

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v.

Superior Plus Energy Services
CASE #63296

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Erin Wells, representing the employer

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

DATE OF HEARING: November 9, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on August 13, 2021, alleging that he was a service technician for the employer's oil and propane service operating out of Rindge; when he separated from the company, his last paycheck showed that he had 64 hours of PTO at \$25.88 per hour, but he did not receive a payout for this time. His claim was for \$1,656.49.

Notice of claim was sent to the employer on August 20, 2021. The employer filed an objection on September 7, 2021. The claimant requested a hearing and a hearing notice was sent on October 8, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant, employer's representative Erin Walls, exhibits offered by both parties, and matters of record in the Department file. During the course of the hearing, both witnesses acknowledged under oath that their written submissions to the Department were true and accurate to the best of their knowledge and belief. Those submissions are treated herein as part of the testimony in the case.

Claimant's documentary evidence submitted for the hearing consisted of copies of his biweekly paystubs covering the week ending January 2, 2021

through the week ending July 31, 2021. The employer did not contest the accuracy of the paystubs.

Employer's documentary evidence consisted of a PTO balance information summary for the claimant, an excerpt from the employee handbook describing PTO policies, and a certificate showing that the claimant had received training with respect to the employer's policies and procedures. The claimant did not contest the substance of the company's policies and procedures contained in the excerpt and he acknowledged that he had received the training. He did not agree with the summary of his PTO balance.

Claimant is 64 years old and lives in ██████████. He has a high school diploma and some college. He has worked primarily as a service technician but also worked for ten years for a package-machine manufacturer. He started working for the employer in September 2016 as a service technician for the company's oil and propane equipment at customer locations. He worked full time weekdays and was on-call every third weekend. He was paid by the hour at regular-hours rate of \$25.88 (as of his last paycheck). He was paid every two weeks by direct deposit, on the Friday following the end of the Sunday-to-Saturday period.

Reference to his 2021 paystubs showed that the claimant generally worked 80 regular hours per pay period, and that he took a total of 88 hours PTO as follows:

Week ending	Hours taken
2/27/21	8
3/13/21	8
5/22/21	40
7/3/21	<u>32</u>
Total	88

Claimant testified that he gave two weeks' formal notice to the company around July 16, 2021, but he also gave informal notice to his immediate supervisor sometime before that. His supervisor advised him that he should take as much accrued time as he could before he left the company. Following this advice, claimant said he took eight PTO days (64 PTO hours) during the last two pay periods—for which he was not paid. Reference to claimant's paystubs for the weeks ending July 17 and July 31, 2021 shows that he worked only 44.50 and 47.97 regular hours, respectively, during those last two pay periods and was not paid for the PTO time that he said he took.

At the hearing, the claimant offered notes that he said reflected that his supervisor had approved eight PTO days that he took during his last two pay periods. These notes, created by the claimant, had not been previously disclosed to the employer and were not admitted into evidence, pursuant to Department administrative rule Lab 204.07.

Claimant pointed out that his final paystub, under the heading Accruals and Balances, listed a PTO Balance of 64.00 hours. He testified that this was the basis for his claim.

Erin Walls, 43, of Upton, Massachusetts, is the senior HR business partner for the employer's northern and southern New England regions, including the Rindge office that the claimant worked out of. She testified that her one-page summary of the claimant's final PTO account balances was accurate. In pertinent part, that document showed,

Grant	Accrued	Approved	Remaining Grant	Remaining
152.00	87.69	-88.00	64.00	-.31

Ms. Walls testified that, at the start of the year, claimant received his full year's award of 152 hours, to be accrued at the rate of 5.85 hours per pay period. Accrued hours could be taken as paid PTO, but only with the employer's approval. She testified that, after giving notice, an employee was not allowed to take PTO time off.

With regard to the claimant's reliance on the PTO Balance of 64.00 hours quoted on the claimant's final paystub, the employer explained that this number related to the number of yet to be accrued hours, i.e., it was the difference between the annual grant of 152 and the PTO that had been used. It did not represent unused accrued PTO time that was available for payout under the company's policies. In the claimant's case, as of his last day worked, he had accrued a total of 87.69 hours PTO.¹ However, he had already used 88.00 hours PTO, leaving him with a fractional negative balance of available PTO time. Subtracting the 88.00 hours PTO already used from the annual award of 152.00 left 64.00 hours that he could accrue during the remainder of the year, had he continued to work for the employer.

With regard to the claimant's testimony that his supervisor approved his taking of an additional 8 hours PTO during the last two pay periods, Ms. Walls testified that this would have been a violation of company practice and policy for two reasons: First, employees could not take PTO after giving two weeks' notice, and second, the claimant did not have 64 hours of unused accrued time available as of the last two weeks.

It was pointed out to the claimant that his testimony that he had taken PTO time during the last two pay periods and not been paid for it raised an issue that was not apparent from his written claim. That claim said simply the following:

¹ Claimant did not contest the employer's evidence that he had accrued 87.69 hours PTO as of his last day at work. He also did not contest that he had used 88 hours of PTO; in fact, he testified that he had taken 12 days or 96 hours.

64 hours of PTO at \$25.88 per hour. Remaining balance at end of employment. Last pay check shows 64 hours remaining.

This wording placed the employer on notice that the claimant was relying on the reference to 64 hours in the last pay check, but not on notice that the claimant would allege that his last two pay checks failed to include payment for PTO time taken during those pay periods. As such, the employer would have no reason to anticipate the need for testimony to rebut claimant's testimony that his supervisor approved eight hours PTO to be taken after he had given notice.

The claimant was given the option of amending his complaint to include such an allegation and continuing the hearing to a future date when the employer would have the opportunity to present any rebutting evidence it may have, or completing the hearing based on the original claim and the reasonable inferences that could be made from that original claim. He chose the latter option.

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 vacation pay. RSA 275:43, V in pertinent part, provides that vacation days and personal days

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.

In this case, the employer's evidence regarding its PTO policy is credited. In particular, it is found that, although the employer allowed the claimant up to 152 PTO hours per year as an annual grant, those days had to be accrued before they could be taken, at the accrual rate of 5.85 hours per pay period. The policy further required that the PTO time had to be approved before it could be taken, and that employees could not use more PTO time than they had already accrued. With regard to PTO pay at termination, the policy provided,

Employee who are terminated with the company and are in good standing will be paid for earned but unused time off.

(Employer's exhibit, emphasis added).

As of his last day worked, claimant had no earned but unused time remaining; he had a fractional negative balance. Thus, he was not entitled to a separation payout for PTO.

To the extent that the claimant relied upon his last paystub's reference to a PTO balance of 64.00 hours, it is found that, in the context of all the other paystubs and the handbook which the claimant acknowledged he was trained on, it was not reasonable for the claimant to believe that this referred to the unused accrued time he was entitled to receive on separation.

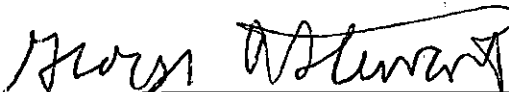
As far as claimant's testimony that his supervisor told him to take PTO during his last two pay periods, he did so, and was not paid for that PTO, such testimony was not corroborated and is not credited. As the employer testified, the supervisor would have been going against company policy against PTO after giving notice. Just as importantly, there was no evidence that the claimant actually had any more earned and unused PTO to take during those last two pay periods. Claimant was given the opportunity to amend his claim and develop his evidence at a further hearing, but declined to do so.

As such, it is found that the claimant did not meet his burden of proving that he was owed a separation payout for PTO.

DECISION

Based on the testimony and documentary evidence and the findings set forth above, the claims for unpaid PTO are respectfully ruled to be **invalid**.

November 29, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb