



MAINE DEPARTMENT OF LABOR

Bureau of Labor Standards
vs.
Harbour Towne Inn

Amended Final Decision
2022 - BLS - 01

History of the Case:

This is a proceeding initiated, by a January 24, 2022 determination, by the Maine Department of Labor's Bureau of Labor Standards (Bureau); against Harbour Towne Inn (Appellant), a State of Maine employer.

The Appellant is represented by Attorney Michael Vallencourt. The Bureau is represented by Assistant Attorney General Anne Macri.

That determination alleged violations of Maine Labor Laws 26 M.R.S.A. § 664(3) and 26 M.R.S.A. § 621-A, and ordered penalties under 26 M.R.S.A. § 671 and §626-A. The Appellant, on February 2, 2022, timely contested the determinations and sought review. The Bureau subsequently designated the undersigned Hearing Officer to conduct the review, and act on behalf of the Director of the Bureau.

Prehearing telephonic conferences were held on February 16, 2022 and March 29, 2022. The Appellant allowed into the record, without objection, Bureau exhibits numbered 1-26. The Bureau allowed into the record, without objection, two emails (McElman, May 9, 2021 and [REDACTED] April 28, 2021) and three payroll records submitted by the Appellant.

The parties entered into a stipulation of the following facts:

1. [REDACTED] were employed by Harbour Towne Inn as Innkeepers from May 11, 2021 through August 23, 2021;
2. Stephanie McElman is the owner and operator of Harbour Towne Inn, located at 71 Townsend Ave, Boothbay Harbor, Maine;
3. During the period of their employment, the [REDACTED] lived on site at the Inn at no cost to them;
4. For the period of May 11 through May 25, 2021, the [REDACTED] were paid \$1,458.33 each in gross wages;
5. For each of the following two-week pay periods through August 20, 2021, the [REDACTED] were paid \$1,346.15 each in gross wages;
6. For their final work week of August 20 through August 23, 2021, the [REDACTED] were paid \$673.08 each in gross wages;

7. *The Maine minimum wage for 2021 was \$12.15 per hour.*

The U.S. Department of Labor Wage and Hour Division (Revised July 2008) "Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)" submitted with the Bureau's Closing Brief is being disregarded by the Hearing Officer since it was not offered prior to the closing of the record.

Issue:

Because the parties have agreed to the above facts, the issues have been reduced to whether [REDACTED] and [REDACTED] were paid the wages that they were entitled under Title 26. This is a mixed question of fact and law.

The Bureau maintains that the enumeration of the hours worked, contained in the [REDACTED] and [REDACTED] complaint filed against the Appellant (Exhibit 24) are correct. And this results in an underpayment and late payment of wages that trigger penalties under Title 26 M.R.S.A. § 626-A, and 26 M.R.S.A. §671.

The Appellant argues that there is no factual basis for the hours claimed by the [REDACTED] and therefore, no penalties are justified.

Findings of Fact:

Stephanie McElman's family has owned and managed Harbour Town Inn, LLC, a Bed and Breakfast with 11 lodging units, in Boothbay Harbor, for decades. She worked there for 30 years, initially as an employee of her parents, and then as owner for 12 years. She is intimately familiar with the operation of the lodging. She has performed all tasks necessary to provide services to the guests lodging at the Inn.

On November 22, 2019, the Bureau sent a letter to McElman bringing possible timely and full payment of wage violations to her attention. It placed her on notice that noncompliance with Maine's labor laws would result in penalties being assessed. No penalties were assessed at that time.

In the summer of 2021, McElman's ex-husband was scheduled for serious medical treatment in Boston. She expected to accompany him and stay in Boston during the treatment. She planned to hire an innkeeper to perform the duties that she performed. She placed on-line ads for an innkeeper.

In the Spring of 2021, the [REDACTED] responded to an employment ad for an innkeeper. After some negotiation, they agreed upon a salary of \$673.08 per week (\$35,000 divided by 52) for each, [REDACTED] and [REDACTED].

The [REDACTED] moved to Boothbay and began work on May 11, 2021. They were trained by McElman.

[REDACTED] was primarily responsible for the preparation and service of breakfast, maintaining the kitchen with appropriated goods, as well as some interior and exterior maintenance. Guests were given his mobile phone to call at any time they needed assistance.

[REDACTED] assisted [REDACTED] with the breakfast duties, checked guests in and out between 10 a.m. and 6:00 p.m., and cleaned the common areas.

McElman was in Boston from July 11 through August 7. While there, she kept in contact with the [REDACTED] through email and other electronic communication.

The [REDACTED] met the expectations of McElman. She was satisfied with the services that they provided for the guests, as well as their maintenance of the facility. While not being given management control over the Inn, McElman relied upon the [REDACTED] to be the B&B's presence to the public and guests.

McElman and the [REDACTED] were not concerned about the actual hours worked. McElman did not provide the [REDACTED] with a work schedule. Irrespective of the hours worked by the [REDACTED], they were each paid \$673.08 per week.

The [REDACTED] gave their notice of resignation effective August 23, 2021. After leaving their employment, the [REDACTED] filed complaints with the Bureau. They were interviewed by Bureau investigative staff. They provided written statements to the Bureau. After reviewing the complaints and Appellant's responses, on January 24, 2022, the Bureau cited the Appellant for violations of labor laws (Due to a computation error, a corrected citation was issued.).

Conclusions of Law:

The Appellant has the burden of establishing the hours worked by the Forests.

26 M.R.S.A. § 622 provides:

"Every employer shall keep a daily record of the time worked by each such employee unless the employee is paid a salary (The salary exception is not applicable since the parties agreed that the [REDACTED] did not come within any of the exceptions in section 663(K))."

26 M.R.S.A. §665(1) provides:

1. *Examination of records, books; copies. Every employer subject to this subchapter shall keep a true and accurate record of the hours worked by*

each employee and of the wages paid, such records to be preserved by the employer for a period of at least 3 years and shall furnish to each employee with each payment of wages a statement that clearly shows the date of the pay period, the hours, total earnings, and itemized deductions.

The law is abundantly clear that the burden of maintaining hourly employment records rests on Appellant, as the employer. While it may be perceived that this is unfair, that is policy judgement made by the legislature and supported by the Courts.

“Records must be kept, and the responsibility is ultimately on the employer for doing so[.]” *Wirtz v. Harrigill*, 328 F.2d 963, 965 (5th Cir. 1964). “[T]he responsibility for making, keeping, and preserving accurate records of the hours worked by his employees rested solely on the Defendant” employer. *Brock v. Bowen Manufactured Hous., Inc.*, 681 F. Supp. 1224, 1227 (W.D. Tex. 1987).

The [REDACTED] and McElman agreed they would be paid a salary. Neither party made an effort to determine if they were violating the State of Maine’s minimum wage law. The parties’ ignorance of the true legal status of the [REDACTED] does not excuse the need to determine whether they were paid in compliance with Title 26 M.R.S.A. §§ 621-A (1), 664 minimum wage and timely payment.

The [REDACTED] were not paid the minimum wage. Nor were their wages paid timely by the Appellant.

The testimony and records presented by the parties were severely hampered by the lack of contemporaneous records of the hours worked. This failure, as noted above, was the responsibility of the Appellant. Nor can it argue that it was ignorant of Maine’s minimum wage laws. It had been placed on notice of them in the November 22, 2019 Bureau letter.

The [REDACTED] complaint to the Bureau included a reconstruction of the hours worked between May and August. They provided detailed testimony to support their claims that they worked 12 or 13 hours per day (except Wednesdays for which they worked one hour).

The Appellant relied upon McElman’s 30 years of experience at the Inn. She presented no specific evidence of the hours worked during the 2021 season. She speculated that the [REDACTED] performed the job tasks as she had experienced over her many years at the Inn. She was not present for most of the time and, was completely absent for weeks while in Boston.

It is not necessary in this proceeding to determine the exact hours worked by the [REDACTED]. The Hearing Officer is persuaded that the hours the [REDACTED] worked far exceeded the total of 9 hours a day suggested by the employer.

Without the employer's records, the Bureau's reliance upon the [REDACTED] reconstruction of the hours worked is appropriate to determine the compliance with minimum wage and late payment laws.

Appropriate Penalties

As shown by the attachment to the letter of citation, Exhibit 24, the [REDACTED] were paid considerably less than the minimum wage required by the 26 M.R.S.A. §664(3). There are 15 weeks between May 12 and August 23, 2022, for which they were underpaid. That is 30 violations. Under 26 M.R.S.A. § 671, the minimum penalty is \$50 per violation. That equals \$1,500 for the 30 violations.

26 M.R.S.A. §621-A(1) provides that every employer must pay in full all wages earned by each employee. Each payment must include all wages earned to within 8 days of the payment date. Because the [REDACTED] were underpaid for the above period, they did not receive timely full payment of wages. Their instances occurred on 05/25/21, 06/11/21, 06/25/21, 07/09/21, 07/23/21, 08/06/21, 08/20/21, and 08/24/21. This is 8 pay dates for each of the [REDACTED] for a total of 16 violations. The minimum penalty for each violation is \$100 per instance. That equals \$1,600 for the 16 violations.

In addition, the Department's regulations allow a multiplier for various reasons. 12-170 Chapter 9 provides for the use of a 1.5 multiplier when, "*[t]he employer has previous violations of the same or similar nature that did not result in court action or penalty*", 12-170 Ch. 9 (III) (A) (2). In this instance, the Appellant had been cited previously for violations of § 621-A in 2019, for which no penalty was assessed. This authorizes a 1.5 multiplier. Applying this multiple to the above \$1600 penalty equals \$2400.

Decision:

The appeal of the Appellant is denied. The decision of the Bureau is affirmed. A penalty of \$3900.00 is ordered assessed against the Appellant.

Allan A. Toubman
Hearing Officer

cc:
Michael Vaillancourt, Attorney for the Appellant
Stephanie McElman, Owner of the Inn
Anne Macri, Assistant Attorney General, Attorney for Bureau,

The Appellant has the right to bring a petition for review of this decision to the Superior Court as provided by the Maine Administrative Procedures Act, 5 M.R.S.A. §§ 11001-11005. 5 M.R.S.A. §11002(3) provides that a petition for review shall be filed within 30 days after receipt of notice, if taken to the proceeding, by a party of which a review is sought.

RECEIVED

JUN 17 2022

**OFFICE OF THE
ATTORNEY GENERAL**

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