

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[REDACTED]
v.

City of Lebanon

CASE #62979

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Mark Broth, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (unpaid vacation pay)
RSA 275:43-b — Payment of Salaried Employees
(unpaid salary)

DATE OF HEARING: September 30, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant, filed on June 28, 2021, bringing two claims. First, that his weekly salary as a police lieutenant was withheld starting May 6, 2021. This claim is for \$13,357.00. Second, that 60 hours of vacation pay were removed from his accruals without explanation. This claim is for \$2,859.00. Notice of the claim was mailed to the employer on June 30, 2021. On July 12, 2021, the employer filed an objection. Claimant requested a hearing and the hearing notice was sent on August 26, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, exhibits offered by both parties, and matters of record in the Department file. (Timothy Cohen, a police captain, was also sworn in as a rebuttal witness for the employer, over the claimant's objection that the witness was not properly disclosed per DOL administrative rule Lab 204.07(b). As it turned out, very little testimony of substance was elicited from Mr. Cohen and counsel for the employer decided he did not need Mr. Cohen's rebuttal testimony. To the limited extent that Mr. Cohen testified, his testimony had no effect on the determination of the issues in the case.)

The claimant is 43 years old and lives in ██████████. He has a bachelor's degree in criminal justice with a minor in public administration. He has been a full-time certified police officer since graduating from the police academy in 2003. That same year he was hired as a patrol officer for the employer's municipal police department. He was promoted to corporal and then lieutenant and police prosecutor. He generally worked weekdays, nine to five, and was paid a weekly salary (\$1,922.00 as of the week ending May 1, 2021).

Claimant also earned 15 hours vacation time per month, awarded at the start of the month. As an employee with more than 10 years tenure, claimant was allowed to accrue and roll over a maximum of 242 vacation hours on his vacation anniversary date; unused hours above the limit were lost. Under "special circumstances" and with the department head's approval, the employer's city manager could grant carryover of an additional 40 hours of unused vacation after a written request received five weeks before the end of the employee's vacation year. Er. Exh. Tab 6 at 22 (Sec. 11.4, Vacation Carryover).

On May 26, 2020, the claimant was placed on paid administrative leave. The reason for this action was that the claimant was being investigated by an outside agency, based on allegations of criminal conduct. The claimant was formally advised of this action in a memorandum from then-police chief Richard Mello dated May 26, 2020. In pertinent part, the memorandum stated,

During this paid leave you need to make yourself available to us during work hours, in this case 0900-1700 hours unless otherwise specified.

Claimant's Exhibit.

Claimant remained on paid administrative leave until the following May and continued receiving his weekly salary. He did not come to work, unless requested to come in for administrative matters and he performed no law enforcement duties, but he remained available in the event he was called in for any purpose. He checked his mobile phone regularly for messages or calls from his employer. He testified that it was his understanding that the "make yourself available" language amounted to a standing order and that, if he should fail to comply with it, he could face further disciplinary action.

On May 6, 2021, the claimant was arrested on criminal charges following an investigation by the Grafton County Sheriff's Office. As a result of that development, the employer changed the claimant's status from paid administrative leave to unpaid administrative leave. Claimant was formally notified of this action in a letter from police chief Philip Roberts. In its entirety, the letter stated:

Dear Mr. ██████████

On May 26, 2020, you were placed on a paid administrative leave after the City and Lebanon Police Department learned that you were under investigation for alleged criminal conduct. On May 6th, 2021, the City and LPD were informed that, as a result of the

investigation conducted by the Grafton County Sheriff's Department, criminal charges have been filed against you.

I trust that you understand that a police officer cannot effectively perform his duties when there are criminal charges pending against him. Should you be convicted on a criminal charge, any law enforcement matter in which you were involved prior to your conviction would be subject to close scrutiny and criminal cases in which you were involved could potentially be dismissed or reversed. Accordingly, we cannot allow you to return to work pending a final adjudication of the pending criminal charges. Further, it would be imprudent and a misuse of public funds to pay an employee who may have committed criminal acts. The City has determined that you will remain on unpaid administrative leave status pending final adjudication of the criminal charges. While you will be unpaid during your administrative leave, you will continue to receive the benefits available to active employees under the applicable collective bargaining agreement and City policies.

Please further note that as your alleged criminal conduct occurred outside of the workplace, the LPD has temporarily deferred conducting an internal affairs investigation until the criminal investigation has been completed. As soon as it has access to the criminal investigation, the City will conduct an internal investigation to determine if you have engaged in conduct that violates City or LPD policies or standards of conduct. Should it be determined that: 1) you have engaged in misconduct; or 2) are convicted for a criminal offense; or 3) have your police certification suspended or revoked, the City reserves the right to take disciplinary action against you, up to and including termination of your employment.

Should you have any questions regarding the above, please do not hesitate to contact me.

Sincerely,

Philip J. Roberts
Chief of Police

Claimant's exhibit.

From May 6, 2021 onward, the claimant no longer received his regular salary. However, the employer did call him in to the office on three occasions, for purposes of carrying out the internal affairs investigation referenced in the May 6, 2021 letter or other administrative purposes. According to payroll records provided by the employer, Er. Exh. Tab 5, claimant was called in for two hours during the week ending June 5, 2021, three hours during the week ending July 3, 2021, and one hour during the week ending August 14, 2021. For each of these three weeks during which he was called in to the office, claimant was paid his full regular salary.¹

Claimant testified that he believed the "standing order" included in the May 26, 2020 memorandum remained in effect after his status was changed to unpaid administrative leave on May 6, 2021. As a result, he continued to check his mobile phone three or four times a day for messages or calls from the employer. He testified that, on one occasion around August 2021, he wanted to go for a few

¹ For the week ending June 5, 2021, he was initially paid only a pro-rated salary for the two hours he spent in the office. However, the employer issued a supplemental payment on July 9, 2021 to bring his net salary for the June 5, 2021 week up to his regular salary level.

days to Plum Island, Massachusetts. He called Chief Roberts to let him know of his plans and that he might be out of touch for a couple of days due to poor cellphone reception. The police chief thanked him for letting him know and said it would be okay so long as he checked for messages or calls as soon as he could.

While he was on unpaid administrative leave, claimant continued to accumulate vacation time at the rate of 15 hours per month, subject to the annual rollover limit. As of the last pay period of June 2021, he had accumulated 355 hours. Claimant's vacation anniversary occurred in July, and his unpaid vacation time was reduced to 242 hours, pursuant to the maximum carryover limit.

Claimant testified that employees generally received a notification or reminder from the employer prior to their vacation anniversary date, but he received none. He did not have electronic access to his paystub information, was unaware of the upcoming vacation date, and did not make a written request for permission to carry over an additional 40 hours.

Claimant's employment formally ended on or around August 27, 2021. By that time, he had accumulated an additional 30 hours of vacation time, bringing his total to 257 hours. He received a separation payout of vacation pay for these 257 hours, totaling \$12,348.85. Er. Exh. Tab 7.

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 salary. Regarding the payment of salaried employees, RSA 275:43-b provides, in pertinent part:

I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

(a) Any pay period in which such employee performs no work.

The claimant admitted that he performed no law enforcement duties after he was placed on unpaid administrative leave, but he argued that, because on and after May 6, 2021, he continued to be subject to the "standing order" contained in the May 26, 2020 memorandum, requiring him to "make yourself available during work hours," he was still entitled to receive his regular salary, up through his separation from employment in August 2021.

The employer pointed out that the May 6, 2021 letter contained no explicit reference to a continuing obligation on the claimant's part to make himself available during working hours. Claimant testified that he did not recall Chief Roberts or anyone else specifically telling him that this provision from the May 26, 2020 memorandum remained in effect; he said it was implicit from his conversations with the chief and it was also his experience that standing orders remained in effect until explicitly countermanded or until their expiration date, if one was stated. The employer further argued that, regardless of whether the "make-yourself-available" provision remained in effect after May 6, 2021, the claimant "perform[ed] no work" after that date, with the exception of those three weeks during which he came in for interviews or administrative matters and was paid his full regular salary.

The claimant's characterization of the requirement that he make himself available during working hours as a "standing order" with no expiration date lacks textual support in the May 27, 2020 memorandum. The natural reading of the memorandum is that if the employer required the claimant's presence in the office, the claimant must be available to do so; it is a fair inference that, if he failed to respond to a request to come in, disciplinary consequences would follow. However, the provision cannot reasonably be construed as requiring him to be "on call" at all times or even on call during normal working hours.

Not only does the May 6, 2021 letter omit any similar directive that the claimant make himself available during working hours, but also, the letter taken in its entirety cannot reasonably be read to imply such a requirement. As of May 6, 2021, the claimant was formally accused of a crime and subject to the jurisdiction of the criminal justice system, including the imposition of bail conditions and required court appearances. From that point forward, the claimant was also entitled to the procedural criminal protections afforded to an accused. As the letter noted, the employer's police department would defer conducting an internal affairs investigation until such time as the criminal investigation was completed, and once it had access to the criminal investigation, the employer would conduct an internal investigation to determine whether the claimant had engaged in conduct that violated City or LPD policies or standards of conduct. It was clear from the letter that the employer was at least temporarily taking a back seat with respect to any demands on the claimant's time.

Thus, the claimant's argument that the make-yourself-available requirement of the May 26, 2020 memorandum remained in force after May 6, 2021 is rejected.

Moreover, the claimant's testimony that he continued to check his cellphone three or four times a day after May 6, 2021 is insufficient to establish that he did "any work" for the employer except for the three occasions when he came in to the office at his employer's request to be interviewed. He received his full weekly salary for each of those weeks. During the other weeks, all he did, by

his own admission, was check his telephone for messages or calls. Such efforts would not constitute "hours worked under Department administrative rule Lab 803.04. That rule incorporates Title 29 Part 785 of the Code of Federal Regulations. Pursuant to 29 C.F.R. 785.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis.

To the extent that the claimant checked his cellphone three or four times a day, such efforts are found to be de minimis and not "hours worked" triggering the requirement that he be paid his regular salary.

Thus, it is found that the claimant failed to prove that he is owed salary from May 6, 2021 until his separation from employment in August 2021.

Claim for Unpaid Vacation Pay. Vacation pay, when such a benefit is a matter of employment practice or policy, is considered wages when due. RSA 275:43, V. In this case, it was not contested that the claimant earned 15 hours vacation time per month, subject to the maximum annual rollover provision of 242 hours, and that he received a separation payout for 257 of unused accrued vacation time.

On the original wage claim, the claimant alleged that 60 hours of vacation time had been improperly removed from his accrual. The evidence showed that at the start of July 2021, his accrued time was reduced from 355 hours to 242 — a reduction of 113 hours. However, this reduction was consistent with the employer's written policy limiting an employee's annual carryover to 242 hours on his vacation anniversary date; unused hours above the limit were lost as of the anniversary date.

The claimant did not deny that the reduction was consistent with the written policy but argued that it was fairly applied to him because he did not receive an advance notification or reminder from the employer that the annual "cutoff date" was coming up; had he received such notice, he would at least have requested special permission to carry over an additional 40 hours, as provided in the written policy. Had he done so, and had the request been granted, his carryover would have been 282 rather than 242; and by his separation date, his accrued balance would have been 297 rather than 257.

The claimant did not argue that the written policy provides for an annual notification or reminder that the annual carryover cutoff date is coming up, and no such provision was found. Claimant testified that it was the practice. Without any corroboration, this self-serving testimony is not credited. As to the claimant's further argument that advance notice of such a reduction in accrued vacation is required under RSA Chapter 275, he was not identified a particular notification

requirement that was violated, based on the evidence in the case. In particular, the notice requirements of RSA 275:49 (Notification, Posting, and Records) were satisfied by written policies regarding accrual and carryover of vacation time.

Even if the employer had provided advance notification or a reminder to the claimant, and he had requested permission to carry over an additional 40 hours, he offered no evidence to support the conclusion that his department head Chief Roberts would have approved the request and that the employer's city manager would have granted it, as required by the written policy. Under the circumstances, where the claimant had been on paid administrative leave for almost 12 months, accumulating accrued time, and was continuing to accrue vacation time while on unpaid leave, it will not be presumed that claimant's department head and the city manager would have deemed that "special circumstances" existed warranting a grant to the claimant of an additional 40 hours vacation time.

It is found that the claimant failed to prove that the employer improperly reduced his accrued vacation time.

DECISION

Based on the testimony and documentary evidence and the findings set forth above, the claims for unpaid salary and unpaid vacation time are rule **invalid**.

October 14, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb