

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Jackson Lucas Events, L.L.C.
CASE #63374

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Dina Masotto, representing the employer

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

DATE OF HEARING: November 15, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on August 31, 2021, alleging that she worked for the employer as director of finance. She gave one week's notice and her final pay check did not include a payout for her 104 accrued unused PTO hours. She alleged that she was entitled to a payout in the amount of \$3,950.00.

Notice of claim was sent to the employer on September 3, 2021. The employer filed an objection on September 15, 2021. Claimant requested a hearing on and one was scheduled by notice sent October 8, 2021.

FINDINGS OF FACT

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

The claimant is 43 years old and lives in Hooksett. She graduated from high school in 1995 and since then has worked in accounting. She started working for the employer on November 15, 2012 in the position of director of finance. She held that position until her separation from the company on August 6, 2021. Her duties as finance director included processing employee payroll and keeping the company's books.

She was paid an annual salary of \$79,000.00. Biweekly pay periods ran from Monday to Sunday. Payday was the Friday following the end of the pay period. Claimant was paid by direct deposit. She generally worked Mondays through Fridays.

On Monday morning, August 2, 2021, claimant gave written notice to the employer that her last day would be Friday, August 6, 2021; the notice was sent via email to company owner Amy Labelle and to HR director Dina Masotto. That Friday was the end of the current pay period.

It was not contested that, as of the latter date, claimant had accumulated 104 hours of PTO. It was also not contested that—if the claimant were entitled to a PTO payout—the payout would be \$3,950.00.

Claimant introduced a copy of the employee manual as evidence. The parties agreed that the manual sets forth the terms of the employer's policies on resigning with notice and payout of PTO upon termination. With regard to termination and notice, the manual states, in pertinent part:

[The company] asks that any employee who wishes to voluntarily resign his or her employment submit a written notice to Amy LaBelle or the Human Resources Manager (1) stating the reason for the resignation; and (2) giving LaBelle two (2) weeks' advance notice. Your thoughtfulness will be appreciated and will be noted favorably should you ever wish to reapply for employment with LaBelle.

Upon termination of employment, an employee will forfeit any and all accrued but unused PTO or other paid time off. Employees who give a minimum of two weeks' notice may receive accrued but unused PTO at separation of employment if they are considered an employee in good standing, at the Owner's discretion. Employees who quit without notice are not entitled to be paid accrued but unused PTO, it is forfeited.

Employee manual 29.

Elsewhere, with regard to PTO, the manual provides:

Accrued but unused PTO at the end of each anniversary year shall be forfeited; PTO may not be carried over into subsequent anniversary or calendar years. Accrued but unused PTO will not be paid upon termination and shall instead be forfeited. However, eligible employees, those that resign with sufficient notice and are in good standing with the Company, may be paid for any accrued but unused vacation remaining in their bank, at the Owner's discretion.

Employee manual 33.

The claimant acknowledged that she did not give two weeks' notice. However, she testified that, during her eight-plus years with the company, she knew of instances where managers gave the employer less than two weeks' notice and still received a payout of their unused accrued time. (As to her basis of knowledge, she testified that, being the person responsible for preparing

payroll, she would receive instructions from the HR director that someone had resigned and whether that employee was to receive a PTO payout.)

The claimant testified that she could not remember names or dates or specific circumstances for these instances in the past. However, she testified to one specific instance: Just a few weeks before she herself resigned, the human resource director gave her notice and worked only five-days after that. Nevertheless, claimant was instructed to include a payout of her unused accrued PTO in the departing HR director's final paycheck.

Regarding her own decision to resign, claimant said it was for personal reasons. When asked why she did not give two weeks' notice, she stated that she did not decide to resign until August 2, 2021 and that she immediately notified the employer of her decision to end her employment the following Friday, August 6, 2021.

Dina Masotto, 42, of Amherst, is the employer's HR director. She testified that she was hired part-time in June of 2021 and became full-time in August 2021 as HR director. She testified that the company is in the hospitality business and operates two restaurants, a nine-hole golf course, a mini-golf attraction, and other event venues. Over the last few years, it has grown very fast. As of 2020, it had around 97 employees and a single office in Amherst. In 2021, the company added an office in Derry and currently has around 262 employees.

Ms. Masotto testified that the claimant's departure from the company on short notice was detrimental to company operations, due to the nature of her position as finance director responsible for payroll and for maintaining the companies' accounting books. She testified that the claimant was asked to stay on for a short while longer as a part-time consultant or to be available by telephone to be paid on an hourly rate to assist the company as needed with the transition. Claimant responded that she would think about it and provide her answer later, but she never did; she was not available after Friday August 6, 2021.

The day after the claimant gave her notice, the company brought in an outside accounting firm to assist with payroll processing and other transitional matters until a new financial director could be hired. A person from the accounting firm worked with the claimant for the rest of the week to learn procedures, passwords, location of information, etc.

Ms. Masotto testified that, when the claimant left on Friday, there were still many questions about passwords and procedures. She said that many of the passwords provided by the claimant were incorrect. She testified that the company was still experiencing adverse consequences from claimant's abrupt departure without an adequate transitional period; the company was still unable to close the books on the fiscal year.

Ms. Masotto testified that the company deemed that the claimant had not given sufficient notice and did not leave the company in good standing, as required by the relevant company policy on payout of PTO. That was why the claimant was not given a payout of her unused accrued PTO. She testified that, had the claimant agreed to help the company on a temporary basis after August 6, 2021, the company's decision regarding PTO would have been different and she would have received her PTO.

With regard to the circumstances of the previous HR director's departure in July 2021, Ms. Masotto agreed that the person did receive a PTO payout; however, she said the circumstances were quite different. The company had been in discussion with this person about her future employment and essentially gave her the choice of resigning on good terms or being terminated. The former HR director elected to resign and she worked only five days after that. The company determined that, under the circumstances, the previous HR director had given sufficient notice and she resigned in good standing, therefore she was paid for her unused accrued PTO.

With regard to claimant's anecdotal information about past practices with separating managers, Ms. Masotto testified she had no knowledge of those circumstances. However, she testified that, during her tenure as HR director since August 2021, PTO payout decisions were made consistently with the terms of the written policies set forth in the employee manual.

After Ms. Masotto testified, the claimant was given the opportunity to respond. Claimant denied that she left the company without properly and accurately instructing the accounting firm representative regarding passwords, procedures, and other information to allow a transition. She conceded that she was asked to help beyond August 6, 2021 either consulting or hourly by telephone; however, she chose not to do so, for personal reasons. She said that she had been good friends over the years with owner Amy Labelle. If Ms. Labelle had been personally in touch with her, she might have agreed to help; but Ms. Labelle did not do so.

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 in pertinent part, provides that 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.” (Emphasis added.) “When 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, it was not contested that the relevant policies are stated in the employee handbook. The claimant argued that those provisions are contradictory between sections and that the resultant policy is unclear; based on company practice, she should have received a separation payout of her PTO.

The employee manual’s section on notice and termination says that the employer “asks that any employee who wishes to voluntarily resign his or her employment submit a written notice to Amy LaBelle or the Human Resources Manager (1) stating the reason for the resignation; and (2) giving LaBelle two (2) weeks advance notice. Your thoughtfulness will be appreciated and will be noted favorably should you ever wish to reapply for employment with LaBelle.” (Emphasis added.)

Claimant noted that “asks” is a request, not a requirement. She is correct in that regard. But the only promise expressed or implicit in the quoted language is that, by giving two weeks’ notice, the departing employee’s courtesy would be noted favorably should she ever reapply for employment there. This language cannot reasonably be read as a promise that no adverse consequence whatsoever will follow if an employee fails to give two weeks’ notice.

Later in the same section of the employee manual, it is stated as a general rule that “accrued but unused PTO will not be paid upon termination and shall instead be forfeited.” However, as an exception to the general rule, “[e]mployees who give a minimum of two weeks’ notice may receive accrued but unused PTO at separation of employment if they are considered an employee in good standing, at the Owner’s discretion.” (Emphasis added.) Thus, as conditions of receiving a PTO payout, two weeks’ notice and good standing with the company are required, according to that portion of the manual.

The employee manual’s section on PTO arguably suggests a more liberal policy with regard to notice: “[E]ligible employees, those that resign with sufficient notice and are in good standing with the Company, may be paid for any accrued but unused vacation remaining in their bank, at the Owner’s discretion.” (Emphasis added.)

Construing the above-referenced provisions in a manner favorable to the claimant, it is found that a reasonable employee would understand that, while giving two weeks’ notice would definitely amount to sufficient notice, a shorter period of shorter notice might also be deemed sufficient, subject to the employer’s exercise of discretion.

The determination of what "in good standing means" is not defined. A commonsense understanding of the term would import, at a minimum, that the employee was meeting her duties and responsibilities up through the date of separation with the company. As with sufficient notice, this determination is to be made by the employer as an exercise of discretion.

Under New Hampshire law, employers are not required to pay separating for their unused accrued PTO. It is up to the employer's discretion whether to offer such a benefits and what the terms will be. RSA 275:43, V. However, employer are required, to give their employees written notice of the terms of all such benefits:

Every employer shall provide his or her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays; sick leave, bonuses, severance pay, personal days, payment of the employee's expenses, pension, and all other fringe benefits per RSA 275:49.

Department administrative rule Lab 803.03 (b).

Although the employee manual could perhaps be made clearer if it provided an explicit definition of "sufficient notice" and "in good standing," its terms are not so vague as to leave an employee in the dark. As noted above, the manual makes it clear that two weeks' notice is sufficient and leaves open the possibility that lesser notice may also be deemed sufficient as an exercise of discretion by the company. The meaning of "in good standing" can also be understood according to commonsense and ordinary business practice.

Ultimately, the application of both of these terms is left to the employer's discretion. In the realm of employment law, the New Hampshire Supreme Court has held that decisions committed by agreement to an employer's discretion are subject to an implied condition of good faith and fair dealing. Richard v. Good Luck Trailer Court (N.H. 2008). An employer cannot use such a provision to deprive the employee of the benefit of the bargain entered into upon employment. In this case, it is found that the employer did not violate its duty of good faith and fair dealing with respect to its determination that the claimant did not give sufficient notice and did not leave in good standing.

Ms. Masotto's testimony is credited, that the claimant's five days' notice, coupled with her refusal to provide temporary paid consulting services or even temporary telephone assistance on a paid-by-the-hour basis, was detrimental to the employer's ability to arrange an orderly transfer of the other duties that the claimant performed as director of finance. Claimant offered no compelling reason why she could not have given longer notice or why she could not have accommodated the employer's request for transitional assistance after August 6, 2021. She stated that she would have considered the request more favorably if the owner had talked to her. While she may have had a personal relationship with Ms. Labelle, normal business practice would be to communicate with the HR director with regard to working out a transitional plan. The claimant provided no evidence of special circumstances that would relieve her of the duty of loyalty

that is reasonably expected of an employee who carried fiduciary duties for over eight years.

Not much weight is given to claimant's testimony regarding past practices of the company. With one exception, the claimant was unable to offer specifics as to the PTO payouts she said were made to managers who separated from the company. She testified that these individuals received PTO even if they did not provide two weeks' notice. However, in her capacity as finance director, she simply received instructions from the HR director as to whether the separating manager would receive a PTO payout. It was not clear from her testimony how she would even know how much notice was given by a departing manager. She did not claim to know why the company decided to make these PTO payouts, or the specific circumstances underlying each case.

The exceptional case was that of the HR director who left sometime in July 2021. The claimant testified that this employee worked only five days after giving her notice, and nevertheless received her a PTO payout. However, the claimant did not claim to be privy to the reasons for the employer's decision to allow a PTO payout.

Ms. Masotto testified that the separation from employment of the HR director was a matter of negotiation; she resigned in lieu of the prospect of termination. There was no evidence that this individual was fired for cause; only that she was not a good match for the company and was going to be let go if she did not resign. The employer's decision to pay her for her unused PTO under those circumstances is not inconsistent with its decision to withhold that benefit from the claimant, based on insufficient notice and not being in good standing on the last day of work.

It is found that the employer's decision in the claimant's case with respect to the PTO benefit was consistent with the discretion reserved to it in the employee manual. The claimant did not meet her burden of proving that she was entitled to a separation payout of her unused accrued time.

DECISION

As RSA 275:43 V considers PTO payout on separation to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that she is due any vacation pay, it is hereby respectfully ruled that her wage claim is **invalid**.

December 1, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb