

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

████████████████████
v.
BISHOP BRADY HIGH SCHOOL

CASE NO. 102968

DECISION OF THE HEARING OFFICER

Appearances: ██████████ the claimant appeared Pro Se.
Attorney Christopher J. Pyles appeared on behalf of the employer.

Nature of Dispute: RSA 275:43 V - Weekly, Unpaid Vacation Pay
RSA 275:43 V - Weekly, Unpaid Sick Pay

Employer: Bishop Brady High School

Witnesses: ██████████ the claimant
Lisa Goddard, the claimant's fiancé
Keith Bergeron, Dean of Students at Bishop Brady High School

Date of Hearing: August 29, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on July 1, 2022, asserting that he is due unpaid wages in the amount of \$4,500.00 for vacation and sick time he accrued but did not use prior to his termination.

The employer was notified by the Department of Labor (DOL) via mailing dated July 1, 2022. The employer objected to the wage claim on July 18, 2022. This hearing was then scheduled accordingly for review of the claimant's claim for unpaid wages under RSA 275:43 V for August 29, 2022 at 1:00 pm. The hearing was held at the DOL offices in Concord, NH with the above parties in attendance.

FINDINGS OF FACT

Mr. ██████████ is a 63-year-old who was hired as the Head Football Coach and Athletic Director at Bishop Brady High School (BBHS) as of July 8, 2021. He was also required to teach one section of the school's Leadership Class and served as the interim tennis coach for the spring of 2022. He was paid \$55,500 for his work as the Athletic Director as well as \$2,000 per semester for teaching the Leadership Class. He was paid in 26 installments. His employment offer also stated he would be eligible for "a

bonus of 12% of the value of financial gifts" he generated. *See page 4.* The claimant's employment offer further stated that he had ten sick days per year, twenty vacation days per year and "flexible hours during non-school and/or non-athletic days". *See page 4.* His employment offer also stated that he would be considered an employee at will. *See page 5.*

On May 3, 2022, an e-mail was sent to the claimant to alert him that he had utilized all his sick time. This e-mail also explained how the claimant could apply for short term disability. *See page 3.*

The claimant was originally sent a letter that he was to be terminated effective June 30, 2022. *See page 2.* However, a letter dated June 8, 2022 noted that concerns about the performance of his duties brought this date forward to June 14, 2022. This letter also stated: "Our records also indicate that you took 26 other paid days off for a total of 36 paid days off even though you were only eligible for 20 vacation and 10 sick days. Therefore, no further paid sick or vacation days are available to you, and you have no accrued, unused time to be paid upon termination of employment." *See page 6.*

Testimony of ██████████

Mr. ██████████ testified that his job as Athletic Director was not able to be accomplished within normal business hours. He would frequently work late into the night and on weekends to get things done. His duties included fundraising, scheduling games/practices for 29 different athletic programs, marketing/communication with parents, monitoring compliance with New Hampshire Interscholastic Athletic Association rules, enforcing concussion and COVID protocols, and attending as many of the games/matches/meets as possible. He also oversaw the renovation of the school's strength training facility. Mr. ██████████ testified that he was preparing an evidentiary packet for submission but did not submit it within the required timeframe because he was on vacation in Florida.

In addition to his duties as Athletic Director, Mr. ██████████ was also the Head Coach for the Football Team. His season officially ran from the second week in August through the third week of October. However, he also ran a summer conditioning program. He had two assistant coaches on his staff for football who shared his workload for that sport.

Mr. ██████████ testified that he understood he had a total of 30 days off to use during the school year, and he does not believe he went over that. Specifically, he indicated that even on his trips to Florida and the date of his knee surgery he was still responding to work-related e-mails and text messages. He testified that if there was a time when he was totally absent, he understood that Mr. Bergeron or Principal Andrea Elliot were available as alternate emergency contacts.

Regarding the mention in his employment offer of "non-athletic days", Mr. ██████████ testified he could only name a few days that would fit that description. Those days included the Thursday through Monday of Easter Weekend, April Vacation Week, and the week of Prom.

Mr. ██████████ testified that he did not always fill out the timecards BBHS used as he was a salaried employee, so the number of hours he worked was immaterial. He indicated that he was never told why he had to complete the timecards. Mr. ██████████ testified that he did not complete any timecard for the week of February 28, 2022 through March 4, 2022 as this was February vacation. *See page 34.*

Mr. ██████████ testified that he was told after the February Vacation period that it was considered part of his calculated vacation day use. Mr. ██████████ stated that he believed there were at least twenty days he was not paid for.

On cross examination, Mr. ██████████ agreed that his timecards do not include hours worked on July 9, 2021, August 5 and 6, 2021, as well as November 29, 2021. *See page 18, 20, and 28.* Mr. ██████████ further agreed that his timecards note on July 23 and 30, 2021 and October 29, 2021 he was "off", and on September 14, 2021 that he was "out" (though Mr. ██████████ said that is not his handwriting). *See page 19, 23, and 26.* Mr. ██████████ further agreed on cross examination that this is a total of ten calendar days.

Mr. ██████████ also agreed that his timecard reflected he was out due to a positive COVID test between January 7, and 10, 2022 for a total of three additional days off. *See page 30.* He was again out of work due to a positive COVID test between January 17, and 21, 2022 for a total of five additional days off. *See page 31.* Mr. ██████████ testified that even when he had COVID he was still working from home.

Mr. ██████████ further testified that the notation on his timecard for the pay period of April 25, 2022 through May 6, 2022 of "Knee Replacement" is not his handwriting. *See page 38.* This would include an additional 10 days of time off. Mr. ██████████ testified that immediately following his knee replacement he was still working 50-60 hours per week from home.

Mr. ██████████ testified that he was allowed to return to work by his treating physician on a restricted schedule beginning on May 10, 2022. His schedule was four to six hours of working from home Monday, Wednesday, and Friday; as well as four hours at BBHS on Tuesday and Thursday.

Testimony of Lisa Goddard:

Ms. Goddard is Mr. ██████████ fiancé and they have been in a relationship the entire time he was employed at BBHS.

Ms. Goddard testified that during the 2021-2022 school year, they went to Florida twice. The first time was for the Thanksgiving Holiday, a trip which lasted from Wednesday November 24, 2021 through Monday November 28, 2021. Ms. Goddard testified that Mr. ██████████ spent most of the time on this trip working in some way.

Ms. Goddard further testified that the second trip to Florida was over the entire week of February Vacation. Ms. Goddard further testified that the claimant spent most of his time this week working as well.

Ms. Goddard further testified that the claimant had a knee replacement surgery in April of 2022 and was unable to report to work for 17 days per his physician's instructions. However, she testified that the claimant began responding to work e-mails and text messages on the way home from his surgery. Ms. Goddard testified that she did not recall if the claimant's doctor had told him, it was okay to work from a seated position at home.

Testimony of Keith Bergeron:

Mr. Bergeron is the Dean of Students at BBHS. He worked with Mr. ██████████ when student athletes would make mistakes such as unsportsmanlike behavior or swearing during games. Mr. Bergeron testified that he would receive calls, e-mails, and text messages well outside of normal school hours during the week and on weekends.

Mr. Bergeron testified that Mr. ██████████ definitely worked more than 40 hours per week on average. However, Mr. Bergeron also testified that Mr. ██████████ was made aware that this would be required before he accepted the job.

Mr. Bergeron testified that BBHS uses timecards for salaried faculty/staff as a way of knowing who is and is not working at the school. He agreed that the hours listed were somewhat immaterial when compared to a notation that the claimant was present at BBHS.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he is owed unpaid 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 employer argued that the claimant cannot meet his burden of proof as he offered only testimonial evidence to refute what is noted on the timecards. The employer further argued that the claimant used greater than the 30 days off allowed by his employment agreement. The employer further argued that days the claimant was traveling for personal reasons would count as days off. The employer further argued that the claimant was made aware that he was out of sick time well before his termination.

The claimant argued that he had accrued vacation and sick hours and had not utilized them. The claimant further argued that the timecards are misleading as he was a salaried employee. The claimant further argued that the testimony from Mr. Bergeron and Ms. Goddard support his contention that he worked more than regular school hours. The claimant additionally argued that he had almost no days between July 8, 2021 and June 14, 2022 which did not require him to do some task related to his job at

BBHS. The claimant finally argued that the statute does not require that he be in the office to be considered working instead of using his vacation or sick time.

The employer's argument that the claimant used greater than the 30 days off allowed by his employment agreement is persuasive. The claimant's timecards indicate a total of 32 days off were taken. These dates included time off for travels to Florida (seven days), two instances of positive COVID-19 tests (eight days), days with no hours documented or a notation that he was "off" (seven days), and a knee replacement surgery (ten days). *See page 18, 19, 20, 23, 26, 28, 30, 31, and 38.* However, Mr. ██████████ and Ms. Goddard testified that he missed 17 days for his knee surgery, not the ten reflected on his timecard which would make the total time off 39 days. This is nearly one third more time off than the claimant was allowed in his employment offer. *See page 4.* The claimant offered no evidence that the employer ever withheld pay for the extra nine days. Additionally, the claimant offered no evidence that the final terms of his employment were different from those in the offer letter.

The claimant's argument that the timecards are misleading as he was a salaried employee is not persuasive. The claimant testified that he was never told why he had to complete a timecard despite being a salaried employee. However, the claimant did not testify that he ever took it upon himself to ask why this was needed. It is clear from Mr. Bergeron's testimony that had the claimant asked he would have been educated about the need for the timecards.

Additionally, the claimant's argument that he had almost no days between July 8, 2021 and June 14, 2022 which did not require him to do some task related to his job at BBHS is not persuasive. The claimant made this argument as a way of showing that he did not actually use any vacation or sick time even when he did not go into the school for several days at a time. However, by his and Mr. Bergeron's testimony the claimant was well aware that the position of Athletic Director required work outside of regular school hours.

Finally, the employer's argument that that the claimant was made aware that he was out of sick time well before his termination is persuasive. It was made clear to the claimant that he was using sick time for his recovery from his knee surgery via e-mail on May 3, 2022, approximately six weeks before his final day at BBHS. *See page 3.* Given this notice, it would have been reasonable for the claimant to investigate how much of his vacation time might still be available to him to complete his recovery. However, no evidence of such an inquiry was presented by the claimant.

Overall, the evidence shows that the claimant took a total of between 32 and 39 days off during the 2021-2022 school year at BBHS. This was more than the total of 30 days allowed by the claimant's employment offer. The claimant presented no evidence that the employer withheld any wages for the additional days off.

DECISION

Based on the evidence and testimony presented, the claimant has failed to show by a preponderance of the evidence that wages were due for ten days of accrued sick

time and 20 days of accrued vacation time. The claimant's request for payment of unpaid wages is denied.

The wage claim is ruled **invalid**.



Timothy G. Fischer
Hearing Officer

Date of Decision: September 26, 2022

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