

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Master An's Taekwondo Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:44 IV liquidated damages

Employer: Master An's Taekwondo Inc., 270 S River Rd, Bedford, NH 03110

Date of Hearing: October 4, 2016 and September 6, 2016

Case No.: 52801

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted, through the filing of her wage claim, that she was owed \$5,661.00 in unpaid wages for hours worked between May 2013 and July 2014. She argues she instructed classes, performed cleaning and other household tasks at the studio, in addition to working for camps and birthday parties. She seeks minimum wage for hours worked, less tuition discounts she received towards her tutorial.

She amended her claim on May 27, 2016, seeking \$5,775.25 in unpaid wages and further sought liquidated damages.

At the hearing, she removed the 8th US Master's Open event on November 17, 2013, for 9 hours, from her claim.

Master An's Taekwondo Inc. argues that the claimant was a student of the school, not an employee. Being a student at the school means being part of the community at the studio. In this capacity, often students assist with clean up after classes, cleaning the studio, clearing walkways, weeding the signage area, and generally making the studio a place of which they can be proud. The claimant did instruct classes as part of her training as well.

They argue there was never an employee/employer relationship between the parties.

FINDINGS OF FACT

The claimant began as a student at Master An's Taekwondo Inc. in the first grade and continued until July 2014 (approximately ten years). She studied several different disciplines. She progressed into instruction and training, eventually training not only

students but other instructors. By all accounts, she was a disciplined and accomplished individual.

The claimant argues she is due the federal minimum wage of \$7.25 for all hours worked for three separate types of events because these activities were an employee/employer relationship over and above the student relationship she had with the Master An's Taekwondo Inc.

She asserts she was an employee who worked as an instructor and performed miscellaneous tasks for Master An's Taekwondo Inc. as follows:

- May 2013 through November 2013
 - ◆ Monday and Wednesday 3:00pm to 5:40pm
 - ◆ Saturday 10:50am to 3:30pm
- December 2013 through January 2014
 - ◆ Tuesday, Wednesday, Thursday and Friday 3:00pm to 5:40pm
 - ◆ Saturday 10:50am to 3:30pm
- February 2014 through July 2014
 - ◆ Tuesday, Wednesday, Thursday and Friday 3:00pm to 5:40pm
 - ◆ Saturday 10:50am to 3:30pm

She argues she worked a total of 760 hours for these dates. She agrees she received a tuition discount during this period and allowed for an offset of \$1,482.

She also argues she was an employee who worked an additional 232 hours as follows:

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|------------------------------|---|
| • Self-Discipline Camp | July 15, 2013 - July 19, 2013; 45 hours |
| • Weapons Camp | July 22, 2013 - July 26, 2013; 45 hours |
| • Tournament Camp | July 29, 2013 - August 2, 2013; 45 hours |
| • Columbus Day Camp | October 14, 2013; 9 hours |
| • Parent's Night Out | December 13, 2013; 7 hours |
| • April School Vacation Camp | April 21, 2014 – April 25, 2015; 45 hours |
| • Summer Camp Session 2 | July 21, 2014 - July 24, 2014; 36 hours |

She seeks \$5,710.00 as due for all hours worked, after an offset of \$1,482 for the tuition discount.

She also asserts the employer should be held liable for liquidated damages.

Master An's Taekwondo Inc. maintains that the claimant was never an employee. All the events in which she participated, and instruction and other miscellaneous tasks she performed were part of her training and being a student within the community at the school.

The Department must first determine whether the claimant was an employee of Master An's Taekwondo Inc.

This analysis will be divided into two parts: instruction and miscellaneous tasks and camps/Parent's Night Out.

RSA 275:42 Definitions. – Whenever used in this subdivision:

II. "Employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria...[criteria omitted].

The claimant argues she was an employee when she instructed classes for the benefit of the Master An's Taekwondo Inc. She maintains she had to provide a schedule of availability. She also argues she performed cleaning and other household tasks at the studio.

Master An's Taekwondo Inc. argues she was a student and part of learning is teaching. They did accept notice of availability as part of the student's schedule. No student has ever had any repercussions for not being available if they had prior said they would be available.

The parties disagree as whether the claimant instructed classes by herself.

The claimant did not provide persuasive testimony that her time spent instructing others, cleaning and performing other household tasks at the studio was engaging in employment with Master An's Taekwondo Inc., rather than furthering her own skills as a student or being a member of the school.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence she was an employee for the instruction and miscellaneous tasks portion of the claim and that she is due any wages for this portion of the claim.

The claimant also argues she was an employee during camps and a Parent's Night Out for Master An's Taekwondo Inc.

The claimant provided credible testimony and evidence that her participation in the camps and Parent's Night Out event did not further her school training or instruction of the disciplines she was learning at the school. She performed general child care duties, including setup and cleanup for snacks and lunches; setup and cleanup of crafts; demonstrations of disciplines for the kids in care; and other child care duties as needed.

Master An's Taekwondo Inc. argues that all of her activities, including the camps and the Parent's Night Out are on a volunteer basis, and are not required. However, participation is part of the community of the school, and not employment.

The claimant's participation in the camps and Parent's Night Out are distinguishable from the instruction because they are not related to her instruction as a student. In participating in instruction, she herself gained additional skill, which was the reason she was in attendance of the school. Participating in activities such as camps and Parent's Night Out, activities which generated revenue for the school, do not increase the skills for which she became a student and are found to be an employee/employer relationship and subsequently engaging in employment.

The Hearing Officer finds the claimant meets the criteria in RSA 275:42 II because she was permitted and directed by any employer, in consideration of direct or indirect gain or profit (continued favor by the school and a tuition discount), to engage in any employment. The claimant provided credible testimony she did not know she should have been paid for working at that time because of her inexperience in the "working world", as she was approximately between 14 and 16 years old.

Master An's Taekwondo Inc. (hereafter "the employer") argues her participation was for the "community of the school" when in fact her participation should have resulted in payment of wages as an employee.

The claimant argues she worked a total of 232 hours, as specified above. She credibly testified that she worked the hours claimed performing duties for the benefit of the employer.

The employer did not argue that the claimant did not work the hours she claimed for the camp and the Parent's Night Out, only that she was not an employee during these activities.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence she is due the claimed \$1,682.00.

The claimant had allowed an offset for the tuition reduction she received, against the total original claim. However, nothing in the statute allows for an offset of tuition discount against wages due.

The claimant also alleges the employer should be held liable for liquidated damages because she should have been treated as an employee and paid for all wages due.

The employer argues that that the claimant was not an employee and therefore not entitled to wages.

RSA 275:44 IV holds an employer liable to an employee for liquidated damages if the employer, "willfully and without good cause fails to pay" all wages within the timeframe required by statute. The New Hampshire Supreme Court defined "willfully and without good cause" in Ives v. Manchester Subaru, Inc. 126 NH 796 to mean, "voluntarily, with knowledge of the obligation and despite the financial ability to pay the wages owed". The Court continued, "an employer acts willfully if, having the financial ability to pay wages which he knows he owes, he/she fails to pay them".

The Hearing Officer finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay her wages due because the employer held a genuine belief she was not an employee for her work performed during camps and Parent's Night Out.

No wages were found to be due for the claimant's time spent on instruction; therefore no liquidated damages can be assessed.

However, even if wages had been found to be due, the employer held a genuine belief that the claimant was not an employee. Therefore, the claimant would not have been able to prove by preponderance of the evidence that the employer acted willfully and without good cause in failing to pay wages due.

DISCUSSION

The burden of proof lies with the claimant in these matters. The claimant has the burden to prove by a preponderance of the evidence that the claimed wages are due. 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.

The claimant met that burden in her claim for the December 13, 2013, Parent's Night Out event, and the Camps in 2013 and 2014.

She did not meet that burden in her claim for the instructional time or for liquidated damages.

Both parties brought up the issue of volunteering. The employer is, by their own testimony, a for profit business, which cannot have volunteers under Lab 803.05.

Pursuant to Lab 803.05 Exemption. The term "employee" as it applies to RSA 275:42, I and RSA 279:1, X shall not apply to the following:

(a) Bonafide volunteers:

- (1) When such volunteers are performing work for public, charitable, or religious facilities;
- (2) When such activities are exempt under 29 CFR Ch. V Section 553:100-106, WH Publication 1297 "Employment Relationship" of the Fair Labor Standards Act;
- (3) Where such bonafide volunteers do not displace a paid employee; and
- (4) Where such volunteer duties do not necessarily or traditionally lead to paid employment.

The employer used the word "volunteer" meaning that the claimant chose of her own accord to do certain activities or tasks.

The claimant used the word "volunteer" under the definition in the Fair Labor Standards Act, which this Department has not adopted in its entirety, see Lab 803.05.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that she is owed a portion of the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of \$1,682.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$1,682.00, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: October 31, 2016

Original: Claimant
cc: Employer

MJD/das