

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM ) Case No. 1421-2011  
OF JOHN ROGER NOLTE, )

Claimant, )

vs. )

**AMENDED  
FINAL AGENCY DECISION**

HELENA AREA HABITAT FOR )  
HUMANITY, A Montana Corporation, )

Respondent. )

\* \* \* \* \*

**I. INTRODUCTION**

After issuing the Final Agency Decision in this matter on January 4, 2012, the parties filed cross-motions for rehearing. Nolte argued that the hearing officer improperly calculated the wages he was owed and Habitat for Humanity argued that the penalty was incorrectly applied. Therefore, the hearing officer is issuing this amended Final Agency Decision to reflect his responses to the requests for rehearing.

Claimant John Roger Nolte appeals from a determination of his \$2,680.00 claim for unpaid wages by the Wage and Hour Unit of the Department of Labor and Industry. Hearing Officer David A. Scrimm held a contested case hearing in this matter on November 17, 2011. Nolte represented himself. Evan Thompson, attorney at law, represented the respondent, Helena Area Habitat for Humanity (HFH).

Nolte and Melony Bruhn, Executive Director, testified under oath. Documents 1 through 115 were admitted into the hearing record as well as respondent’s Exhibit A. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUE

The issue in this case is whether the Helena Area Habitat For Humanity owes wages for work performed, specifically vacation pay, as alleged in the complaint filed by John Roger Nolte, and owes penalties as provided by law.

## III. FINDINGS OF FACT

1. The claimant was employed by HFH as a supervisor in its retail outlet, ReStore, beginning in November 2005 until he was discharged on February 23, 2011. At the time of his discharge, Nolte earned \$10.00 per hour.

2. After the claimant was terminated, he was compensated \$1,161.81 for the 128 hours he worked prior to being terminated.

3. The Wage and Hour Unit determined that HFH owed the claimant \$440.00 in unpaid vacation wages he had accrued and penalties in the amount of \$242.00. HFH paid these amounts to the claimant.

4. Pursuant to HFH's personnel policy, Nolte was to receive 80 hours of paid annual leave each year. The policy did not allow employees to carry unused leave from one year to succeeding years.

5. In 2009, Nolte used 64 hours of annual leave. Documents 73-75, 77-78, and 80. The remaining 16 hours did not carry forward and HFH is not obligated to pay Nolte for those hours. Nolte earned 80 hours of annual leave that he could use beginning in January 2010.

6. In 2010, HFH allowed Nolte to take 120 hours of paid annual leave. Documents 37, 47, 48, 52, and 55. The additional 40 hours were approved by Bruhn and the HFH Board president. In addition, Nolte earned 80 hours of annual leave that he could take beginning in January 2011.

7. When Nolte was terminated in 2011, HFH paid him for 12 hours of annual leave. The 12 hours of annual leave was HFH's proration of the 80 hours Nolte could earn in 2011. Nolte worked until February 23<sup>rd</sup>, the 54<sup>th</sup> day of 2011 (Dividing 54 days by 365 = .147 which when multiplied by the 80 hours Nolte could earn in 2011 results in approximately 12 hours).

8. When Nolte was terminated, he was owed 80 hours of annual leave for 2011. HFH subsequently paid him for 44 hours after the Wage and Hour Determination was issued. HFH owes Nolte for 36 hours of earned vacation pay.

9. Nolte's unpaid vacation wages amount to \$360.00 (36 times \$10.00 per hour).

10. Penalty on unpaid wages at 55% equals \$198.00 (\$360.00 times 0.55 = \$198.00).

#### IV. DISCUSSION

Montana law requires that employers pay employees wages within ten days after the wages become due pursuant to the particular employment agreement. Mont. Code Ann. § 39-3-204. Except for compliance with minimum wage and overtime law, the parties can agree to the amount of wages to be paid. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

"Vacation pay which has been earned and is due and owing must be considered in the same category as wages and is collectible in the same manner and under the same statutes as are wages." 23 Op. Att'y Gen. 151, 153 (1949); *In re the Wage Claim of Sharon Langager*, (1998) 287 Mont. 445, 453; 954 P. 2d 1169, 1173-1174.

In *Langager*, the court looked at other state court holdings regarding vacation pay and found that "an employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions." *Langager*, 1998 MT 445, ¶25, *quoting Rowell v. Jones & Vining, Inc.* (Me. 1987), 524 A.2d 1208, 1211.

HFH's vacation policy in force during the relevant part of Nolte's employment provides as follows:

Full-time employees are entitled to 40 hours of vacation after one year and 80 hours of vacation after two years of continuous employment. Vacation may not be carried forward from year to year . . . Unused vacation leave will be paid in full to employees at the time of termination. Document 99.

Thus, HFH has adopted a "use it or lose it" policy regarding the vacation benefit it provides. Employees are provided a vacation benefit, which they must use within the

calendar year they earn it. In 2009, Nolte had earned 80 hours of paid vacation available to him. He only used 64. Had Nolte asked to use the remaining 16 hours of his earned vacation time within calendar year 2009, he would have been paid for it. Because he did not take the time during the fiscal year he earned it, he lost it. His pay for the year was actually the same as if he had taken the rest of his accrued vacation time, but he had to work the 16 hours that he could have spent on paid vacation. While Nolte disputes that he received a copy of the annual leave policy, he did acknowledge receiving it on December 3, 2008 (Exhibit A).

In *Stuart v. Department of Social & Rehabilitation Services* (1993), the Montana Supreme Court provided a clear indicator that use it or lose it vacation policies are neither in conflict with the Wage Payment Act nor unacceptable public policy. 256 Mont. 231, 235, 846 P.2d 965, 968. The court held that because the Legislature created the right for public employees to earn annual vacation leave credits, it could condition those rights to limit the accumulation of those credits. *Id.*

The state has expressed the terms of its “use it or lose it” vacation leave policy in statute. Private employers, so long as they do not violate express statutory limits (such as minimum wage law), can express the terms of their vacation leave policy (if they have one) in their employee policies. HFH expressed the terms of its “use it or lose it” policy in its Employee Manual it developed during Nolte’s tenure. In both cases, the employer was still free to set the terms and conditions of its conditions of employment. *Langager* at ¶25. In a more recent case involving payment for personal time, found analogous to vacation time, the court consistently held that “to the extent that an employer has obligated itself to pay money for earned but unused personal time, there exists an obligation to pay wages under 39-3-201(6)(a).” *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶21-22, 125 P.3d 1121 ¶21-22.

Like the State of Montana in *Stuart*, HFH limited its obligation to pay for unused vacation time. The State of Montana’s “use it or lose it” vacation policy allows its employees to accumulate no more than two times the amount of vacation leave earned in one year. HFH’s “use it or lose it” policy simply prohibits carrying over unused time from one year to the next. While under such a policy employees have to be vigilant lest they lose vacation time earned, HFH policy does not require it to pay for unused time. Indeed, at hearing Nolte testified that he thought he had used all his annual leave in 2009, however his time sheets indicate that he only used 64 hours. HFH set a value of zero on unused vacation time. Because employers are free to set the terms and conditions of employment and to limit their obligations regarding the benefits employees earn, HFH is under no obligation to pay wages to Nolte for his unused 2009 annual leave. *McKonkey* ¶ 24.

Nolte's 2010 earned annual leave is a different matter. Under HFH's annual leave policy, Nolte should have been paid for the 80 hours of unused annual leave he had earned when he was terminated. He was paid for 12 hours at the time he was terminated, but that was a pro-rated amount for the vacation time he earned from the beginning of 2011 to the time he was terminated. Nolte was subsequently paid for 44 hours after the Wage and Hour Unit determined that amount was owing. HFH thus owes Nolte \$360.00 for 36 hours of unpaid annual leave (80 hours - 44 hours = 36 hours).

For claims not involving minimum wage or overtime, a 55% penalty must be imposed. Admin. R. Mont. 24.16.7566.<sup>1</sup> On the \$360.00 in unpaid annual leave HFH owes a penalty in the amount of \$198.00. Admin R. Mont 24.16.7566(1)(b) reduces that penalty to 15% if the employer pays the penalty within the time specified in the determination. The hearing officer's decision is a final agency decision and not a department determination as contemplated by the statute and these rules and thus the reduction in penalty is not available once the matter is transferred to the Hearings Bureau for a contested case hearing.

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. HFH owes Nolte \$360.00 in unpaid annual leave and a penalty on the unpaid wages of \$198.00.

## VI. ORDER

Helena Area Habitat for Humanity is hereby ORDERED to tender a cashier's check or money order in the amount of \$558.00, representing \$360.00 in wages and \$198.00 in penalty, made payable to John Roger Nolte, and mailed to the **Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503**, no later than 30 days after service of this decision. HFH may deduct

---

<sup>1</sup> The 110% penalty provision that Nolte argued for is not applicable here because none of the special circumstances requiring imposition of that penalty apply to this case. See Admin R. Mont. 24.16.7556.

applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 8th day of February, 2012.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.