STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.

Surface Creations of Vermont, L.L.C.
CASE #62111

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Scott Devoid, representing the employer

NATURE OF DISPUTE: RSA 275:43, I & V (unpaid wages/vacation)

DATE OF HEARING: March 25, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on February 1, 2021, alleging he is owed his vacation pay upon separation. His claim was for $2,884.62. Notice of claim was sent to employer on February 3, 2021. On February 16, the employer filed an objection accompanied by a payment of $144.20. Claimant accepted that as partial payment and requested a hearing. A notice of was sent on March 4, 2021. Both parties participated in the hearing remotely by video conference, under a standing order of the Department necessitated by the COVID-19 state of emergency.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's representative, exhibits offered by both parties[1], and matters of record in the Department file. During the course of the hearing, both parties acknowledged under oath that their written submissions to the Department were

[1] Mr. Devoid did not recall receiving the claimant's exhibits (the company's benefits policies for 2020 and 2017 and paystubs for pay dates 1/15/2021 and 2/11/2021). However, when they were described to him, he agreed that he already had copies of the documents and did not object to their use at the hearing. The claimant had made marginal notes on these exhibits but these simply restated arguments he made at the hearing and were not given independent evidentiary weight. After the hearing, it was determined that the Department did mail copies of the claimant's exhibits to the employer, attached to the claimant's request for hearing.

true and accurate to the best of their knowledge and belief, and those submissions are treated herein as part of the testimony in the case (with the exception of marginal notes on the claimant's exhibits; see footnote 1).

The claimant is years old and lives in . He has a G.E.D. For much of his working life, he has been a carpenter and granite installer. He started working for the employer in September 2010. He was hired as a granite installer and later promoted to estimator and branch manager for the Vermont-based company's operation in Claremont. He was paid a weekly salary of $1,442.31. Pay periods ran from Sunday to Saturday, with pay day the following Friday. He was paid by direct deposit.

Scott Devoid, 38, lives in Charlotte, Vermont. He is a managing member and part owner of the company, which fabricates and installs stone countertops. The company headquarters is in Milton, Vermont and it has a branch office in Claremont. Mr. Devoid purchased the company in 2019. He regularly works at the company headquarters.

On January 4, 2021, the claimant gave notice that he was ending his employment; his last day would be Friday, January 8. On Tuesday, January 5, he was terminated, effective that day. Accordingly, claimant did not work through the end of the period as planned, but only the first two days. He received his final paycheck on the next regular pay day, Friday, January 15 in the full amount of his regular salary.

All employees with at least one year of service as of January 1 received a week's paid vacation, which had to be used during the company's annual end-of-year shutdown from Christmas to New Years'. Claimant believed that he was also entitled to a payout on separation for two weeks of unused vacation time. The company refused to pay it, so he filed the instant claim.

He testified that his claim for unused vacation pay was based on the company's written policy as revised effective January 1, 2020. Claimant submitted a copy of the policy as an exhibit. That policy provides in pertinent part that employees with three or more years' service as of the first of the year are eligible for a second week's paid vacation, which must be scheduled a month in advance and approved by the manager (hereinafter, "the second vacation-week benefit"). . Employees with four or more years' service on January 1 receive an additional half-day's vacation time for each year's service beyond the fourth year. This vacation time also had to be scheduled a month in advance and approved by the manager (hereinafter, "the long-term employee benefit").

With 11 years of service, claimant believed he was entitled to the second vacation week and to the long-term employee benefit. As of January 1, 2021, he had about two weeks' of unused vacation, figured as follows:

5 days	Awarded pursuant to the second vacation-week benefit
3.5 days	Awarded pursuant to the long-term employee provision
2 days	Unused vacation pay from 2020
10.5 days	Total

Claimant rounded this down to ten days/two weeks' salary, i.e., $2,884.62.

Mr. Devoid agreed that the company practice was to pay employees for their unused vacation time on separation. He also agreed that, as of January 1, 2021, claimant had 3.5 days of unused vacation from the long-term employee benefit. He testified that three of those days were used on the claimant's final paycheck covering the pay period January 3–9. Claimant worked only Monday and Tuesday but was paid for the whole week; Wednesday, Thursday, and Friday were charged as vacation days used. That left only a half day of accrued unused vacation time. After receiving the complaint, the company wrote another check to the claimant equivalent to one-half day's work. That check was mailed to the Department and subsequently accepted by the claimant as a partial payment.

Mr. Devoid denied that claimant was entitled to a payout for the two allegedly unused days from 2020. Pursuant to company policy and practice, vacation days could not be carried over to the next year. Therefore, even if claimant were correct about the two days left over from 2020, they were forfeited at the end of the year.

With regard to the five days from the second vacation-week benefit, Mr. Devoid agreed that, under the 2020 policy, the claimant would be entitled to the additional five days he was claiming. However, he testified that the claimant was not subject to that policy; he was subject to the previous policy, adopted in 2017. The employer submitted a copy of the 2017 policy, signed by the claimant and dated January 4, 2019. According to the 2017 policy, the second week's vacation benefit was not awarded to eligible employees until July 30 of each year. The claimant separated from the company in January and therefore the second week's vacation was never awarded to him.

Explaining how he determined that the claimant was not subject to the 2020 policy, Mr. Devoid stated that he kept on file documents signed by each employee every January acknowledging receipt of the benefits policy in effect for the coming year. He had acknowledgments signed by the claimant from 2018 and 2019 but he did not have an acknowledgment showing that the claimant received the 2020 policy. He testified that, if he had on file a signed acknowledgment on the 2020 policy, the claimant would be entitled to the second-week vacation award as of January 1, 2021; he recently had another employee leave the company and, because he had on file a signed acknowledgment of the 2020 policy, this employee received the extra week.

Mr. Devoid also testified that in 2021, the company had again revised the policy. In pertinent part, the new policy was like the 2017 policy: the second week was awarded on July 30. Thus, under the 2021 policy, the claimant also would not have been entitled to the second vacation-week benefit on January 1. However, he agreed that the claimant had never seen this policy, and therefore it could not be applied to him.

In response to this testimony, the claimant testified that, as the branch manager, it was his responsibility to provide copies of such policies to all the Claremont employees and to obtain their signatures as acknowledgment of receipt. He further testified that he did sign the 2020 policy and return it to management, just as he signed the earlier policy documents in previous years. He said the copy of the 2020 policy he submitted as an exhibit was a copy of the one he turned in to management; he always kept copies of the policies as they came out. He did not know why the 2020 policy had his signature but no date, whereas the 2019 document had his signature and the date. Claimant testified that he never was shown 2021 policy.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that he was 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).

At the conclusion of the evidentiary portion of the hearing, there were three issues to be decided.

First and foremost: Was the claimant subject to the 2020 policy or the 2017 policy? The employer argued that, because there was no proof that the claimant signed the acknowledgement form on the 2020 policy, while he did have proof that the claimant signed the 2017 policy in 2019, it follows that the claimant cannot claim the benefits under the 2020 policy and is stuck with the provisions of the policy first adopted in 2017.

Contrary to the employer's argument, there was evidence that the claimant signed the 2020 policy: he testified that he signed it and turned it in with the other policies signed by the employees he managed at the Claremont office. He also provided a copy of the 2020 policy with his signature (but no date) on it.

More importantly, the employer's argument is based on a mischaracterization as to the significance of the claimant's signature on the policy. By signing, the claimant was not agreeing or electing to be subject to the

new policy instead of the preceding one; he was simply acknowledging receipt of the new policy. The acknowledgment form on the 2020 policy reads as follows:

> Please note:
> The above Benefit Policies are in effect as of 01/06/2020 and supersede any prior benefit policies.
> I have received, read and understand the above policies.
> Employee signature: _____
> Date: _____

(Emphasis added.) By its own terms, the new policy was in effect and superseded any prior policies, regardless of whether the claimant signed the form or not. The apparent purpose of obtaining the employee's signature was to undercut any future claim by the employee that he was never told about the new policy. Such acknowledgments are also required by Department Administrative Rule Lab 803.03(f)(6).

The employer's reasoning would be more apt in the context of an election of benefits, for example, choosing which insurance plan to participate in. But these policies were not elective. There is no evidence that an employee could choose to remain subject to an earlier policy.

Therefore it is found that, whether or not the claimant signed the acknowledgment, he was subject to, and a beneficiary of, the policies set forth in the 2020 document. The employer agreed that, if the 2020 policy applied, the claimant would be entitled to five days from the second vacation-week benefit.

The second issue presented was whether the claimant was entitled to a payout for the two days he claimed were left over from 2020. The 2020 policy clearly states that there is no carryover of unused benefits to the next year; it is a use-it-or-lose-it arrangement. The employer also testified that unused vacation days from the preceding year were not paid out to an employee who separates from the company after the start of the new year. Based on this evidence, it is found that this part of the claim is without merit; those two allegedly unused days were forfeited at the end of the year.

The third issue was whether the employer was allowed to subtract three days from the 3.5 days awarded to the claimant on January 1, 2021 through the long-term employee benefit, corresponding to the last three days in the final pay period during which the claimant did not work.

New Hampshire law generally requires that salaried employees "receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked," RSA 275:43-b, I. There are certain exceptions to this rule, one of which permits employers to prorate salary on a daily basis when an employee "terminates of his own accord before the end of a pay period." RSA 275:43-b, II. That exception does not apply in this case,

because it was not contested that the claimant gave notice that he was quitting effective at the end of the current pay period and that he intended to work his regular schedule that week. It was the employer's decision to terminate him on Tuesday. None of the other exceptions to the general rule apply, either. See RSA 275:43-b, I(a)-(e). The employer was therefore required to pay the claimant his full regular salary and it could not lawfully deduct those three days from his accrued vacation time.

DECISION

It is therefore found that the claimant met his burden of proving that he was entitled to a separation payout as follows:

5 days	From the second vacation-week benefit
3.5 days	From the long-term employee benefit
8.5 days	Total

Claimant's weekly rate of $1,442.31 prorates to a daily rate of $288.462. Multiplying this amount by 8.5 gives $2,451.93 as the gross amount he was due as a payout of his unused vacation pay. His claim is found to be **valid** to that extent. Subtracting the employer's partial payment of $144.20 covering one-half day of the 3.5 days owed for the long-term employee benefit) leaves a balance due of $2,307.73.

The employer is hereby ordered to send a check to the Labor Department, payable to , in the amount of $2,307.73, less applicable deductions, within 30 days of the date of this Order.

April 8, 2021
Date of Decision

George A. Stewart, Hearing Officer

GAS/cb