

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Black Bear Lodge LLC

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages/bonus
RSA 275:44 IV liquidated damages
RSA 275:42 V, personally liability of corporate officer/manager

Employer: Black Bear Lodge LLC, PO Box 357, Waterville Valley NH 03215

Date of Hearing: September 7, 2017

Case No.: 55239

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant originally asserted she was owed \$2,000 in unpaid bonus. She then amended her claim to \$10,000 in unpaid bonus. She further amended her claim to seek liquidated damages and asserted that Douglas McDermod should be held personally liable.

At the hearing, the claimant waived the request for personal liability.

The employer denies the claimant was due any bonus under their written policy.

FINDINGS OF FACT

The claimant worked for the employer from May 18, 2015 through April 28, 2017, as the general manager.

The claimant argues she is due 1) a \$1,000 bonus for a GSS rating, 2) a \$1,000 bonus for a Star rating bonus, and 3) a \$2,000 and a \$6,000 for two tiers of net profit bonus.

She argues that because she received a bonus of \$2,000 for 2016, even though she was told there was no net profit, she should receive this bonus again for 2017. She also argues the employer received a new award in 2017 that they had not had in the past. Further, she alleges the employer did not tell her to implement a Star rating program for the facility. She also alleges that because employer's bylaws for revenue and profits are set up in such a way that it can never make more than \$1 in profit and she would never be able to attain the \$8,000 net profit tier bonus in the written plan, they should have to pay her this bonus because it was an "empty promise". No documentation was presented to confirm the allegation of the bylaw requirement. She

also disagrees with the figures previously submitted by the employer regarding their financial budget status.

The employer argues the claimant did not make the “improvements” as required for the GSS and Star rating bonus to attain a bonus. They had a net loss of over \$31,000 for the fiscal year ending March 31, 2017, documentation previously submitted, therefore, no net profit bonus is due.

Pursuant to RSA 275:49, on March 24, 2015, the employer noticed the claimant in writing of the eligibility requirements of the bonus program as follows, “You will also be eligible for an annual bonus tied to 3-metrics inclusive of financial performance of the “Board approved annual operating budget”. Since our fiscal year begins April 1 of each year, the annual operating budget and bonus is for the 12-month operating period ending March 31. Based on your start date, your bonus would be pro-rated for your corresponding period of service within the 12 month operating period. For the period ending 3/31/16, our annual bonus earning potential would be \$10,000 and would be based on the following 3-metrics including:

1. GSS Rating improvement = \$1,000
2. Star Rating improvement = \$1,000
3. Pre-tax net profit as follows:
 - (a) 10% on the first \$20,000 of pre-tax net profit, or up to \$2,000
 - (b) 20% on the next \$30,000 of pre-tax net profit, or up to \$6,000

The earned bonus would be paid after the year-end annual financial review was completed by our outside accounting service (usually by the first week of May) and capped at \$10,000 (and pro-rated for your period of services within the 12-month period operating budget year). In subsequent years, a comparable plan would be offered.”

Neither party produced a signed copy of this agreement, but both agreed this was the controlling document.

The claimant did not improve the GSS Rating of the employer. Her own documentation, previously submitted, shows that their ranking remained the same throughout 2015, 2016 and 2017. Though they may have received an additional award, their ranking did not improve from the previous ranking.

The bonus structure clearly states a GSS Rating improvement is required for the bonus. The claimant’s argument that she received a bonus in the prior year is not persuasive as the employer can always choose to pay more than is required by their written policy. Making a discretionary bonus payment which is not required by written policy does not set precedent for future payments to be made.

Therefore, the Hearing Officer finds the claimant failed to prove she is due the GSS Rating improvement bonus.

The claimant agrees the employer did not participate in the STAR Rating. As the employer did not participate, the claimant could not improve the standing. The claimant’s argument that she received a bonus in the prior year is not persuasive as the employer can always choose to pay more than is required by their written policy. Making a discretionary bonus payment which is not required by written policy does not set precedent for future payments to be made.

Therefore, the Hearing Officer finds the claimant failed to prove she is due the STAR Rating improvement bonus.

The employer did not make a profit for the fiscal year ending March 31, 2017, and instead suffered a loss of over \$31,000. As the employer did not make a net profit, no bonus would be due the claimant under section 3.

The claimant's argument that the bylaws prevent the employer from making a profit of more than \$1 and therefore this section is an "empty promise," is not persuasive. No documentation was given to show that the employer is prevented from making a profit of more than \$1. Even if the employer is prevented from making a profit of more than \$1, the written policy is clear how bonus eligibility is determined under the net profit. An "empty promise" may be unfair, but it would not require a bonus payment in this instance.

Therefore, the Hearing Officer finds the claimant failed to prove she is due the net profit bonus.

Because no wages are found to be owed, no liquidated damages can be awarded. Even if wages had been found due, liquidated damages would not have been awarded.

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 employer provided credible testimony and evidence that they held a genuine belief that the bonus was not owed. Therefore, the Hearing Officer would have found that the claimant failed to prove by a preponderance of the evidence liquidated damages were due as the employer held a genuine belief that the bonus was not due.

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 this Department finds that the claimant failed to prove by a preponderance of the evidence that she is owed the claimed wages/bonus, it is hereby ruled that this portion of the Wage Claim is invalid.

As 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 wages due in the time frame required by statute, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that the employer willfully and without good cause failed to pay wages due in the time frame required, it is hereby ruled that the portion of the Wage Claim for liquidated damages is invalid.

Melissa J. Delorey
Hearing Officer

Date of Decision: September 25, 2017

Original: Claimant
cc: Employer

MJD/nm