

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Listen Community Services
CASE #63472

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Kyle Fisher, representing the employer

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

DATE OF HEARING: November 18, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a wage claim on September 15, 2021, alleging that he was employed as a warehouse worker and truck driver for the employer's thrift store in Lebanon. He claimed that when he separated from the company, he did not receive all the PTO that he was entitled to. He had 139.88 hours remaining but received only 80 hours' worth in his final paycheck. His claim was for \$1,013.00.

Notice of claim was sent to the employer on September 20, 2021. The employer filed an objection on September 27, 2021. Claimant requested a hearing on September 29, 2021 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 both parties, 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 46 years old and lives in Windsor, Vermont. He has a high-school diploma, awarded in 1994. For a number of years, he ran his own cleaning business. The employer was one of his customers.

Claimant was hired on January 27, 2016 to work at the employer's thrift store warehouse Lebanon and to drive a truck to pick up furniture and other goods donated to the thrift store. On January 28, 2016, claimant received orientation materials that included a copy of the employee handbook. He signed an acknowledgment that he had received the handbook and understood it. (Er. Exh.)

The handbook provided, in pertinent part,

An employee who provides Listen with two week's written notice of intent to resign is entitled to up to 10 days of earned but unused leave time. In order to receive up to 10 days of earned but unused leave time, the employee must work their last two weeks. In other words, employees cannot take 10 days of vacation time as their last 10 workdays with the agency.

Er. Exh.

Claimant testified that, in 2018 or 2019, the employer had a meeting for employees, to explain a new policy regarding leave time. As claimant described it, leave time had previously been awarded annually. The new policy was that leave time would be earned with each pay period worked. Claimant testified that, during this meeting, his manager Robert Broadwell made the comment that the change was good because it meant that everybody gets to keep their time. Claimant testified that he understood from this that the change meant that employees could keep all their earned time rather than losing it. Claimant testified that he never received an updated handbook.

Claimant testified that sometime in August 2021, he was thinking of leaving the company and taking a different job. At that time, he had quite a lot of earned time because, during the COVID-19 pandemic, work had been very busy and vacations were impractical due to travel restrictions and quarantines, so he had not taken much time off. He told his manager, Mr. Broadwell, of his plans to change jobs, and he asked whether he needed to use up his earned leave time before giving formal notice. Mr. Broadwell told him that he did not need to do that because he would receive a payout for all his accrued time in his final paycheck. Consistent with this testimony, claimant submitted in evidence a to-whom-it-may-concern letter:

In the matter of ██████████ leave time, I told him that to the best of my knowledge we were entitled to receive the full amount of unused time in our final paycheck. We had recently (in the past couple of years) changed the accrual method and at that time I was under the impression that we would then get the full amount. I personally was not aware that the policy was capped at 80 hours.

The letter was signed, "Robert Broadwell, Warehouse Manager, Listen Community Services." (Cl. Exh.) The employer agreed the letter was authentic.

Relying on the advice from his manager, the claimant did not try to use up his earned PTO after that.

On Monday August 30, 2021 claimant gave Mr. Broadwell his written notice that he was resigning, effective Friday, September 10, 2021. Later that day, Mr. Broadwell informed the claimant that the company policy had been changed and the maximum payout for unused leave time was 80 hours.

In his final paycheck, dated September 14, 2021, claimant received a payout of \$1,353.60 for 80 hours of leave time. His remaining 59.88 hours were forfeited. (Er. Exh.)

Kyle Fisher, 41, of Grantham, is the employer's executive director. He has been with the company for eight years. Mr. Fisher testified that the company's policy with regard to payout of unused leave time is set forth in its employee handbook, adopted on July 1, 2014. The policy on payout of unused leave time has not changed since then. Pursuant to the policy, a separating employee's payout of earned leave time is capped at 80 hours. Mr. Fisher testified that this policy has been applied consistently without exception since it was adopted.

Mr. Fisher testified that, on August 30, 2021, Mr. Broadwell wrote an email notifying HR that claimant had given his two weeks' notice and was intending to work through the last day, September 10, 2021. His email also stated that he had told the claimant he would receive a payout of his earned leave time in his final paycheck. Shortly afterward, HR responded with an email to Mr. Broadwell telling him that the leave time payout was capped at 80 hours, pursuant to company policy.

Mr. Fisher stated that, in light of the circumstances, he offered to allow the claimant to use the extra leave time as days off, if he could postpone his departure date for a few days. Claimant testified that he did not accept this offer because he had already committed to a start date of September 13, 2021 in his new job. The extra PTO days were forfeited, pursuant to company policy and practice.

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).

RSA 275:43, V 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.

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

- (a) Every employer shall at the time of hiring and prior to any changes notify his or her employees in writing as to the rate of pay or salary, whether by daily, weekly, biweekly, semi-monthly, or yearly, or by commissions, as well as the day and place of payment and the specific methods used to determine wages due pursuant to RSA 275: 49.
- (b) 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.
- (c) Pursuant to RSA 275:49, every employer shall inform his or her employees in writing of any change to such employees rate of pay, salary, or employment practices or policies as referred to in Lab 803.03 (a) and (b) prior to the effective date of such change.

Department administrative rule Lab 803.03.

In this case, the employee handbook, adopted July 1, 2014 and provided to the claimant when he was hired in 2016, stated that a separating employee would receive a maximum payout of 10 days' (80 hours') worth of unused earned leave time. However, it was not contested that, a year or two before the claimant resigned, the employer changed some of its policies regarding leave time. Claimant testified without contradiction that no updated handbook was ever provided to him, nor was one introduced into evidence at the hearing.

The employer testified that the change involved how leave time was awarded—from an annual basis to a pay-period accrual basis. However, the claimant testified that there was also a change with respect to the maximum amount that could be accrued. During the meeting to explain the change to employees, his manager Robert Broadwell had made the comment that the change was good because it meant that everybody gets to keep their time. At the hearing, both witnesses agreed that employees were now allowed to roll-over their unused leave time annually, subject to a maximum amount that they believed was around 200 hours. This seems to contradict a provision in the excerpt from the 2014 employee handbook, which states, "no more than 10 days...of unused leave time may be carried over to the next calendar year." Er. Exh. Although there was no testimony regarding this particular provision, it does suggest that the accrual method was not the only change made to the policies governing the use of leave time.

The employer's testimony is credited that the written policy regarding the cap on payout of leave time was never changed. However, that does not resolve the matter. The question presented is whether, notwithstanding the provisions in the handbook he was provided in 2016, the claimant was provided with fair notice that he would be limited to 80 hours if he sought to cash out his unused accrued leave time upon his resignation.

It is found that claimant's manager advised him to the effect that he would receive a cashout of all his unused earned leave. He asked his manager what the policy was and that is the answer he received. This conversation occurred about three weeks before he gave notice. The manager apparently did not seek confirmation from HR before giving this advice. Relying on this advice, the claimant did not try to use his accumulated leave hours before giving notice.

Three weeks later, when the claimant gave his formal notice, Mr. Broadwell told HR that he had advised claimant he would receive all his unused leave time with his final paycheck. Apparently it was a surprise to Mr. Broadwell to learn that there was an 80-hour cap on separation payout of leave. It appears that Mr. Broadwell believed that the changes made in 2018 or 2019 regarding leave time also included a change to the policy on how much unused leave time could be paid out on termination.

Plaintiff's testimony that he never received an updated handbook was not disputed and is credited. Under these circumstances it was reasonable for him to rely on his manager's statement as to the company's practice regarding separation payout of unused leave time. The employer's reliance on the 2014 handbook is therefore found to be unavailing.

The claimant met his burden of proving that the company policy and practice, as explained to him, was to allow him to cash in all 139.88 hours' of leave time, not just 80 hours' worth.

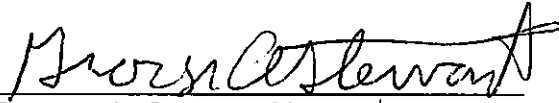
Accordingly, the claimant is owed for the balance of his unused leave time, which the parties agreed was 59.88 hours. At claimant's then-current hourly rate of \$16.92, that comes to \$1,013.17.

DECISION

As RSA 275:43, V considers a personal time payout to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he was due a personal time payout for 139.88 hours and was only paid for 80 hours, it is hereby ruled that his wage claim is valid to the extent of 59.88 hours, which comes to \$1,013.17.

The employer is hereby ordered to send a check to the Labor Department, payable to ██████████ in the amount of \$1,013.17, less applicable deductions, within 30 days of the date of this Order.

December 2, 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb