

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

TOWN OF PETERBOROUGH
CASE # 23-WG-00435

DECISION OF THE HEARING OFFICER

Appearances: Claimant - ██████████
Employer - Nicole MacStay – Town Administrator

Nature of Dispute: RSA 275:43, V – Unpaid Vacation
RSA 275:43-b – Unpaid Salary

Date of Hearing: April 4, 2023

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed a Wage Claim with the Department on February 13, 2023. A Notice of Wage Claim was forwarded to the employer who objected on February 23, 2023. The claimant requested a hearing February 27, 2023. On March 10, 2023 this hearing was scheduled as captioned above. All parties appeared.

FINDINGS OF FACT

The following findings of fact are based upon the testimony of the witnesses. The submissions of the parties and matters of record in the Department file.

After 5 years of part-time employment at the Town of Peterborough the claimant was hired to a full-time position as Payroll Finance Accountant starting on November 13, 2017. Her starting compensation was \$28.85 per hour or approximately \$60,000.00 a year. She was working in that position when the Town Administrator at the time pursued approval for a raise in her salary. There were not funds available for the raise so instead on August 15, 2018 she was awarded an additional week of vacation time annually. Therefore, in addition to the 2 weeks' vacation provided by the Town's Employee Manual the claimant was awarded 3 weeks of vacation.

As of March 4, 2019 the claimant was promoted to the position of Assistant Human Resources Director / Payroll & Benefits Accountant. The offer letter dated February 26, 2019 states that her starting salary is \$71,760.00 a year and she "...will be entitled to vacation and leave in accordance with the Town's Employee Manual."

On November 3, 2022 the claimant went out on sick leave and that was supplemented by the donations of sick leave from co-workers. On December 29, 2022 the claimant emailed the employer and notified them that her doctor has her returning to work on January 16, 2023. On January 12, 2023 the claimant emailed the employer asking if her sick leave carried her to the end of week she was "...[j]ust trying to plan my return." The employer did not reply to the claimant's emails.

Later the claimant was advised that her emails were inadvertently sent to a spam folder and never read by the employer. Further, pursuant to an internal investigation conducted in January the Town was investigating her conduct at work. The Town was prepared to terminate her for cause. She accepted an alternative to those procedures and tendered her Letter of Resignation on January 20, 2023. She subsequently emailed the Town that it was unnecessarily harmful for rumors to be spread by Town employees that she was terminated.

Upon separation, the claimant was not compensated for the additional week of vacation time promised to her on August 15, 2018 and awarded to her every year since then. She seeks an order awarding her that additional week of vacation owed upon her separation from employment on January 20, 2023.

Ms. MacStay testified for the employer that an additional week of vacation time was not paid upon separation because that applied to her previous job in 2018 as Payroll Finance Accountant. The Offer Letter on February 26, 2019 promoting her to Assistant Human Resources Director / Payroll & Benefits Accountant on March 4, 2019 states that she is only paid vacation time according to the Town Employee Manual and she was. The Town testified that they were unaware that the claimant had awarded herself the additional one week of vacation time annually since 2019. Had they known they would have advised the claimant to that she was not entitled to the additional week of vacation time.

Upon separation the claimant was not compensated for the preceding week from Monday, January 16, 2023 through Friday, January 20, 2023. She did not work that week. However, she asks for an order from the Department awarding her salary for that week because she told the employer she could return on January 16, 2023 with a doctor's note. Even if she was under investigation at least 2 previous employees that were under investigation were paid for that time despite being asked not to report to work.

Ms. MacStay testified for the employer testified that an employee's report of a doctor's note is not sufficient to return to work from sick leave. An actual doctor's note is required. Even if they received a doctor's note returning the claimant to work on January 16, 2023 (which no one has ever seen) it is not automatic that the claimant would have been paid for that final week.

DISCUSSION AND CONCLUSIONS

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

A. RSA 275:43 V - Unpaid Vacation Pay/Earned Time:

The claimant seeks an award of \$3,291.00 for accrued vacation time at the date of her separation from employment. RSA 275:43, V states that “vacation pay...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) In this case if the employer’s practice made the vacation pay due as wages, they were due within 72 hours of the claimant’s separation from employment.

It is undisputed that the Offer Letter effective at the time of her separation from employment stated that the claimant will be paid vacation time as defined by Town Employee Manual. It is undisputed that the claimant was paid her vacation time as defined by the Town Employee Manual. It is undisputed that after the Offer Letter in 2019 the claimant continued to receive an additional week of vacation time annually.

If the 2018 promised additional week of vacation became *the practice of the employer* by way of consistent payments thereafter, the claimant would be entitled to the \$3,291.00 she seeks.

Ms. MacStay testified for the employer that the Town was unaware that claimant in her capacity as Assistant Human Resources Director / Payroll & Benefits Accountant was “paying herself” this extra time every year after 2019. However, that should have ended with the promotion and raise in 2019. The claimant did not challenge that testimony or offer any evidence indicating the Town was aware that she continued awarding herself an additional week of vacation after her 2019 promotion.

The Department finds that the claimant should have asked if she was still entitled to the bonus week of vacation time after accepting the promotion and raise stating she was only entitled to vacation time described in the Town Employee Manual. The Department finds that the employer should have caught the subsequent awards of bonus vacation time much sooner. Like many critiques, this seems abundantly clear in hindsight. Equally clear is that the employer did not have a *practice* to award this bonus time to the claimant because at a minimum that would have required them to be aware that it was happening.

B. RSA 275:43-b - Unpaid Salary:

The claimant was a salaried employee, was separated from employment when she tendered her resignation letter on January 20, 2023. She asks that in lieu of actually working the week preceding her separation from employment that her report of having a

doctors note returning her to work on January 16, 2023 and then being ignored entitles her to compensation for that week regardless of being under investigation. Her testimony that previously other employees under investigation were paid was unchallenged. The employer's testimony that an actual doctor's note is required to return from sick leave was unchallenged and persuasive.

The Department finds that notifying the employer that a doctor's note returning the claimant to work was forthcoming does not rise to the level of the claimant actually being entitled to salary as if she was working. This email from the claimant did not have any details or an actual doctor's note attached. It was never responded to by the employer. That should have prompted the claimant to call the employer by telephone or send a written letter. The Department is not going to speculate retroactively how better communication between the parties could or should have been dealt with.

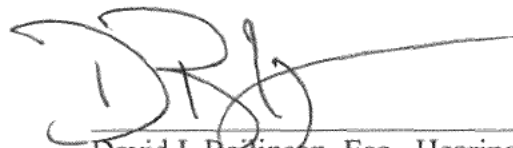
DECISION

Pursuant to RSA 275:43 V - Unpaid Vacation Pay/Earned Time, based on a thorough review of the evidence and testimony presented, it is determined that the claimant did not successfully prove, by a preponderance of the evidence, that she is due unpaid wages for accrued vacation time at separation from employment. **This Wage Claim is invalid.**

Pursuant to RSA 275:43-b - Unpaid Salary, based on a thorough review of the evidence and testimony presented, it is determined that the claimant did not successfully prove, by a preponderance of the evidence, that she is due unpaid wages for the last workweek prior to her resignation. **This Wage Claim is invalid.**

So Ordered:

May 1, 2023
Date of Decision



David L. Barlinson, Esq., Hearing Officer

DIB/nd