

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

ELECTRONIC SECURITY PROTECTION INC

Case No. 63067

DECISION OF THE HEARING OFFICER

Appearances: ██████████ on his own behalf, Pro Se
Geoffrey Davis, on behalf of the employer

Nature of Dispute: RSA 275:43 I – Weekly, Unpaid Wages
RSA 275:43 V – Weekly, Unpaid Vacation Pay

Date of Hearing: August 19, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

On the basis of the claimant's assertion that he is owed \$2,000.00 in unpaid wages in the form of unpaid vacation pay he filed a Wage Claim with the New Hampshire Department of Labor (DOL) on July 12, 2021; a Notice of Wage Claim was forwarded to the employer on July 13, 2021. The employer objected to the Wage Claim in writing on July 15, 2021. The claimant requested a formal hearing on July 19, 2021. Notices of Hearing were sent to both parties on July 28, 2021, and a formal hearing was scheduled accordingly.

A formal hearing was held at the Department of Labor Headquarters in Concord, New Hampshire on August 19, 2021 at 9:45am. Live testimony was provided by Mr. ██████████ on his own behalf, as well as Mr. Geoffrey Davis, on behalf of the employer.

FINDINGS OF FACT

Mr. ██████████ began working for the employer on October 22, 2018 as an Alarm Technician. On December 12, 2020, Mr. ██████████ employment was terminated. At that time, Mr. ██████████ was earning \$30.00 per hour. Mr. ██████████ was not given an Employee Handbook at the time of hire and Mr. Davis acknowledged that the employer does not maintain an Employee Handbook.

Mr. ██████████ submitted into the record a job advertisement from the employer, which stated, "Vacation Time" as being offered.

Additionally, Mr. ██████████ submitted text messages between himself and the employer's office manager. The office manager informed Mr. ██████████ that as of November 1, 2020, he would have two (2) weeks' vacation time available; however, he could not take both weeks together.

Mr. ██████████ submitted a pay stub demonstrating that he used thirty two (32) hours of vacation time the week beginning November 22, 2020. Mr. Davis asserted that Mr. ██████████ used an additional eight (8) hours of vacation time the Friday before that week.

On December 18, 2020, Mr. ██████████ sent a text to the office manager, "After November 1 I had 2 weeks vacation. When will I see that Vacation pay. Thought it would be in last paycheck." The office manager responded, "I have sent your text to Geoff." Mr. ██████████ had no further communication with the employer after this text exchange on December 18, 2020

Mr. Davis testified that the employer does not have a vacation policy; rather, they try to make sure that "good employees get vacation." Mr. Davis noted that Mr. ██████████ had used forty (40) hours of his vacation time after November 1, 2020 and before his termination. Mr. Davis explained that vacation time does not accrue from year to year; vacation time is use-it or lose-it.

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 and due \$2,000.00 in unpaid wages in the form of unpaid vacation pay. Proof by a preponderance of the evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

First, it should be noted that the claimant's request for damages is confusing. If Mr. ██████████ believed he was owed for two (2) weeks' vacation pay at \$30.00 per hour, as he asserted, he would be owed \$2,400.00. Moreover, Mr. ██████████ submitted evidence to demonstrate that he took thirty two (32) hours of vacation after November 1, 2020, which would reduce his request to \$1,440.00. Mr. Davis credibly testified that Mr. ██████████ took an additional eight (8) hours of vacation time, which would further reduce the amount to \$1,200.00. However, Mr. ██████████ did not request payment of unpaid vacation pay in any of these amounts; rather, he requested \$2,000.00 in unpaid vacation pay and it is unclear why.

Regarding vacation pay, the State of New Hampshire does not require employers to offer benefits to their employees and, if they do, does not require employers to implement specific terms or guidelines. However, if the employer offers benefits to employees, a thorough description of how employees earn them, how employees are able to use them, what happens to any accrual at separation, as well as any other stipulations the employer decides to include, are required pursuant to RSA 275:49. RSA 275:49 requires employers, in part, to inform employees in writing, as to their employment practices and policies with regard to vacation pay, personal time off (PTO) pay and other fringe benefits.

While all parties acknowledge that the employer did not maintain an Employee Handbook, this is not dispositive.

RSA 275:43 V states, in part, that paid time off (earned time, vacation, etc.) pay, when such a benefit is a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, *when due* [emphasis added]. Vacation pay only become wages "when due". "When due" is a reference to the benefit guidelines specified in employer's policies.

In this matter, the employer did not have a vacation policy or an Employee Handbook, so the employer's past practice must be analyzed. However, neither side provided testimony

regarding the employer's practice. It would be important to know if other terminated employees were paid their remaining vacation time upon termination.

Ultimately, it is the claimant's burden to prove by a preponderance of the evidence that he is owed and due \$2,000.00 in unpaid vacation pay. As there was no Employee Handbook, one must analyze the employer's past practice; however, there was no testimony whatsoever regarding the employer's practice.

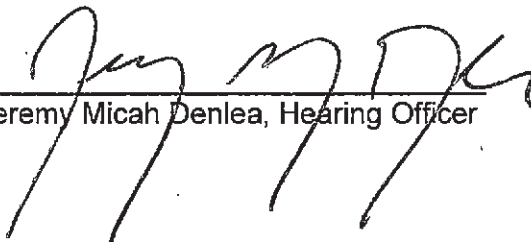
In order for Mr. ██████████ to prevail in this matter, he would need to show that he is owed and due the vacation pay by demonstrating that it was the employer's practice to pay terminated employees vacation pay with their final check. Additionally, the damages sought by the claimant would need to be clarified. In this case, it is determined that the claimant has failed to demonstrate that it was the employer's practice to pay vacation pay upon termination.

Overall, it is the claimant's burden to prove, by a preponderance of the evidence, that he is owed and due \$2,000.00 in unpaid wages in the form of unpaid vacation pay. Given the reasoning explained above, Mr. ██████████ has not met his burden of proof in this matter. This Wage Claim is invalid.

DECISION

Based on a thorough review of the evidence and testimony presented, and as RSA 275:43 (I) and RSA 275:43 (V) require that an employer pay all wages owed and due to an employee, it is found that the claimant did not prove, by a preponderance of the evidence, that they are due unpaid wages in the form of unpaid vacation pay; it is hereby ruled that **this Wage Claim is invalid.**

August 26, 2021
Date of Decision



Jeremy Micah Denlea, Hearing Officer

Original: Claimant
cc: Employer

JD/cb