STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

v.
JCM Business Solutions, L.L.C.
CASE #62151

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Karen Welby, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (vacation pay/PTO)

DATE OF HEARING: April 5, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on February 5, 2021, composed of three parts: that he was not paid for two hours spent participating in a mandatory interactive orientation video and completing new-employee forms; that he was not paid for time spent going through mandatory airport security searches before starting work each day from May 2018 through the middle of 2020; and that he was entitled to a payout on separation for two accrued personal days and one weeks' accrued vacation.

Notice of claim was sent to employer on February 9, 2021. Employer filed an objection on February 22, 2021, and the notice of hearing was sent out on March 4, 2021. Both parties participated remotely by telephone under a standing order of the Department, necessitated by COVID-19.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative, exhibits offered by both parties, 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 true, and those statements are treated herein as part of the testimony in the case.

The claimant is [redacted] and lives in Manchester. He has two associate degrees, one in business administration and the other in electronics. Prior to working for the employer, he was a correctional officer in Massachusetts for 16 years. He also helped to found and served as treasurer of an independent correctional officers' union.

Karen Welby, 40, lives in Long Beach, New York. She is the HR director for the employer. She has worked for the employer since 2014. The employer is a New York-based company that provides janitorial and maintenance services in airports and other facilities in the Northeast. It has 50 employees in New Hampshire, 38 of whom work at Manchester-Boston Regional Airport.

Claimant testified that he was offered a job with the employer, following an interview on or about May 4, 2018. The interview was with office manager Carmen Estrada and took place in the staff break room. Later that day, claimant was required to participate in an interactive orientation video that lasted 90 minutes. No one told him he would be paid for completing this activity. The video dealt primarily with security issues.

After that, the claimant was given some new-employee paperwork to complete. He was told he could complete it in the break room that day or take it home. He took the paperwork home and completed it there. It took him 30 minutes. He was not paid for this time. Ms. Welby admitted that new employees are given the option of completing these forms at work and, if they do so, they are compensated for the time. Claimant chose to complete his forms at home.

Claimant's first regular day at work was Friday May 11, 2018. His job was to empty the trash barrels throughout the garage and sweep the floors. Claimant is vision-impaired and the employer tailored the job to suit his sight limitations. It did not require close reading or fine vision.

Claimant worked weekday mornings from eight until noon. After an initial period of time at $10.25 per hour, his regular hourly pay was raised to $11.00. Pay periods ran from Monday to Sunday, with pay day the following Friday.

Each day when claimant arrived at the airport, he was required to enter the airport building through an employees-only entrance and then submit to a security search. The search was performed by employees of Manchester-Boston Regional Airport. The search took about five minutes. After completing the security search, he would go to the employer's break room and punch in for work.

Claimant testified that he was required to go through security search every day from his first day at work until the end of June 2016, when the airport discontinued the mandatory security searches of employees. When he got his first paycheck, he asked Ms. Estrada if he was being paid for the time spent going through the airport security search and was told no. Claimant calculated that over the term of his employment, he spent just over 48 hours in the security searches, for which he was not paid.

Pursuant to a written Benefits Summary (employer's exhibit), the employer provides one week (40 hours) of paid vacation for regular full-time and part-time employees after the first year of continuous employment, based on a calendar year. For part-time employees, the one week is pro-rated. As a 20-hour-a-week employee, claimant earned 20 hours vacation per year. Unused vacation pay cannot be carried over to the next year and or cashed in upon separation. Pursuant to the same written policy, full-time employees receive two paid personal days per calendar year after 90 days' continuous employment. Part-time employees are not eligible for paid personal time. Unused personal time cannot be carried over or paid out on separation.

Claimant testified that on more than one occasion he requested a copy of the employee handbook but was never provided one. Claimant said that he never saw the Benefits Summary. Ms. Welby testified that the Benefits Summary was posted in the employee break room.

Ms. Welby testified that claimant received 20 hours of paid vacation time for 2019 and 20 hours for 2020. Over the same period, he received pay for 20 hours of personal time. Ms. Welby testified that the payments for personal time off were in error because, pursuant to the written policy, part-time employees are not eligible for paid personal time off. Her testimony regarding paid vacation and personal time payments was corroborated by a cumulative earnings summary (employer's exhibit).

In 2020, the employer instituted a face-covering policy in response to COVID-19. Employees were required to wear masks at work unless they provided a medical certificate that warranted exemption from the requirement. Claimant did not comply with the face-covering policy.

At the end of November 2020, claimant went out of work due to a workplace injury. His doctor released him to work as of January 4, 2021. However, the employer notified the claimant that he could not return to work unless he agreed to wear a mask or provided a medical certificate exempting him from the requirement. (Employer's exhibit.) Claimant refused to do so.

On January 6, 2021, without first getting employer's permission to return to work, claimant came to the office. During a meeting with Ms. Estrada in the office and Ms. Welby by telephone, claimant was told that, unless and until he agreed to wear a face covering or provided the required medical certificate, he could not work and would be deemed suspended. At that point, claimant turned in his employee ID badge, collected his belongings, and left. His employment effectively ended that day.

The last day the claimant worked was November 30, 2020. In his final paycheck dated Friday December 11, 2020, for the pay period Monday November 30–Sunday December 6, 2020, he was paid for the four hours regular pay plus four hours personal time off, for a total of $88.00. Employer's exhibit.

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).

Claim for unpaid time participating in the orientation video. Pursuant to RSA 275:42, "'wages' means compensation...for labor or services rendered by an employee." Thus, if the time spent watching constituted hours worked for the employer, then claimant as an hourly employee was entitled to be paid for it. As to what constitutes hours worked, Department Administrative Rule Lab 803.04 incorporates Title 29 Part 785 of the Code of Federal Regulations, promulgated by the United States Department of Labor. In pertinent part, the referenced federal regulations provide as follows:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;
>
> (b) Attendance is in fact voluntary;
>
> (c) The course, lecture, or meeting is not directly related to the employee's job; and
>
> (d) The employee does not perform any productive work during such attendance.

29 C.F.R. 785.27. All four criteria must be satisfied.

It is found that the first three criteria were not met. The training took place during the workday. He was told that before he could begin doing his job, he had to complete the interactive training video. The training concerned security issues which, in the airport context, are found to be directly related to the job of a parking garage janitor. Accordingly, it is found that the 90 minutes spent watching the video constituted hours worked, for which the claimant was entitled to be paid at his starting salary, which was $10.25 per hour.

Claim for unpaid time completing new-employee forms. It could be argued that this activity also fell within the scope of the above-cited federal regulation. However, it is not necessary to decide that point. In light of Ms. Welby's testimony that new employees are permitted to complete these forms at work while on the clock or to complete them at home and bring them back to work, it is found that the claimant was entitled to be paid for the time he spent doing them at home. Ms. Welby agreed that 30 minutes was a reasonable estimate of the time required.

Claim for time spent in airport security searches. Again, this is an issue of whether the activity in question constituted "hours worked." However, this activity clearly stands on a different footing from watching an orientation video and

completing new-employee paperwork. The searches were mandated not by the employer but by the airport authority. They did not constitute "lectures, meetings, training programs and similar activities." Thus, 29 C.F.R. sec. 785.27 does not apply.

A nearby federal regulation, 29 C.F.R. 785.34, provides in pertinent part,

> [T]ravel time at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom, or practice.

It is found that the activity in question falls within the scope of "travel time at the commencement...of the workday." Claimant cited no statute, regulation, or contractual agreement rendering compensable the time he had to spend in the security searches before reporting to work. Therefore the time was not compensable. Compare, Bonilla v. Baker Concrete Construction, Inc., 487 F.3d 1340 (11th Cir. 2007) (holding that time spent going through FAA-mandated security screening en route to worksite was not compensable under the FLSA).

Claims for Accrued Vacation Pay and Personal Time on Separation. RSA 275:43, I requires that an employer pay all wages due an employee.

> Vacation pay and personal days, when such benefits are a matter of employment practice or policy, or both, shall be considered wages when due. In this case, the claimant provided no evidence to support a finding that the employer, as a matter of practice or policy, offered payout of accrued/unused vacation pay at the time of separation.

With regard to the claim for one week's vacation pay, it is found that the clamant was paid one weeks' vacation in 2019 and one week in 2020. It is unclear whether, under the employer's written policy, he had accrued any vacation time following his second anniversary of employment on May 4, 2020. However, it is unnecessary to resolve this question, because the employer does not pay for unused vacation pay on termination. Pursuant to the employer's vacation policy, any unused vacation pay was forfeited.

With regard to the claim for unused personal time off, the employer's written policy clearly states that part-time employees are not eligible for this particular benefit. To the extent that the claimant might argue that the employer's (mistaken) approval of paid personal time off established a contrary practice, his claim for a separation benefit is nevertheless precluded, because, according to its written policy, the employer does not pay for accrued personal time on separation.

As for notice of the employer's policies, Ms. Welby's testimony that the Benefits Summary was posted in the break room is credited. Claimant's testimony that he never saw that document is not credited. Claimant was apparently aware that the policy granted him 20 hours vacation per year and two personal days per year, but unaware of the limitations on the policy, i.e., no

personal time for part-time employees and no payout of vacation or personal time upon separation. His selective awareness of the policy raises a question as to the credibility of his claim that he was unaware of the policy. There was no evidence that claimant was unable to read posted notices, either with the aid of a magnifying glass or the assistance of another person. With 16-years as a correctional officer, and experience serving as the officer of a union, it is found likely that he would be aware of the importance of taking note of notices posted in an employee break room.

The employer's apparent failure to provide the claimant with access to an employee handbook does not alter the conclusion on this point. By administrative rule, vacation and personal day benefits are required to be in writing:

> Every employer shall 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 employee's expenses, pension and all other fringe benefits per RSA 275: 49.

Lab 803.03(b) (emphasis added). The employer satisfied this requirement by posting the Benefits Summary.

Thus, it is found that the claimant failed to meet his burden of proof with respect to the claims for separation pay for unused vacation or personal time.

DECISION

For the reasons stated, the claims for unpaid wages for time spent participating in the orientation video and completing new employee paperwork are ruled **valid** to the extent of two hours at the claimant's initial hourly rate of pay, $10.25, totaling $20.50. The claims for unpaid wages for time spent in airport security searches and separation pay for unused vacation and personal time are ruled **invalid**.

The employer is hereby ordered to send a check to the Department, payable to [redacted], in the amount of $20.50 less applicable payroll deductions, within 30 days of the date of this Order.

April 22, 2021
Date of Decision

George A. Stewart, Hearing Officer

GAS/cb