows:

> Unfortunately, that does not fulfill the terms of our agreement. We had a contract I expected you to honor since we held up our end. I will let the Department of Labor handle it.

Cl-Exh. 40, Er.-Exh. 31. The claimants did not sign a release and no additional payments were made. They filed the instant wage claims on February 14, 2022.

In her testimony, the employer did not disagree with the terms of the agreement as it was set forth in Ms. [redacted] February 4, 2022 email. However, she enumerated a number of specific tasks relating to the business windup and transition that the claimants failed to perform satisfactorily. She further stated that the claimants wasted significant time on tasks that were of no value to the company. She testified that the extra amounts she paid to each claimant in their

final paychecks were based on her assessment of how well they had performed their responsibilities under the bonus agreement.

The claimants countered that they had done more than could reasonably have been expected of them with respect to their regular duties and assisting in the transition. Included in their exhibits were letters from the buyer of the business, Terrence McCormick, addressed to each of them individually. Mr. McCormick explained that he would not be offering them continuing employment because he already had sufficient staff. He closed each letter as follows:

> We are very grateful for the time and attention you have given to the transition and your willingness to stay on through the completion of the transition. Your professionalism is commendable and should serve you well at your next position.

Cl-Exh. 12, 13. The claimants pointed out that Ms. [redacted] December 21, 2021 performance review was generally positive and that it concluded with a six percent raise for her. Cl-Exh. 8–11. Also, they noted that that there were no documents or other exhibits to corroborate the employer's claims of poor performance and no evidence that the employer complained to the claimants about poor performance.

DISCUSSION AND CONCLUSIONS

The claimants had the burden of proving by a preponderance of the evidence that they were owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

Claim for unpaid bonus. A bonus award, when due, is considered part of wages, pursuant to RSA 275:42, III. "When due" is a reference to contingencies specified in the description of the bonus offer that the employee needs to meet in order to be eligible for the bonus. It is the claimants' burden to prove that the employer offered them a bonus and that they met the contingencies entitling them to receive the bonus.

At the outset, it is noted that counsel for the employer characterized the extra payments as severance pay rather than bonus awards. However, the claimants' testimony is credited that the employer made the offer as an incentive for them to stay on with the company at least until the busy period in December and, ideally, until the sale was completed, rather than resigning immediately as they had intended to do. Thus, the extra payments were a reward to be earned—otherwise known as a bonus. The payment was characterized as a bonus on Ms. [redacted] paystub. The email description of the agreement relied upon by both parties described the extra payment as a bonus, Cl-36, Er-Exh. 27,

and the employer referred to it as a bonus in a subsequent email. Cl-Exh. 39, Er-Exh. 30. It is therefore found that the "additional payments" at issue here were bonuses and not severance pay.

In her testimony, Ms. [redacted] described the bonus agreement as a two-step incentive: For staying on the job through the busy part of December, claimants would receive $5,000.00. For staying on until the completion of the sale, they would receive an additional $5,000.00.

Ms. [redacted] emailed recounting of the terms of the verbal agreement, Cl-36, Er-Exh. 27, is consistent with her testimony. The employer did not challenge its accuracy. It is therefore taken as a memorialization of the verbal agreement. However, it will not be parsed as might be done with a document drafted by lawyers. The testimony of the parties will be used as an aid to interpreting it.

The key provision that the claimants and the employer agreed upon was that the amount of the bonus payout would be "dependent upon our fulfilling our regular employment duties until the sale of the practice was complete" and "on how long we stayed, with the minimum length being through the first two weeks in December when the busy season for the practice began to wrap up, the full amount to be due if we stayed to the end." Cl-36, Er-Exh. 27.

The parties differed as to the significance of the $5,000–$10,000 range. Claimants' position appeared to be that $5,000 was the amount they would receive if they worked through the first two weeks of December and quit then. If they worked through to the date of sale, they would receive $10,000.00. Ms. [redacted] testified that there were no other specific requirements as to eligibility for the bonus. Consistent with that understanding, the claimants rejected the employer's February 7, 2022 offer of $5,000.00 because they had stayed until the business sold and "held up our end." Cl-Exh. 40, Er.-Exh. 31.

The employer testified that she retained discretion to award lesser bonuses based on her assessment of how well the claimants performed their regular duties and their special assignments related to closing down the business and assisting in the transition to a new owner. Thus, $5,000 was the maximum the claimants could earn if they stayed through mid-December and fulfilled all their duties, and $10,000 was the maximum they could earn if they stayed until the business closed and they fulfilled all their duties. If she determined that their performance was deficient, she could award a lesser amount even if they stayed on until the closing.

To the extent the claimants believed that working until the sale was completed automatically entitled them to the full bonus, and that participation in the business wind-up and transition were not part of the bonus agreement, that understanding was not reasonable in light of the February 4, 2022 memorialization and the circumstances under which the agreement was originally made on

October 11, 2021. The February 4, 2022 email describes the bonuses as "dependent upon our fulfilling our regular employment duties"; and based on the testimony regarding the October 11, 2022 agreement, it is found that those regular employment duties would entail assisting in the business windup and transition.

The employer's understanding of the agreement is found to be reasonable and consistent with the notion of a bonus. By staying until the business closed, the claimants became eligible to receive a bonus of up to $10,000; however, the exact amount of the bonus was subject to the employer's sound discretion, based on her assessment of how well the claimants fulfilled their responsibilities—including participating in the wind-up and transition.

Decisions committed by agreement to an employer's discretion are subject to an implied condition of good faith and fair dealing. Richard v. Good Luck Trailer Court (N.H. 2008). An employer cannot use such a provision to deprive the employee of the benefit of the bargain entered into upon employment.

Here, the employer made a determination that the claimants did qualify for a bonus—just not the maximum bonus. It is not the Department's role to substitute its judgment for the employer's, but rather to determine whether the evidence showed that the employer, by not paying the maximum bonus but a lesser amount, deprived the claimants of the benefit of the bargain they entered into upon agreement.

It is found that the claimants failed to prove that it was an abuse of discretion for the employer not to pay them the maximum bonus award. Neither did they prove that they were entitled to any specific lesser amount beyond the $3,000.00 and $2,700.00 amounts already paid as a bonus.

Claim for liquidated damages. RSA 275:44 provides, in pertinent part,

> I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.
>
> II. Whenever an employee quits or resigns, the employer shall pay the employee's wages no later than the next regular payday, as provided under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the employer shall pay all wages earned by the employee within 72 hours.
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> III. When work of an employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the employer shall pay in full to such employee not later than the next regular payday, as designated under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.
>
> IV. If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues

> after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller.

The claimants argue that paragraph I sets the applicable time limits for payment, because they were discharged by the employer. The employer argues that paragraph III sets the applicable time limits, because the claimants were not discharged for misconduct but instead were laid off.

The statute does not define the terms discharge and layoff. In common usage, "discharge" sometimes implies a degree of misconduct on the part of the discharged employee and sometimes does not. However, in legal texts, the term does not generally carry that implication:

> **Discharge.** To release; liberate; annul; unburden; disencumber; dismiss. To extinguish an obligation; terminate employment of person; release, as from prison, confinement, or military service.

Black's Law Dictionary 416 (5th ed. 1979) (emphasis added). In common usage, layoff covers both temporary and permanent separation from work and it does not carry an implication of employee misconduct. The same is true in legal texts:

> **Layoff.** A termination of employment at the will of the employer. Such may be temporary (e.g., caused by seasonal or adverse economic conditions) or permanent.

Id. 799, Based on the foregoing discussion, claimants' separation from payroll could arguably fall under either subparagraph I or III.

However, the employer's interpretation of discharge as excluding no-fault terminations violates the maxim that a statute should not be interpreted to lead to an absurd, unjust, or illogical result. In re Russell C., 120 N.H. 260, 264 (1980). It would mean that any person fired for cause would be entitled to final payment within 72 hours (paragraph I) while any person who is terminated without fault would have to wait until the next regular payday (paragraph III). In the specific case of a person who is laid off temporarily or indefinitely for lack of work with a promise or expectation of being called back, such a result may not qualify as absurd, unjust, and illogical. However, to require an employee who is permanently terminated without misconduct to wait longer for his or her paycheck than would a person fired for misconduct is illogical, unjust, and absurd.

The employer's reliance upon Appeal of Beebe, 124 N.H. 533 (1984), is misplaced. That case involved an employee who was laid off on January 7 and, while laid off, committed misconduct on January 13 for which he was fired. Had he not committed the misconduct, he would have been recalled on January 18. The issue was whether he was eligible to receive unemployment benefits in light of RSA 282-A:32, I(b), which disqualifies a person from receiving such benefits if he or she "was discharged for misconduct connected with his work." (Emphasis added).

The statute at issue in Beebe. RSA 282–A:32, I(b), does not use discharge with an implication of misconduct; it explicitly references misconduct.

Unlike RSA 282-A:32, I(b), RSA 275:44, I omits any reference to misconduct. Beebe does not support inferring misconduct where none is mentioned.

The employer's argument that, because the claimants were not terminated for misconduct, their final paycheck was not due until the next regular payday, is unpersuasive. It is found that the claimants were entitled to receive their paycheck within 72 hours of their discharge, as mandated by RSA 275:44, I.

Pursuant to RSA 275:44, IV, an award of liquidated damages requires a finding that the employer acted "willfully and without good cause." Our Supreme Court has construed this expression as a single phrase meaning "voluntarily, with knowledge that the wages are owed and despite financial ability to pay them." Ives v. Manchester Subaru, Inc. (N.H. 1985). The Court stated, "A willful act is a voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact."

That standard is satisfied in this case. The employer knew that the claimants' last day was January 26, 2022, the day the business closed. She had the financial ability to pay their final wages. Even assuming the employer believed final wages were not due until the next regular payday, she was mistaken as a matter of law, and ignorance of the law does not constitute good cause for failure to pay final wages in time. The claimants proved they were entitled to liquidated damages.

Claimants were discharged on January 26, 2022. Their final wages were due within 72 hours, i.e., on January 29, 2022. For each countable day after that during which the amount remained unpaid, damages accrued at ten percent of the total due, up to a maximum amount equal to the amount of unpaid wages. Claimants received their final wages on February 4, 2022. There were five countable days during which they were not paid: January 31 and February 1–4. (The day they received payment is counted; otherwise, employers could routinely delay payment by one day past the deadline without any consequences.)

Liquidated damages are assessed as follows:

Ms. [redacted] $5,249.90 x 10% x 5 days = $2,624.95
Ms. [redacted] $6,024.60 x 10% x 5 days = $3,012.30

DECISION

Having reviewed the evidence and arguments in the case, it is found that the claimants failed to prove that they were entitled to the full $10,000.00 bonus or any lesser amount not already paid. Accordingly, their claims for unpaid bonus are ruled **invalid**.

With respect to their claims for liquidated damages, it is found that the claimants proved that the employer willfully and without good cause failed to pay

their final wages when due for five countable days. The claims for liquidated damages are therefore found to be **valid**.

The employer is hereby ordered to send a check to the Labor Department, payable to [redacted] in the amount of $3,012.30, within 30 days of the date of this Order.

The employer is hereby ordered to send a check to the Labor Department, payable to [redacted] in the amount of $2,624.95, within 30 days of the date of this Order.

July 12, 2022
Date of Decision

George A. Stewart, Hearing Officer

GAS/nd