

STATE OF NORTH CAROLINA  
COUNTY OF CRAVEN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
22 DOL 01676

A Dogs Dream Petitioner,  v.  NC Department of Labor Respondent.	<b>FINAL DECISION</b>
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THIS CASE CAME ON FOR HEARING before the Honorable Samuel K. Morris, Administrative Law Judge, on October 17, 2022, in New Bern, North Carolina. Based on the evidence presented at hearing and, for the reasons set forth below, this Tribunal AFFIRMS the Respondent Department of Labor's ("Respondent") determination that Petitioner A Dog's Dream, LLC ("Petitioner") violated N.C.G.S. § 95-25-15(b) and 13 NCAC 12.0801, and its penalty assessment of \$70.00 against the Petitioner.

#### **APPEARANCES**

Petitioner: A Dog's Dream, LLC, pro se.<sup>1</sup>  
1819-A Race Track Road  
New Bern, NC 28562

Respondent: Stacey A. Phipps  
Attorney for Respondent  
North Carolina Department of Labor  
P O Box 629  
Raleigh, NC 27602-0629

#### **EXHIBITS**

Admitted for Petitioner:  
None.

Admitted for Respondent:  
Exhibit 1, pp. 1-187, complete Wage and Hour Bureau Investigative File 201154.<sup>2</sup>

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<sup>1</sup> Petitioner appeared in this proceeding through a Mr. Dan Spangler a non-attorney manager or member-manager of Petitioner as permitted by N.C. Gen. Stat. § 150B-23(a). See Notice of Nonattorney Representation filed November 22, 2022.

<sup>2</sup> Respondent provided an Exhibit notebook to Petitioner and to the Tribunal at hearing. The same was electronically filed with the Tribunal on October 26, 2022, in accordance with the post-hearing Order.

## **WITNESSES**

For Petitioner: Daniel Paul Spangler (“Spangler”)

For Respondent: Elizabeth Anderson, Wage and Hour Division Investigator

## **ISSUE**

Whether Respondent properly assessed a Civil Money Penalty against Petitioner for two violations of the Wage and Hour Act?

## **BURDEN OF PROOF**

By operation of N.C. Gen. Stat. § 150B-25.1(b), the State agency must prove by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed.

## **PROCEDURAL HISTORY**

1. This contested case arises from a civil monetary penalty the Respondent assessed against Petitioner for an alleged violation of the North Carolina Wage & Hour Act (“The Act”), N.C. Gen. Stat. § 95-25-15(b) and 13 NCAC 12.0801.
2. On May 2, 2022, Petitioner filed the Petition in the Office of Administrative hearings seeking review of the Respondent’s assessment of the civil penalty.
3. This Tribunal subsequently issued orders requiring the parties to file prehearing statements. Both parties subsequently filed prehearing statements.
4. After proper notice to the parties, this Tribunal called this contested case for hearing on October 17, 2022 in Craven County, North Carolina, and both parties were present.

**BASED UPON** careful consideration of the evidence in the whole record and, after careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, this Tribunal makes the following factual findings that are material to the resolution of the dispute presented in this contested case. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993), *aff’d*, 335 N.C. 234, 436 S.E.2d 588 (1993) (“[T]he trial court need not make a finding as to every fact which arises from the evidence; rather the court need only find those facts which are material to the resolution of the dispute.”).

In making the following factual findings, this Tribunal has weighed all evidence and has assessed the credibility of the witnesses by considering the appropriate factors for judging

credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

### **FINDINGS OF FACT**

1. Petitioner is a domestic limited liability company.
2. Respondent is an agency and department of the State of North Carolina. Respondent's responsibilities include, *inter alia*, enforcing the rules and regulations governing wage payments and employment records for employers in North Carolina.
3. Petitioner operates a facility in New Bern, North Carolina, which provides onsite pet care, including boarding services.
4. On November 22, 2021, Charles Lowry ("Lowry") interviewed with Petitioner for a kennel technician position. The interview consisted of what Petitioner characterized as a two-part process. The first part of the interview consisted of verbal questions and answers as well as a review of his resume (Ex. 1, pp. 46-48). Petitioner explained to Lowry that there was a second part of the interview process, lasting approximately two hours, which would be an unpaid working interview. (Ex. 1, pp. 38-41). Petitioner described this as his normal hiring process, during which Petitioner can observe, *inter alia*, how a potential hire interacts with the animals and the initiative shown by applicants during the interview.
5. On November 23, 2021, Lowry returned for the second portion of the interview. Petitioner allowed Lowry to perform tasks for Petitioner's business, including sweeping and mopping the compound and picking up dog feces. Petitioner was not paid for the tasks performed during the second part of the interview.
6. On or about November 29, 2021, Lowry filed a complaint with the Respondent alleging unpaid wages ("Lowry Complaint").
7. The Respondent subsequently commenced an investigation of the Lowry Complaint during which it contacted Petitioner and requested it provide items of information, including records of Lowry's time performing tasks for Petitioner.
8. Petitioner was cooperative and responsive in providing documents and answering questions. Petitioner did not keep or maintain any records of Lowry's time performing tasks, and, therefore, did not provide any records of the same.
9. At the hearing, the Respondent presented testimony from Ms. Elizabeth Anderson, a Wage and Hour Division investigator with the Respondent, who conducted the Respondent's investigation of the Lowry Complaint.
10. Throughout the investigation, Respondent and Petitioner corresponded via mail and email and spoke on the phone, during which Petitioner contended that Lowry was not an "employee."

11. At the conclusion of her investigation, Ms. Anderson determined that Mr. Lowry's complaint for unpaid wages was unsubstantiated. However, Ms. Anderson concluded that Petitioner had violated the record keeping requirements of N.C. Gen. Stat. § 95-25-15(b) in failing to keep records regarding the time Petitioner suffered or permitted Lowry to work. (Ex. 1, p. 120).

12. On April 14, 2022, Respondent sent Petitioner a Notice of Civil Money Penalty (Ex. 1 pp. 148-149).

13. The Notice of Penalty stated that Respondent's investigation revealed Petitioner had violated the record-keeping provisions of the North Carolina Wage and Hour Act and that Petitioner was being assessed a civil money penalty of \$70.00.

14. Investigator Anderson testified that the penalty calculation, as indicated on Ex 1. p. 122, was as follows:

- a. Level I violation \$50 (for failure to create and maintain records)
- b. Level II Violation \$125 (for failure to document hours worked)
- c. Total Penalty \$175
- d. Reduction of 60% based on Petitioner's self-reported annual dollar volume (Ex 1, p. 33)
- e. Yielding an adjusted penalty amount of \$70.

**BASED UPON** the foregoing Findings of Fact, and upon the clear and convincing evidence or greater weight of the evidence in the whole record, the undersigned makes the following:

### **CONCLUSIONS OF LAW**

1. The North Carolina Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein pursuant to Article 3 of Chapter 150B and Chapter 95-25 of the North Carolina General Statutes. All parties have been correctly designated and there is no question of misjoinder or nonjoinder. Notice of hearing was provided to all parties in accordance with N.C. Gen. Stat. § 150B-23(b).

2. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without any regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946). A court of other hearing authority need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E. 2d 588 (993).

3. The Court must decide the case only on the basis of the evidence presented and facts officially noticed, all of which are made part of the official record for purposes of administrative and judicial review. *N.C. Dept's of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 657, 599 S.E.2d 888, 893 (2004).

4. The issue before this Tribunal in this contested case is a narrow one: Did the Respondent properly assess a civil penalty against Petitioner for violations under the Act relating to employer record keeping requirements?

5. “In a contested case involving the imposition of civil fines or penalties by a State agency for violation of the law, the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency.” N.C. Gen. Stat. § 150B-25.1(b).

6. The Respondent assessed the penalty at issue based on Petitioner's alleged failure to comply with the recordkeeping requirements under the Act with respect to Lowry.

7. The Act requires employers subject to its provisions to maintain certain records with respect to its employees:

[E]very employer subject to any provision of this Article shall make, keep, and preserve such records of the persons employed by the employer, including the ages of employees, and of the wages, hours, and other conditions and practices of employment which are essential to the enforcement of this Article and are prescribed by regulation of the Commissioner . . . .”

N.C.G.S. § 95-25.15(b)

8. The Respondent’s rules also contain similar record keeping requirements. *See generally* 13 NCAC 12.0801(mandating that “[e]very employer shall maintain complete and accurate records” containing various information “for each employee in each workweek, unless the employee is specifically exempted[.]”

9. If an employer fails to maintain records in accord with N.C. Gen. Stat. § 95-25.15(b), the Act directs the imposition of a civil penalty:

Any employer who violates the provisions of G.S. 95-25.15(b) or any regulation issued pursuant to G.S. 95-25.15(b), shall be subject to a civil penalty of up to two hundred fifty dollars (\$250.00) per employee with the maximum not to exceed two thousand dollars (\$2,000.00) per investigation by the Commissioner or the Commissioner’s authorized representative.

N.C.G.S. § 95-25.23A(a).

10. Claiming no exemption from the Act, Petitioner, as an employer, is required to make and keep time and payroll records of its employees.

11. The clear and convincing evidence here reveals that the Respondent requested Petitioner to produce payroll and time records relative to Lowry. Petitioner does not dispute that it did not maintain records on Lowry. It argues that it did not keep records because Lowry was not an “employee.”<sup>3</sup>

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<sup>3</sup> Neither Respondent nor Petitioner disputes that Lowry was not an employee in the common, every-day sense of the term. But the term “employee” under the Act is a technical term, defined not by common usage but by the plain language of N.C. Gen. Stat. § 95-25.2(3).

12. The Act defines an “Employee” as “any individual employed by an employer.” Under the Act, the term “Employ” “means to suffer or permit to work.” N.C. Gen. Stat. § 95-25.2(3).

13. Given the clarity of the relevant statutes, this Tribunal is required to construe subsection (a) of N.C. Gen. Stat. § 95-25.23A using its plain meaning.

14. A plain reading of the statute in this case supports the penalty assessed against Petitioner. During the working interview, Lowry performed manual labor tasks designed to benefit Petitioner’s business, such as cleaning. An employment relation within the meaning of N.C. Gen. Stat. § 95-25.2(3) arose between Petitioner and Lowry when Petitioner suffered or permitted Lowry to work.

15. As such, for a brief period, Petitioner employed Lowry within the Act’s definition of “Employ,” thereby obligating Petitioner to the recordkeeping requirements under the Act.

16. Respondent requested Petitioner to produce payroll and time records. Petitioner did not produce the requested records. Petitioner did not make and keep time and payroll records for Lowry. Such action on the part of Petitioner violated N.C. Gen. Stat. § 95-25-15(b) and 13 NCAC 12.0801.

17. Pursuant to N.C. Gen. Stat. § 95-25.23, Respondent can issue a civil money penalty to an employer who violates the provisions of N.C. Gen. Stat. § 95-25.15(b) or any regulation issued pursuant to N.C. Gen. Stat. § 95-25.15(b).

18. Respondent issued details of its findings to Petitioner on April 14, 2022, including assessment of a penalty in the amount of \$70.00 for violations of the record-keeping provisions of the North Carolina Wage and Hour Act.

19. Respondent calculated the penalty in accordance with N.C. Gen. Stat. § 95-25.23A and properly issued Petitioner a civil money penalty in the amount of \$70.00.

20. Respondent met its burden of proof by clear and convincing evidence that Petitioner actually violated the Wage and Hour Act.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Respondent’s determination that the Petitioner violated N.C. Gen. Stat. § 95-25-15(b) and 13 NCAC 12.0801, and the Respondent’s assessment of a \$70.00 penalty against the Petitioner, are hereby **AFFIRMED**.

### **NOTICE OF APPEAL**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**IT IS SO ORDERED.**

This the 21st day of December, 2022.



Samuel K Morris  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Daniel P Spangler  
A Dogs Dream  
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Petitioner

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Attorney For Respondent

This the 21st day of December, 2022.



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