

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

Ristorante Massimo Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:48 I illegal deductions
RSA 279:26-b tip pooling

Employer: Ristorante Massimo Inc, 59 Penhallow St, Portsmouth NH 03801

Date of Hearing: March 13, 2018

Case No.: 56644

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts the employer illegally deducted \$76,429.50 from his tips/wages, due to his required participation in a mandatory tip pool. He seeks these tips/wages as due.

The employer denies the tip pool was mandatory. The handbook clearly outlines the tip pooling arrangement is employee driven, the option of opting out, and the contact information for the New Hampshire Department of Labor for questions.

FINDINGS OF FACT

The claimant worked for the employer from summer 2013 through October 2017, when he was terminated. The claimant began his working relationship with the employer as the employer was looking to expand his business from a restaurant to include a full service bar and the claimant was looking to "get back into" the Portsmouth upscale dining arena. The claimant accepted the position of bar manager/beverage director. In addition, he worked behind the bar, which had seating for thirteen and some standing room, and occasionally assisted with the five tables seating approximately fourteen patrons in the bar area. He did not work in the restaurant located downstairs from the bar.

The claimant argues he was told upon hire that he was required to participate in a mandatory tip pooling arrangement. He acknowledges he agreed to work under this arrangement, but only because he wanted the job. He felt he would not be hired if he did not agree to the tipping arrangement. He did not ask any questions about whether

he could opt out of the tipping arrangement, rather he only asked if tips were shared between the restaurant downstairs and the bar upstairs, which they are not.

The claimant agrees he never asked to opt out of the tipping arrangement during his employment. He did ask for other opportunities to create tips for himself, such as sending bar backs home when they were not busy, so they would not take a larger share of the tip pool. He further argues the original employee handbook he received when he began employment did not reference any tip pooling and that he never saw any subsequent employee handbooks.

The employer argues that he never told the claimant that the tip pooling arrangement was mandatory, but that it was an employee driven arrangement. The claimant signed a notice stating he received the employee handbook upon hire, though undated, both parties agree he signed around the time of hire, documentation previously submitted. The handbook submitted does contain a description of the tip pooling arrangement, an opt out policy and the contact information for the New Hampshire Department of Labor. He vehemently argues the employee handbook provided for the hearing which includes the previously listed information is the copy the claimant received. Further, the claimant was the bar manager and had access to all of the documentation, including the handbook and updates.

The employer also argues that he had regular meetings (daily initially, then weekly, and as needed) with the claimant regarding issues with the business and changes to be made. He respected the claimant's thirty years of experience in the business and his expertise and relied heavily on him. The claimant regularly and repeatedly made requests which the employer granted, including vacation pay, which no other front of the house employee received, and multiple employee loans. At no time did the claimant ask about opting out of the tip pool or complain about the tip pooling arrangement in any way. He did ask to send employees home when it was slow, but the employer did not like to take away hours employees were expecting to work and be paid for. The claimant once resigned but the employer did not accept it, and the claimant returned to work.

The employer also asserted they had been inspected by this Department and the tip pooling arrangement was found to be lawful.

He did have one employee who at one point during her employment asked to opt out of the tip pool; however, she changed her mind and asked to stay in the pool. He credibly testified he would hire an employee who did not want to be part of the tip pooling arrangement.

The parties agree tips for the bar come from four sources:

- Tips left in cash on tables
- Tips left on credit cards from the tables
- Tips left in cash in a bucket on the bar
- Tips left on credit cards from the bar

The parties also agree it is most likely impossible to determine the amount of tips that were generated by each bar stool, bar standing or table, and tips are left in cash, on credit cards, and sometimes both.

For each shift, a bartender worked behind the bar, a wait staff assigned to the tables, and a staff member to assist with running food and other duties as needed (the parties disagree as to the technical name of the position, bar back versus back waiter). The parties also agree that the bar generated more tips than the tables (60-65% bar, 35-40% tables).

The \$76,429.50 claimed represents tips/wages for the thirty-six month preceding his separation from employment in October 2017. RSA 275:51 V requires that an employee file a Wage Claim no later than 36 months from the date the wages were due. This Wage Claim was filed with this Department on January 9, 2018. Therefore, any portion of the claim prior to January 10, 2015, cannot be dealt with through this decision.

The claimant did not maintain any contemporaneous notes about the tips he shared in the tip pooling arrangement nor did he submit any documentation for the hearing regarding his calculation for the \$76,429.50 claimed, including dates and amounts of wages due. He did attempt to submit documentation after the close of the hearing, however, it was returned to the claimant as ex parte communications. This documentation was not reviewed by the Hearing Officer and is not considered for this Decision.

The claimant's argument that the tip pooling arrangement was mandatory and that the employee handbook he received did not contain the description, opt out and contact information for the New Hampshire Department of Labor, is not found persuasive or credible in light of the credible testimony and documentation of the employer.

The claimant has the burden of proof in this matter to show by a preponderance of the evidence that he was required to participate in a mandatory tip pooling arrangement and that the employer illegally deducted his tips/wages. The Hearing Officer finds that the claimant failed to meet that burden of proof. The claimant, therefore, fails to prove by a preponderance of the evidence that tip pooling arrangement was mandatory and that tips/wages are due.

DISCUSSION

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that his assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant failed to meet his burden in this claim.

Even if the claimant had met his burden to prove he had participated in a mandatory tip pool, he would still have the burden to prove tips/wages had been illegally deducted from him.

The claimant credibly testified that tips came from multiple sources. He is unable to prove the total amount of tips that were in the bucket on the bar, the amount of tips left in cash on the tables, the tips left on credit cards at the bar, and the amounts left

on credit cards on the tables, and subsequently, the tips he gave away as part of the tip pool; further he is unable to prove which tips were meant directly for him. He is also unable to prove that he did not financially benefit from participating in the tip pool, rather than distributing his own tips to other staff.

Therefore, the Hearing Officer finds would have found that that the claimant did not prove by a preponderance of the evidence that he is due the claimed tips/wages.

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 he is owed the claimed tips/wages, it is hereby ruled that the Wage Claim is invalid.

Date of Decision: March 29, 2018

Original: Claimant
cc: Claimant's Attorney
Employer
Employer's Attorney

MJD/nm