

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.
COBB HILL CONSTRUCTION, INC.

Case No. # 63376

DECISION OF THE HEARING OFFICER

Appearances: ██████████ self-represented, claimant
Alison Milioto, Human Resources, on behalf of Cobb Hill
Construction, Inc.

Nature of Dispute: RSA 275:43 V - Weekly, Unpaid Vacation Pay

Claimant: ██████████

Employer: Cobb Hill Construction, Inc.

Date of Hearing: October 13, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a Wage Claim with the New Hampshire Department of Labor on September 1, 2021 asserting that he is owed 170.77 hours of unpaid vacation pay for total of \$6014.52. Notice of Wage Claim was forwarded to the employer on September 3, 2021. The employer's objection to the Wage Claim was received on September 13, 2021. The claimant requested a hearing for review. A hearing was scheduled accordingly and Notices of Hearing were forwarded to both parties on December September 17, 2021.

A formal hearing was held by the Department of Labor in Concord, New Hampshire at 8:30 AM on October 13, 2021. Both parties appeared for the hearing. The claimant presented his own interests and provided live testimony. Alison Milioto appeared on behalf of Cobb Hill Construction, Inc. and advised that she provides human resources for the employer.

FINDINGS OF FACT

The claimant submitted a Wage Claim to the Department of Labor asserting that he was owed unpaid wages for 170.77 hours of unpaid vacation pay. The claimant worked for this employer, full-time, as a superintendent for more than seven years. At the time he was hired, the company's policy was that employees would be paid out unused vacation time upon separation from employment.

In April 2021, the company's policy changed. Ms. Milioto testified that the policy changed on April 26, 2021. The information contained in the evidentiary packet indicates that the employer was transitioning away from using two time off banks and will be implementing a combined PTO bank. The new policy which became effective April 26, 2021, allows employees to roll over a maximum of 40 hours from year to year on their anniversary dates. The policy indicates that they will no longer have a cash out option, and, upon termination either voluntary or involuntary time off will not be paid out upon termination of employment. This policy was emailed to the employees.

The claimant testified that he was aware of the policy change as he did receive the email. In light of the new policy allowing only 40 hours of vacation time to rollover, he requested to take three weeks of vacation between June and July 2021 and intended to rollover 40 hours of vacation leave as permitted by the new policy as he had 170.77 hours of vacation leave accrued. The claimant's anniversary date is July 18th. The claimant submitted his vacation leave request on June 1, 2021. On June 10th, his supervisor Jerry Kingwell visited with him at the jobsite and asked him not to take the vacation time because they needed him. They did not have another superintendent to oversee the construction project during the time the claimant requested to use vacation hours. The claimant's supervisor promised him that they would make an exception and allow him to rollover his vacation time in exchange for waiting to take a vacation until the project was done.

Ms. Milioto agreed that this conversation took place. She noted that exceptions were made for select employees whose anniversary dates fell shortly after the April 26, 2021 policy change. She further indicated that the intent was to allow the claimant to rollover the vacation time in order to take vacation following the completion of a project; there was no promise made to pay out unused vacation hours upon separation from employment.

The claimant tendered his resignation providing a two week notice to the employer on August 10, 2021. He last worked for the employer on August 20, 2021. At the time of separation from employment his rate of pay was \$35.22 per hour.

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 unpaid wages. Proof by a preponderance of evidence

as defined in Administrative Rule Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

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 and other fringe benefits.

The claimant argued that the he worked hard for this employer for over seven years and had 170.77 hours of accrued vacation time when the policy change when into effect on April 26, 2021. In light of the new policy, he requested three weeks of vacation so as not to lose his time and plan to rollover 40 hours as permitted by the new policy. At his employer's request, he waited to take vacation until after the project was done with the understanding that he would not lose the vacation hours he had accrued. The claimant argued that the employer demonstrated that the policy was flexible when it suited them. He argued that he should be paid for the 170.77 hours of vacation time that he had earned.

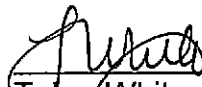
The employer argued that while the owner promised the claimant that he would be able to take time off after the job was completed, there was no promise that the claimant would be paid for accrued but unused hours upon separation from employment. It is speculated that had the claimant continued his employment, he would have been able to use his vacation hours as agreed upon.

Here, it appears the claimant had a verbal agreement with his supervisor that for the benefit of both parties, the claimant would delay using vacation hours until after the project was complete and the employer would allow the claimant to use his accrued time and not lose it on his anniversary date of July 18 in light of his willingness to delay his vacation. There was no evidence presented that the parties had an agreement that he would be paid accrued but unused vacation leave upon separation from employment. The claimant voluntarily left employment with Cobb Hill Construction in August 2021.

While the claimant's testimony that the policy at the time of his hire was that unused vacation hours were paid upon separation from employment, the evidence presented supports that there was a change to this policy that went into effect on April 26, 2021. The policy effective April 26, 2021 indicates in writing that upon termination, either voluntary or involuntary, time off which has been accrued but not used will be forfeited. Time off will not be paid out upon termination of employment. The evidence supports that this policy is reduced to writing and provided to employees via email which the claimant conceded he received. It is found that the employer acted in accordance with the effective policy at the time of the claimant's separation from employment.

DECISION

Based on the evidence and testimony presented, and as RSA 275:43 I requires that an employer pay all wages due an employee, it is found that the employer acted consistent with New Hampshire Statute. The claimant did not meet his burden to prove by a preponderance of the evidence that he is owed unpaid wages, it is hereby ruled that **this Wage Claim is invalid.**



Tahra White
Hearing Officer

Date of Decision: November 1, 2021

Original: Claimant
cc: Employer

TW/cb