

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

█
v.

Exeter Center
Case No.: 63630

DECISION OF THE HEARING OFFICER

Appearances: █ Claimant

Employer: Jessica Foley – Campus Human Resources Manager, Exeter Center

Nature of Dispute: RSA 275:43 I - Weekly, Unpaid Vacation Pay
RSA 275:43 V – Weekly, Unpaid Personal Days

Date of Hearing: January 3, 2022

BACKGROUND AND STATEMENT OF THE ISSUES

The current issue concerns the employer's alleged failure to pay the claimant all the wages due to her. Specifically, the claimant asserts that she is owed for 2 unpaid vacation days and an unspecified number of personal days.

The claimant filed a Wage Claim with the Department on October 13, 2021 for \$2,080.00 in unpaid vacation and personal time. A Notice of Wage Claim was forwarded to the employer on October 15, 2021. The employer's objection to the claim was received by the Department on October 18, 2021. The claimant requested a hearing on the disputed claim, on October 27, 2021. Hearing Notices were forwarded to the parties on November 3, 2021.

FINDINGS OF FACT

The claimant worked as a nursing supervisor for the employer beginning in 2021. In 2021 the claimant explained that at the time of the wage claim she was working as both a nursing supervisor and performing nursing duties as well. The claimant's schedule at the time of the wage claim was Thursday from 3 pm to 11 pm and Saturday and Sunday 7am to 7pm. The claimant testified that her rate of pay was between \$35.00 and \$38.00 per hour.

The claimant testified that when she was solely a supervisor there was no problem with using vacation time. The claimant testified she was approved for weekend vacation time July 31 and August 1, 2021 on June 9, 2021. The claimant testified that in order to get the approval she had to agree to work two additional days before the vacation date. Those dates were Friday June 10 and Friday June 17. The claimant provided employer documentation of the approval dated June 10, 2021 which states that the claimant "will work Friday 6/10 and Friday 6/18 (sic)".

The claimant testified that during the week of July 19, she reminded management of her July 31 - August 1 vacation. The claimant testified that the following week of July 26 the campus human resources manager (present at the hearing) requested that the claimant forgo her vacation. When the claimant reminded the HR manager of her approved vacation, the HR manager replied "I forgot." The claimant testified that later that week the HR manager, the Director of Nursing and the Scheduling Department all requested that she forgo her vacation.

The claimant testified she felt that her employment may be in jeopardy at that point, felt pressured and subsequently worked during her approved vacation time. She was subsequently terminated August 22, 2021.

The claimant did not testify as to how much personal time she was owed. No personal time policy was cited by either party.

The employer's objection, received on October 19, 2021, states that "██████████ signed and initialed Genesis Healthcare, Exeter Center Benefit information policies. Specifically HR Policy 405 Vacation which states that unused vacation time is generally not paid out upon termination". The employer submitted copies of same vacation leave policy that were signed and initialed by the claimant.

Policy 405 states, among other requirements:

"2. Although the Company will strive to accommodate employees' vacation time requests, the Company, will, in its sole discretion, determine whether to approve or decline employees' vacation time requests."

"7. Unused vacation time is generally not paid out upon termination" (emphasis added).

8. If an employee is rehired:

8.1 Within 30 days of termination, his/her vacation time balance will be reinstated if the balance was not paid out upon termination" (emphasis added).

The employer provided no other argument or evidence in support of its counterclaim.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that he is owed additional wages. Proof by a preponderance of evidence as defined in Lab 202.05 means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both.

The employer has a policy. The policy was in effect at the time the claimant stopped working for the employer in August 2021. The claimant did not state that she was unaware of the policy/practice of the employer. The claimant received approval from the employer to use her vacation time on July 31 and August 1, 2021. The approval appears to have been contingent upon the claimant agreeing to work two additional days. This meant that when the claimant requested vacation time on June 9

she was asked to work the next day June 10 and the following Friday June 17. The claimant was essentially forced to cover other employees' shifts in order to receive approval to use her own vacation time. The claimant complied with the terms imposed by her employer and worked the additional 2 days in June.

The employer's policy does not mention that an employee must agree to cover another employee's shifts in order to use vacation time. The employer's policy does not include a caveat that approved vacation time may be revoked upon management's discretion.

The claimant received approval from the employer for the vacation time. The claimant was subsequently told by management that the approval was forgotten. The claimant was subsequently repeatedly asked to forgo her vacation until she did so.

The employer's written policy, which "generally" does not pay out unused vacation time, explicitly articulates the possibility of unused vacation time being paid out upon termination, obviously at the employer's discretion.

After reviewing all the evidence, the claimant has provided persuasive evidence that she is entitled to receive payment for July 31, 2021 and August 1, 2021. The employer appears to have disregarded its own policy and imposed requirements that do not appear in the policy, thereby voiding the policy. A plain English reading of this policy supports the claimant's interpretation. Furthermore, the employer did not refute any of the claimant's testimony. It is found that the claimant has two vacation days that she was not allowed to use. Given the circumstances surrounding the approval of the vacation days and then the denial of the pre-approved time, it is unjust to refuse to pay the accrued and unused days at the time of separation three weeks later.

The hearing officer reaches no conclusion as to unused personal-time because the issue was not raised during the hearing by either party.

DECISION

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers vacation pay, sick pay, and personal days' pay 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 she was not paid for July 31, 2021 and August 1, 2021; the claimant is entitled to 24 hours of pay at \$38.00 an hour (\$912.00). It is hereby ruled that the Wage Claim is valid in the amount of \$912.00.

The employer is hereby ordered to send a check to this Department, payable to ██████████ in the total of \$912.00, less any applicable taxes, with a statement of such deductions within 30 days of the date of this Order.


James W. McClain Jr.
Hearing Officer

Date of Decision: January 12, 2022

Original: Claimant
cc: Employer

JWM/cb