

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

School Administrative Unit 6
CASE #63283

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Patrick Landroche, Esq., representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43, V — Weekly (unpaid sick pay)
RSA 275:43, V — Weekly (unpaid vacation days)
RSA 275:48, I (illegal deduction from wages)

DATE OF HEARING: January 6, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage complaint on August 9, 2021, alleging that she worked as an assistant superintendent for the employer school district in Claremont. She advanced four claims: that she was not paid for the last five days worked; that she was not paid on separation for her accrued sick days; that she was owed vacation pay for 13 days; and that the employer improperly deducted \$1,247.54 from her final paycheck.

Notice of the claim was sent to the employer on August 12, 2021. The employer filed an objection on August 19, 2021, asserting that the claimant received the amount of wages due to her under the relevant contracts, that pursuant to the employer's policy and practice, the claimant was not entitled to sick pay or to a payout for unused vacation days in excess of the annual carryover maximum, and that the deduction from her final paycheck was lawful. Claimant requested a hearing on August 20, 2021 and the notice of hearing was sent on November 3, 2021.

At the conclusion of the hearing, counsel for the employer stated that the employer did not contest the claim of an improper deduction pursuant to RSA 275:48, 1 and would pay the amount alleged in the complaint. On her part, the claimant withdrew her claims for unpaid wages and sick pay. Thus, the only remaining dispute was unpaid vacation time. Accordingly, the findings set forth below are limited to those deemed relevant to that issue.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and the employer's representative, employer's exhibits, and matters of record in the Department file. Both witnesses acknowledged under oath that their written submissions to the Department and the exhibits were true and accurate to the best of their knowledge and belief, and those statements and narrative submissions are treated herein as part of the testimony in the case.

Claimant is ██████████. She has a master's of education and a certificate of post graduate studies from Plymouth State College. She has worked in public education for 17 years. She worked for the employer for about three years, first year as a high school principal and the last two as assistant superintendent of the district. Her daily rate (imputed from her annual salary) was \$415.85.

She worked under annual contracts running from July 1 to June 30. In July 2021, due to workplace conditions that she found objectionable, she submitted her notice of resignation and was released from the current contract, covering the 2021–2022 year. Her last day worked was July 23, 2021.

The district policy on vacations placed a limit on how many vacation days could be carried over into the next contract year. The stated limit was 10 days. However, as a response to COVID-19, the superintendent raised the rollover limit to 15 days for the rollover to the 2021–2022 school year.

Claimant testified that during 2020-2021, she was in charge of carrying out the district's COVID-19 protocols and related issues. As such, she was unable to use up all her vacation time and stood to lose as many as 13 or 23 days¹ due to the rollover. Prior to the end of the 2020–2021 school year, claimant talked with Superintendent Tempesta about her concerns and asked if there was a way for her to receive a payout for these days instead of forfeiting them. She testified that the superintendent seemed open to the idea and suggested that money

¹ In her written complaint, the claimant specified 13 as the number of vacation days that she was seeking to be paid for. In documents admitted in evidence at the hearing, she specified 23 days. Whether 23 was an error or there was another reason why the amount in the claim was reduced to 13, the matter is moot given the ultimate disposition of the claim for unpaid vacation days.

might be available through a federal COVID-19 grant. He indicated that he would look into the matter.

Claimant testified that, at some point before the end of the 2021–2022 school year, Superintendent Tempesta agreed and confirmed that the district would let her keep the extra vacation days above the rollover cap, in consideration of her special circumstances relating to her duties carrying out the COVID-19 protocols.

At this point, the claimant had not given notice of her intent to resign July 23, 2021. She testified that there was no specific discussion about what would happen to those days in the event she terminated her contract early,

Soon after the start of the 2021–2022 contract year, claimant gave her notice of resignation. On July 8, 2021, she emailed the superintendent:

Mike,

As you are aware, I had 38 vacation days that I did not take last year, I was able to roll over 15 leaving me with 23 [sic] days. I am requesting to be paid for the 23 unused days.

Thank you for your consideration.

██████████

Er. Exh. 6. Later that day, the superintendent responded, in pertinent part:

Hi Donna,

We can review this when we are both in the office. I thought we said that we would roll 15 days for all administrators—I just responded to Alex on this as well. As for cashing days, no one has language that they can cash days—including myself, but I will investigate this in terms of possible CARES reimbursement. I need to check the precedent of what everyone has been allowed to accumulate and cash when they leave the district. This is usually spelled out pretty clearly in contracts, but I will follow up next week.

Best,

Mike

Er. Exh. 6. Claimant testified that the superintendent never followed up with her on her request to be paid for the unused vacation days from 2020–2021 that were not carried over into the new contract year.

In her final paycheck, claimant received a vacation payout for 16.65 days. This included the 15 days carried over from the 2021–2022 year plus 1.65 for vacation time accrued during the time claimant worked in new contract year. The cash payout came to \$6,923.90. (After the claimant filed her wage claim, the employer realized that it had miscalculated the amount of vacation time she accrued in the month of July 2021. It should have been 1.83 days instead of 1.65. The employer voluntarily paid the claimant directly for this shortfall and no issue on that matter was presented to the Department.)

The claimant filed the instant wage claim for the 13 days that she lost pursuant to the rollover cap.

Michael Tempesta, 56, of Bristol, has been superintendent of the employer school district for three years. He testified that it was his initiative, with the school board's approval, to increase the rollover to 15 days from the 10 stated in the written policy, because many employees had been unable to use all their vacation days during the 2020–2021 school year. Regarding the alleged agreement to let the claimant keep the hours she would otherwise lose due to the annual rollover cap, he denied that he ever made such a commitment, verbally or in writing, but instead simply said he would try to find out if money could be found through one of the federal COVID-19 grants to accommodate the claimant's request.

He stated that, after the email exchange with the claimant on July 8, 2021, he determined that no money was available to accommodate the claimant's request for a cash payout for the extra days.

DISCUSSION AND CONCLUSIONS

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

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.

It was not contested that pursuant to the employer's written policy, the claimant could roll over a maximum of 10 unused vacation days to the next contract year, and that the excess days were forfeited. In response to the special circumstances created by COVID-19, the employer increased the maximum to 15 days for the contract year 2021–2022. It was also not contested that upon separation, the claimant was entitled to a payout of her unused accrued days.

Pursuant to this policy, the claimant was entitled to a payout for 15 days rolled over plus 1.85 days earned in July 2021, and, after including the employer's voluntary adjustment for an underpayment in her last paycheck, this is what she received.

The claimant's testimony that the school superintendent verbally agreed let her keep the excess hours over the rollover maximum, so that she could take these extra days in the next year or cash them out in the event of an early separation, is not credited. Rather, the superintendent's testimony that he only agreed to look into whether funds could be found to support such a request but never found a source and never agreed to let her keep those days, is credited.

The email exchange on July 8, 2021 is consistent with the superintendent's testimony. In her email, the claimant acknowledged the 15-day rollover and did not specifically refer to a prior agreement regarding keeping the excess days; instead, she requested that she be paid for them. In his reply, the superintendent also made no reference to a prior agreement that claimant could keep more than 15 days; he simply stated that he would "investigate this in terms of possible [COVID-19-grant] reimbursement" and "check the precedent of what everyone has been allowed to accumulate and cash when they leave the district." If, as the claimant testified, the superintendent never did get back to her on this, the lack of an affirmative answer does not constitute evidence that he granted the request or promised a payment.

In assessing whom to believe on this issue, it is also noteworthy that the alleged promise was made prior to the claimant tendering her notice, and the claimant admitted that a cash payout in the event of an early termination was not specifically discussed.

It is therefore found that the claimant failed to meet her burden of proof that she was entitled to a vacation payout for the excess vacation days above 15 from the 2020–2021 calendar.

DECISION

For the reasons discussed above, the claim for unpaid vacation pay under RSA 275:43, V is ruled **invalid**. With the employer's agreement, the claim for an illegal deduction under RSA 275:48, I is ruled **valid** in the amount of \$1,247.54. With the claimant's agreement, the claims for unpaid wages under RSA 275:43, I and unpaid sick pay under RSA 275:43, V are withdrawn with prejudice.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$1,247.54, less applicable deductions, within 30 days of the date of this Order.

January 24, 2022
Date of Decision

GAS/nd


George A. Stewart, Hearing Officer