

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████ ██████████

v.

Cheers, P. R. & C. Gaming Corporation

DECISION OF THE HEARING OFFICER

Appearances:

Nature of Dispute: RSA 275:43 I Weekly, Unpaid Wages
RSA 275:43-b Payment of Salaried Employees, Unpaid Salary

Claimant: ██████████ ██████████

Employer: Cheers, P. R. & C. Gaming Corporation

Date of Hearing: September 10, 2018

Case No.: 57407

BACKGROUND AND STATEMENT OF THE ISSUES

The employer operated a charitable gaming establishment in Salem, New Hampshire. On June 1, 2018 the establishment's license was suspended by the New Hampshire Lottery Commission

The claimant worked as a Charity Liaison for the employer.

The current issue concerns alleged unpaid wages in the form of salary. The claimant holds she was a salaried employee receiving \$800.00 per week.

The employer argues the claimant was paid an hourly wage the entire time she worked for him.

On the basis of the claimant's assertions she is owed unpaid wages she filed a Wage Claim with the Department on June 21, 2018; on June 22, 2018 a Notice of wage Claim was forwarded to the employer. The Department received the employer's objection on July 3, 2018 a Notice of Employer's Objection was forwarded to the claimant on the same day. The claimant requested a Hearing on July 16, 2018. Accordingly a Hearing was held at the Department on October 10, 2018.

The claimant amended her claim at the Hearing to \$1,360.00 in order to account for a check she received from the employer in the amount of \$80.00 prior to the Hearing.

FINDINGS OF FACT

The employer objected to a submission made by the claimant and received by the Department on September 5, 2018 testifying he never received the documents. The claimant provided a United States Post Office (USPO) generated receipt that reflects an attempt to deliver the documents to the employer's home address in Salem, Massachusetts on September 5, 2018. The delivery was rejected. This Hearing Officer asked the employer if someone at his residence did not accept the delivery of the documents; he responded first, "I don't know what you are talking about," then testified that deliveries are never refused at his house. When this Hearing Officer offered the employer to take time to review the claimant's evidence, he rejected them stating "The documents don't mean nothing to me." This Hearing Officer accepted the documents into evidence.

The claimant requested to submit the USPO receipts including a time table reflecting the periodic status of the documents in the delivery process. The evidence included a receipt for the claimant's cost for the mailing. The employer objected to the submission because they were not received within the required timelines. This Hearing Officer accepted the documents into evidence.

The claimant began working for the employer during the week of January 20, 2018, her last day of work was June 14, 2018. She began by receiving an hourly rate of pay. On January 31, 2018 the claimant submitted a resignation letter to the employer. He did not accept her letter of resignation. Subsequently the parties negotiated a change in the claimant's pay. The parties agreed the claimant's pay would increase from an hourly rate-of-pay to a salary; the claimant withdrew her resignation. For every pay period subsequent, the claimant was paid a salary of \$800.00 per week, except for the last two (2) pay periods. The last two (2) pay periods the employer paid her an hourly rate-of-pay of \$20.00 per hour.

The claimant provided her wage statements for the pay periods 1/20/18 through 6/20/18. All except three pay periods show her being paid a salary of \$800.00 per week. The first pay period shows her being paid for working 39.58 hours at \$20.00 per hour, her last two statements show her being paid for eight (8) hours for the pay period 6/2/18 to 6/8/18 and for four (4) hours the final pay period, each pay period her pay was calculated with a rate-of-pay of \$20.00.

The employer testified the claimant was paid hourly throughout the period she worked for him.

The claimant's job duties included, but were not limited to, coordinating licensing of charities and employees, maintaining a handbook of regulation manuals, performing human resource duties, interacting with the New Hampshire Department of Revenue for facility licensing and restaurant certificate. The claimant's job duties are typical of an employee in upper management.

The employer testified the claimant had an entry level job and disparagingly referred to her as "nothing more than a labor runner."

DISCUSSION AND CONCLUSIONS

The claimant has the burden of proof in these matters to show by a preponderance of the evidence that she is owed additional wages. 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.

First, with regard to this Hearing Officer's acceptance of the claimant's exhibits prior to the Hearing, Lab 204.06 reads: Waiver or Suspension of Rules by the Hearing Officer. The hearing officer, upon the motion of any party, or on his or her own initiative, shall suspend or waive any requirements or limitation imposed by this chapter when the suspension or waiver:

- (a) Appears to be lawful; and
- (b) Is more likely to promote the just, accurate and efficient resolution of the pending dispute than would adherence to the particular requirement or procedure.

It was, and is, this Hearing Officer's Decision to accept the claimant's exhibits on the basis they were more likely to promote the just, accurate and efficient resolution of this dispute.

The claimant's testimony and evidence that she was a salaried employee beginning February 3, 2018 and paid in a manner commensurate with her job duties is credible. Her evidence including wage statements and copies of correspondence with the employer lends credibility to her assertion that she began receiving a salary on the pay period beginning February 3, 2018.

The employer argued that the claimant was paid hourly as a "labor runner" and paid accordingly. The employer testified the claimant was paid for forty (40) hours worked for every pay period from February 3, 2018 through June 1, 2018 because she was not on site to log her time-in and time-outs, and that he therefore had to submit something to the payroll service so he chose to submit forty (40) hours as an estimate of the hours she worked. This Hearing Officer does not find this argument credible.

This Hearing Officer finds the claimant was a salaried employee beginning February 3, 2018 through the pay period ending June 15, 2018.

RSA 275:43-b reads in-part: I. A salaried employee shall receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked; provided, however, a salaried employee may not be paid a full salary in each of the following instances:

- (a) Any pay period in which such employee performs no work.
- (b) When an employee receives a disciplinary suspension without pay in accordance with the Fair Labor Standards Act, as amended, for any portion of a pay period, and written notification is given to the employee, at least one pay period in advance, in accordance with a written progressive disciplinary policy, plan or practice and the suspension is in full day increments.
- (c) If an unpaid leave of absence for a salaried employee is allowed pursuant to a written bona fide plan, policy or practice for absences, of a full day or more, of an employee caused by bereavement leave.
- (d) Any portion of a work day or pay period for leave taken under, and in accordance with, the federal Family and Medical Leave Act of 1993, as

amended, if written notification from the employer stating the reason for such leave is given to the employee and placed in the employee's personnel file.

(e) If the salaried employee voluntarily, without coercion or pressure, requests time off without pay for any portion of a pay period, after the employee has exhausted any leave time pursuant to a written bona fide leave plan, practice or policy and such leave time requested by the employee is granted by the employer.

The claimant provided credible evidence and testimony that she worked the pay period 6/2/18 to 6/8/18 and was paid \$160.00 and worked the pay period 6/9/18 to 6/15/18 and was paid \$80.00.

This Hearing Officer finds the claimant proved by a preponderance of the evidence that she was a salaried employee receiving a salary of \$800.00 per week during the period she claims and that she is owed \$1,360.00.

DECISION

Based on the evidence and testimony presented and as RSA 275:43 I requires that an employer pay all wages due an employee and as RSA 275:43-b requires a salaried employee receive full salary for any pay period in which such employee performs any work without regard to the number of days or hours worked and as the Department finds the claimant proved by a preponderance of evidence she is owed the claimed wages it is hereby ruled this Wage Claim is valid in the amount of \$1,360.00.

The employer is hereby ordered to send a check to the Department, payable to [REDACTED] [REDACTED] in the total of \$1,360.00 less applicable taxes, with a statement of such deductions within 20 days of the date of this Order.

[REDACTED] [REDACTED]
Hearing Officer

Date of Decision: October 10, 2018

Original: Claimant

Cc: Cheers, P. R. & C. Gaming Corporation