

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

v.

Town of Stratham
CASE #62218

DECISION OF THE HEARING OFFICER

APPEARANCES: Keith Diaz, Esq., representing the claimant
Abigail Karoutas, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (unpaid sick pay)
RSA 275:44, IV — Employees Separated from Payroll
before Pay Days (liquidated damages) (withdrawn at
hearing)

DATE OF HEARING: April 26, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on February 23, 2021, alleging that the employer owes her a separation payout for her accrued sick leave hours valued at \$5,194.56. Notice of claim was sent on February 25, 2021. Employer filed an objection on March 11, 2021. Notice of hearing was sent on March 26, 2021. At the start of the hearing, the claimant agreed with the employer's figures as to the amount of sick time she had accrued and her final hourly rate of pay. Based on these figures, the value of her claim was amended to \$5,199.51.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's town administrator David Moore and finance administrator Dawna Duhamel, supplemented by offers of proof by counsel, exhibits offered by the parties, and matters of record in the Department file.

The claimant is years old and lives in Newfields. She started working for the town part-time in July 2010 and became a full-time employee in January 2012. She was the executive assistant to the town's chief of police.

The town's employee benefits are spelled out in an employee manual. Claimant acknowledged receiving a copy on January 5, 2012. Benefits include paid vacation time, paid sick leave, and compensatory time off. Part II (B) (12) of the manual, Termination & Severance Pay, provides as follows, in pertinent part:

When you leave the Town of Stratham, you will be paid for the actual time worked, plus any accrued but unused vacation time, as specified under "Vacations" in the "Benefits" section of this Manual and any accrued but unused sick time, as specified under "Sick Leave" in the "Benefits" section of this Manual, as well as any accrued but unused "compensatory time off" as provided in the "Compensatory Time Off" section of this Manual.

The referenced provisions for payment of accrued sick time are contained in Section 6 of Addendum B to the manual. After discussing how much sick time an employee is permitted to bank (generally up to 228 hours), the section concludes as follows:

Upon death, or state retirement, you will receive payment for any accumulated but unused sick leave at your usual rate of pay.

With regard to retirement, the employee manual at Part III (J) (1) provides that every town employee is automatically enrolled in the New Hampshire Retirement System (NHRS) and is required to make contributions to it.

On August 28, 2020, claimant voluntarily left the employ of the town. She was 52 years old at the time. Her contributions to NHRS had vested on or before December 31, 2011 and, as of her resignation date, she had accrued nearly 22 years of creditable service with the retirement system. (It was not explained where and how she accrued the 22 years, but the fact itself was not contested.) Claimant calculated that, if she elected to begin receiving retirement benefits immediately upon leaving the town's employ, her monthly pension would be \$1,010.58. If she waited until she reached 60 years of age, it would be \$1,533.23. She chose not to begin receiving benefits immediately. In September 2020, she started working full time for a real estate brokerage firm.

The town, determining that the claimant's employment did not end with her death or state retirement, did not pay the claimant her accrued but unused sick leave.

Town administrator David Moore is 53 years old and lives in Stratham. He has been employed by the town since January 2019. He has 20 years of experience in municipal administration. He testified that he had no knowledge of any town employee receiving a payout of unused, accrued sick pay other than people who elected immediately to begin receiving their retirement pension. He knew of people who left the town's employ and did not immediately retire; but in every case, those people were not yet vested and retirement-eligible at the time of separation. Such people did not receive a payout for sick pay when they left. He testified that the claimant was the first case he had heard of where a vested,

retirement-eligible employee declined to begin receiving retirement benefits but still demanded her sick pay.

The town's finance administrator Dawna Duhamel testified to the same effect.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she was owed a separation payout of her accumulated sick pay. 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).

RSA 275:43, V provides 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.

"[W]hen due" is a reference to contingencies specified in the employer's policy that the employee must meet in order to be eligible for the benefit in question. The terms and conditions of such benefits are at the sole discretion of the employer. However, RSA 275:49, V and Lab 803.03 (f) (6) require such policies to be in writing and acknowledged by the employee.

It was not contested that the employer put the policy at issue in writing, provided it to the claimant, and obtained from her a written receipt.

However, the claimant argued that the description of the policy is not sufficiently detailed and, as a result, the policy is ambiguous. Based on this premise, she posited that "ambiguity in an employment policy concerning rate of pay, vacation time, sick leave, and other fringe benefits shall be in favor of payment to the employee," citing IBM v. Kfoury (N.H. 2017). Because the policy in this case is ambiguous, she concluded, it must be construed to include persons such as the claimant who are eligible to begin receiving their pension benefits at the time of separation but choose not to do so.

The employer countered that the sick-pay policy is not ambiguous and is clear on its face, especially when taken in context of the related provisions of the employee manual. The employer also argued that claimant's reliance upon Kfoury was misplaced: the quotation from Kfoury was not a holding of the case but dicta, because the contract in that case was not found to be ambiguous.

The hearing officer agrees with the employer that the policy language in question should not be construed in isolation, but rather, in the context of the employee manual as a whole, and the claimant did not argue otherwise; in fact, the claimant also referenced numerous other parts of the employee manual in her written submission.

Taken in context, the language at issue:

Upon death, or state retirement, you will receive payment for any accumulated but unused sick leave at your usual rate of pay.

is not ambiguous. To start with, it applies only to town employees who end their employment:

When you leave the Town of Stratham, you will be paid for ... any accrued but unused sick time, as specified under "Sick Leave" in the "Benefits" section of this Manual,

Section 12 of the manual, Termination & Severance Pay (emphasis added). It is also noteworthy that all town employees are automatically enrolled as members of NHRS and are required to contribute to the NHRS retirement fund. This is explained in the employee manual, Part III (J) (1). under the heading, Retirement.

Given this context, "Upon death, or state retirement" denotes two specific situations in which the town will pay accrued sick time at the end of employment: death and state retirement. While "state retirement" lacks the simplicity of "death," its meaning in context of the employee manual is not difficult to discern. It refers to the switch from being a contributing member of NHRS to being a retired member receiving a pension. It is not surprising that neither the town's administrator nor its finance officer was aware of another instance where a vested, retirement-eligible employee had left the town, declined to take early or full retirement, and nevertheless demanded the sick pay benefit. Contrary to the claimant's suggestion, it does not require a law degree to understand that "upon state retirement" means commencing to receive one's pension benefits.

Upon her separation from employment, the claimant at age 52 was eligible for early retirement. She chose not to take early retirement, leaving herself the option of retiring later, such as at age 60, when her monthly pension would be larger. However, by not becoming a retired member of NHRS and starting to receive her pension in conjunction with her separation, claimant removed herself from the second category of persons who could claim sick pay upon separation.

The claimant's proposed interpretation of the language in question is not a reasonable one. True, the claimant did not suggest that every employee who leaves the town's employment is eligible for the benefit; such a construction would require ignoring the "state retirement" language altogether. However, to fit the claimant into the class of beneficiaries requires reading additional words into the provision:

Upon death, or vesting of and age-eligibility for state retirement benefits, whether you elect to take retirement or not, you will receive payment for any accumulated but unused sick leave at your normal rate of pay.

(Emphasis added.) The town could have written the policy that way. However, it is not reasonable to read the policy as if it included these words when it does not.

As the town administrator testified, the decision to offer employee benefits implicates the town's prudential responsibilities to its taxpayers to spend town money wisely. Not only does the claimant's expansive reading of the policy at issue require reading words into it, but also, it undermines one of the apparent purposes of the policy, as written: to encourage town employees to remain on the job until they reach full retirement age. To construe the benefit as being equally available to persons who actually retire and to persons who are eligible for retirement but decline to retire, diminishes the policy's incentive for an employee to remain on the job until full retirement age is reached.

In Appeal of Naswa Motor Inn, Inc. (N.H. 1999), the New Hampshire Supreme Court noted, "If the [statutory] language is subject to more than one reasonable interpretation, we will resolve the ambiguity...." The language at issue here is in an employee manual, not a statute. Nevertheless, the underlying principle seems applicable to this extent: Before a policy is deemed ambiguous, it must be shown that there is more than one reasonable interpretation of the language in question.

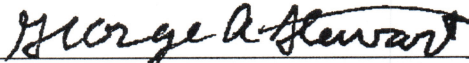
The claimant has not offered a reasonable alternative interpretation of the language at issue. As such, her argument that the policy is ambiguous is without merit. Also, as discussed above, any vagueness in the phrase "state retirement" is clarified when the phrase is considered in light of the related policy provisions, in particular, the section on retirement.

Based on the foregoing, it is found that by opting to defer receiving her pension to an indefinite future date after she separated from town employment, the claimant removed herself from the class or persons eligible "upon state retirement."

DECISION

As RSA 275:43, I requires that an employer pay all wages, including benefits, when due, and as the Department finds that the claimant failed to prove by a preponderance of the evidence that she was eligible to receive a payout of accumulated sick pay on separation, it is hereby ruled that the Wage Claim is **invalid.**

May 19, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb