

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

██████████
v.

Summercrest Senior Living, L.L.C.

CASE #63173

DECISION OF THE HEARING OFFICER

APPEARANCES: Claimant, self-represented
Rebecca Hassan, representing the employer

NATURE OF DISPUTE: RSA 275:43, I — Weekly (unpaid wages)
RSA 275:43-b — Payment of Salaried Employees
(unpaid salary)

DATE OF HEARING: September 21, 2021

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed on July 26, 2021. She alleged that she worked for the employer as a salaried employee but the employer began paying her on an hourly basis after April 25, 2021 after she had a non-work related injury and she began working from home and in office as needed. The amount of her claim was \$4,820.00. She later amended this amount by adding \$711.32, based on a review of her final paystub.

Notice of claim was sent to the employer on July 27, 2021. The employer filed an objection on August 11, 2021 alleging that the employer, with the claimant's agreement, prospectively adjusted her salary as a result of claimant's inability to work full-time while recovering from a non-work related injury. Notice of hearing was sent on July 28, 2021.

FINDINGS OF FACT

The following findings are based on the testimony of the claimant and Rebecca and Dan Hassan, exhibits offered by the employer, and matters of record in the Department file. Employer's exhibits consisted of ten biweekly paystubs covering the period from March 28, 2021 through July 31, 2021; a summary of hours worked at the facility, hours available remotely, personal time

used, holiday hours paid, vacation time hours used, total wages per pay period, bonus (on call hours paid out), and vacation time paid out; plus nine email threads between the claimant and business office manager Pamela Jones. Both parties acknowledged under oath that their written submissions to the Department were true and accurate to the best of their knowledge and belief, and those statements are treated herein as part of the testimony in the case.

Claimant has an associate degree in nursing and a bachelor of science degree. She is a registered nurse. She started working at the employer's assisted-living facility in Newport in May of 2019. She was the health services director. She was paid a biweekly salary of \$3,076.00. Pay periods ran from Sunday to Saturday and paydays were on Thursday after the end of the pay period. She normally worked in the facility 40 hours a week. She would occasionally be called in outside of her normal schedule, but this time was considered to part of her duties as the health services director and she was not separately compensated for it. In addition to her regular salary, claimant was paid separately for scheduled on-call time.

On March 26, 2021, claimant sustained a cat bite on her dominant hand. It became infected and she was hospitalized twice; the second time was for surgery on April 7, 2021. Claimant gave her employer a doctor's note taking her out of work effective April 6, 2021, with a return to work date "to be determined."

Claimant testified that she gave the doctor's note to administrator Hailey Wetherbee on April 9, 2021. She told the administrator that she wanted to take short-term disability until she could return to work. However, she agreed that while she was out she would answer questions as they came up. She was on call that weekend.

Claimant testified that, during April, she received over 130 work-related text messages from Ms. Wetherbee and additional ones from other staff, she came in to the office at least four times, and she continued to carry out her scheduled on-call duties.

Claimant testified that on May 5, 2021, she had a telephone conversation with Ms. Wetherbee in which Ms. Wetherbee said that she thought the claimant had earlier agreed to adjust her workweek to 20 hours and a reduction of her salary by half. Claimant told her there had been no such agreement and she was simply waiting for her short-term disability to come through, at which point she expected her weekly paychecks would stop.

Claimant's next paycheck, dated May 13, 2021, was accompanied by a paystub showing that her salary was \$1,528.00—half of her regular salary. The next one, dated May 27, 2021 was the same.

Claimant testified that during the month of May, she had over 160 work-related texts from Ms. Wetherbee and additional ones from staff, over 35 telephone calls from staff, and she continued with her scheduled on-call duties.

On May 26, 2021, she gave the employer a doctor's note releasing her to work part time, 20 hours a week, effective immediately. She returned to working in the facility working part-time hours

On June 7, 2021, claimant received approval from the short-term disability carrier, stating that she would be compensated for the hours she missed at work due to her injury.

Claimant gave her notice on June 15, 2021. Her last day at work was July 23, 2021. She testified that after giving notice, she continued to do her part-time schedule, and continued to receive calls at home as she had done since she was hired. Her last day at work was July 23, 2021.

Rebecca Hassan is the employer's co-owner, with her husband Dan. They live in Shelburne, Vermont. Prior to the filing of the instant claim, they did not have any direct contact with the claimant regarding the issues raised therein. Ms. Hassan said her testimony was based on information provided to her by the facility administrator, Hailey Wetherbee.

According to Ms. Hassan, when the claimant brought in the doctor's note taking her out of work indefinitely, the claimant agreed to work remotely from home, in addition to doing on-call work which was separately compensated. For working remotely at reduced hours, she agreed to accept a 50-percent reduction in her salary.

Later, when the claimant presented the doctor's note allowing her to work 20 hours a week in the facility, Ms. Hassan testified, the claimant agreed with Ms. Wetherbee that she would continue working at 50 percent of her original salary. They further agreed that when and if the claimant worked more than 20 hours, she would be compensated for those hours on a pro-rated basis.

DISCUSSION AND CONCLUSIONS

The claimant had the burden of proving by a preponderance of the evidence that she was owed unpaid wages. Proof by a preponderance as defined in Lab 202.05 is a demonstration by admissible evidence that a fact or legal conclusion is more probable than not. The hearing officer is charged with evaluating the testimony and exhibits in the case and deciding the issues presented, based upon "reliable, probative, and substantial evidence," Department Rule Lab 204.07(n).

The claimant argued that, because she never agreed to a reduction in wages and continued to work from home and later on reduced hours, the employer was required to pay her the full salary. The employer countered that there was such an agreement and that the claimant had no basis to demand full salary after the agreement was made.

As to the existence of the agreement, Ms. Hassan admitted that she did not participate in the discussions between the claimant and the facility administrator Ms. Wetherbee. As such, little weight is given her testimony that the claimant agreed to a reduction in her salary. The claimant admitted that Ms. Wetherbee did tell her the terms of the alleged agreement in a conversation on May 5, 2021. However, her testimony that she never agreed to the plan is credited

When the claimant received her paycheck on May 13, 2021, it was apparent from the paystub that her salary was now listed as \$1,538.00—half of what had been receiving up to and including the previous paycheck, dated April 29, 2021. This was sufficient to place her on notice that the employer had changed her compensation. However, by this time, the claimant was already five days into the next pay period.

Claimant was an at-will employee. The employer was free to alter the terms and conditions of her employment, including her salary, so long as it provided advance notice. Any change made without advance notice is improper; and the employee is entitled to receive her usual wages for work done prior to receiving notice of a change. After receiving notice of a prospective change, an employee is free to continue working under the new terms or to terminate her employment.

Given that the claimant first received notice of the change five days into a pay period, she was entitled to receive her full salary up through the end of that pay period, which ended on May 22, 2021. For each of the two pay periods ending May 8, 2021 and May 22, 2021, claimant received \$1,538.00 in salary, a total shortfall of \$3,076.00.

A review of the subsequent paystubs shows that the employer paid the claimant consistently at the reduced salary, but pro-rated upwards to the extent the claimant's biweekly hours exceeded 40. The email exchanges submitted by the employer from June and July suggest that the claimant was cooperating with the new plan by turning in the hours she worked and was not complaining about not receiving her former salary.


DECISION

Based on the testimony and evidence submitted, it is found that the claimant's salary was reduced without advance notice. As such, she is entitled to

her full salary up through the end of the pay period in which she first received notice of the change. The total shortfall in wages was \$3,076.00. Her claim is **valid** to that extent.

The employer is hereby ordered to send a check to the Department, payable to ██████████ in the amount of \$3,076.00, less any applicable deductions, within 30 days of the date of this Order,

October 8 2021
Date of Decision


George A. Stewart, Hearing Officer

GAS/cb