

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: JOYCE NGANGA,

Determination of Compliance No. 059-16

OAH Docket No. 02-2016-LI-00031

NO. 2016-013-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on July 20, 2016, having considered the petition for administrative review filed by Joyce Nganga (the Appellant) with the Director's Office on August 16, 2016, briefing submitted to the Director's Office, and having reviewed the record created at hearing and the records and files herein, issues this Director's Order. This Order intends to resolve the contested issue of whether the Appellant was paid all wages due her based upon her employment with Wellness Village Group LLC (the Employer). **The Determination of Compliance No. 059-16, issued by the Department on October 16, 2015, is AFFIRMED.**

The parties in this matter are the Department and the Appellant.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Initial Order on July 20, 2016, following an administrative hearing on July 14, 2016. The Initial Order affirmed the Department's October 16, 2015 Determination of Compliance No. 059-16.

2. On August 16, 2016, the Appellant timely filed a petition for administrative review with the Director. The Appellant's petition for administrative review attached additional evidence that was not presented at the administrative hearing.

3. On October 12, 2016, the Department filed a response to the Appellant's petition for administrative review.

4. On November 9, 2016, the Appellant filed a reply to the Department's response to the petition for administrative review.

5. The Department of Labor and Industries issued a Determination of Compliance on October 16, 2015, concluding that the Appellant was properly paid for all hours that she worked at Wellness Village LLC and Silver Cedar, and that no additional wages were owed to the Appellant for the period of July 17, 2014 through July 22, 2014 or for any other period the Appellant worked for the Employer at either of the above facilities.

6. Because there is a conflict on material points in the record, it is necessary to make a finding of credibility. Having reviewed the documents and evidence presented, the Administrative Law Judge found the employer's testimony to be more logically persuasive. The Director gives due regard to this finding and agrees with the Administrative Law Judge's assessment of the credibility of the witnesses.

7. The Director adopts and incorporates the Initial Order's Findings of Fact No. 4.2 to 4.23.

8. The Director also adopts and incorporates the Initial Order's "Issue Presented," the "Order Summary" and the "Hearing" summary.

II. CONCLUSIONS OF LAW

1. Based on the Appellant's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.

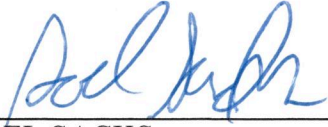
2. The additional evidence submitted by the Appellant, and arguments related thereto, were not part of the administrative hearing record and may not be considered here on appeal to the Director. RCW 34.05.464; *see Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 205-06, 971 P.2d 591 (1999). Appellant had a full opportunity to present such evidence at the administrative hearing on July 14, 2016.

9. The Director adopts and incorporates the Initial Order's Conclusions of Law and Initial Order.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Determination of Compliance No. 059-16 is AFFIRMED and the Initial Order of July 20, 2016, is incorporated by reference herein.

DATED at Tumwater this 15 day of December, 2016.



JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to DirectorAppeal@LNI.WA.GOV, or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 15 day of December 2016, via certified mail, postage prepaid, and by regular mail to the following:

Joyce Nganga
121 S 339th Circle, Apt. C
Federal Way, WA 98003

Rebecca Echols
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Wellness Village Group, LLC
4217 139th Pl. NE
Mill Creek, WA 98012

DATED this 15 day of December, 2016, at Tumwater, Washington.



Lisa Rodriguez

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In The Matter Of:

Joyce Nganga,

Appellant.

Docket No. 02-2016-LI-00031

INITIAL ORDER

Agency: Labor and Industries
Program: Wage Payments
Agency No. DOC-059-16

1. ISSUES

- 1.1. Did the Department of Labor and Industries' Determination of Compliance properly conclude that Ms. Nganga was paid all wages due her based upon her employment with Wellness Village Group LLC?
- 1.2. Did the Determination of Compliance properly conclude there were no violations of the Wage Payment Act pursuant to RCW 49.48?

2. ORDER SUMMARY

- 2.1. The Determination of Compliance properly concluded that Ms. Nganga was paid all wages due her based upon her employment with Wellness Village Group LLC Order. The Department's Determination of Compliance is **AFFIRMED**.
- 2.2. The Determination of Compliance properly concluded there were no violations of the Wage Payment Act pursuant to RCW 49.48.

3. HEARING

- 3.1. Hearing Date: July 14, 2016
- 3.2. Administrative Law Judge: Stephanie Croom Williams
- 3.3. Appellant: Joyce Nganga
- 3.4. Agency: Department of Labor and Industries
 - 3.4.1. Representative: Rebecca Echols, Assistant Attorney General

3.4.1.1. Observing: Ryan Gompertz, Law Clerk

3.4.2. Witnesses:

3.4.2.1. Ahmed Sheikh, Owner, Wellness Village Group LLC

3.4.2.1.1.1. Ildiko Dobondi, Wellness Village Group LLC

3.4.2.2. Ruth Castro, Industrial Relations Specialist, L&I

3.5. Exhibits: Exhibits 1 through 19 were admitted.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1. The Department of Labor and Industries issued a Determination of Compliance on October 16, 2015, concluding that the Ms. Nganga, Appellant, was properly paid for all hours that she worked at Wellness Village LLC and Silver Cedar, and that no additional wages were owed to the Ms. Nganga for the period June 17, 2014 through June 22, 2014 or for any other period Ms. Nganga worked for the employer at either of the above facilities.

4.2. Ms. Nganga filed an appeal and requested an administrative hearing on November 13, 2015.

4.3. The case was referred to the Office of Administrative Hearings on February 3, 2016.

Was Ms. Nganga properly paid wages that were due to her for the period that she worked for Silver Cedar and Wellness Village LLC?

4.4. Ahmed Sheikh and his wife, Ildiko Dobondi own two adult family homes, Silver Cedar and Wellness Village LLC. They are the principles in the Wellness Village Group LLC. Each adult family home has six residents. The residents primarily are elderly and need assistance in performing daily activities of living.

- 4.5. Mr. Sheikh and Ms. Dobondi hire live in caregivers to provide care for the residents. The live in care givers work 24-hour shifts and are paid \$130 per shift.
- 4.6. Two caregivers are assigned to work a shift. The live in caregivers are provided a room in which to sleep. The caregivers decide amongst themselves who will respond to night calls or requests during the night from the residents.
- 4.7. Some caregivers are credentialed by the state or are "delegated" to administer medication to the residents. Ms. Nganga was not "delegated" to administer medication to the residents.
- 4.8. Ms. Nganga interviewed with Ms. Dobondi, Co-Owner, for the job of live in caregiver on June 30, 2014. The position offered by the employer was for a 24-hour live in caregiver. The position paid \$130 per shift. The live in caregiver would be assigned to Silver Cedar but could be required to work at the other facility owned by the employer, Wellness Village.
- 4.9. The caregivers who work for the employer are all 24-hour live in caregivers, with one possible exception. Generally, Ms. Nganga was hired to work 5 days with 2 days off.
- 4.10. Ms. Nganga was offered and accepted the job as a 24-hour live in caregiver by Ms. Dobondi. Ms. Nganga was to be paid \$130 per shift. Meals were included.
- 4.11. Ms. Nganga worked for the employer from July 2, 2014 until July 22, 2014.
- 4.12. Ms. Nganga trained for the job for two days, July 2 and July 3, 2014. She was paid for half a shift, \$65 for her two days of training
- 4.13. Ms. Nganga commenced performing her duties as a live in caregiver after her training.
- 4.14. At some point after she began working, Ms. Nganga had a conversation with Mr. Sheikh about her duties and responsibilities of the job. It is disputed but Ms. Nganga alleged that Mr. Sheikh said he would pay her \$180 per shift when she worked at Wellness Village because of her managerial experience.

- 4.15. Mr. Sheikh denied ever promising to pay Ms. Nganga \$180 per shift to work at Wellness Village or his other facility. Mr. Sheikh does not have any live in caregivers who are paid \$180 per shift. In support of his argument that he would not have offered to pay Ms. Nganga at a higher rate per shift than other live in caregivers, he notes that Ms. Nganga was not licensed to administer medication to the residents. He asserts there was no logical basis to pay her more per shift than the other live in caregivers.
- 4.16. We find the testimony of Mr. Sheikh more logically persuasive and accept same as fact herein.
- 4.17. Ms. Nganga believed that she was hired to work shifts which lasted 12 hours rather than 24 hours. She admitted that she was provided a room by the employer and that she stayed overnight when she worked at either facility. However, Ms. Nganga asserts she did not understand that she was hired to work as a 24-hour live in caregiver.
- 4.18. Mr. Sheikh asserts Ms. Nganga was hired as a 24-hour caregiver, that he only hires live in caregivers who work 24-hour shifts and that Ms. Nganga actually worked 24 hour shifts as a live in caregiver.
- 4.19. We find the testimony of Mr. Sheikh on this point to be more credible and more logically persuasive and accept same as fact herein. We examined the hours of work reported by Ms. Nganga. The evidence provided by Ms. Nganga shows for several days she worked 24 hours shifts. Perhaps Ms. Nganga believed she was only doubling up on shifts, however, the evidence supports the employer's contention that the shifts lasted 24 hours. Further there evidence shows the caregivers were provided a room in which to sleep. They were provided a room because the live in caregivers were required to sleep on the premises.
- 4.20. Ms. Nganga received a call from Mr. Sheikh on July 17, 2014 asking her to work at Wellness Village because he was short staffed. This was supposed to have been Ms. Nganga's day off after working 5 days straight for Silver Cedar. She agreed to work the shift.
- 4.21. Ms. Nganga does not have her own vehicle and took a bus from her residence in Federal Way to Seattle to catch the bus which ultimately would get her to Wellness Village. Ms. Nganga missed the connecting bus.

Mr. Sheikh asked Ms. Nganga to take a taxi from her location in Seattle to Wellness Village. Mr. Sheikh paid for the taxi.

4.22. Ms. Nganga worked for the employer after this shift. As shown in her document, she worked 24 hours at Wellness Village. (Exhibit 19).

4.23. Ms. Nganga was issued a check dated July 20, 2014 in the amount of \$1,430 for the period of time that she worked for Wellness Village Group. No information accompanied the check indicating either the period of time Ms. Nganga worked or the period of time the check covered.

4.24. Credibility Finding

Because there is a conflict on material points in the record, it is necessary to make a finding of credibility. Having reviewed the documents and evidence presented, we find the employer's testimony to be more logically persuasive and accept same as fact herein. We believe that Ms. Nganga is sincere in her belief that she was not properly paid by the employer. Perhaps there was confusion or a real misunderstanding about the hours Ms. Nganga was required to work as a live in caregiver. It is not uncommon for misunderstandings to arise about the terms and conditions of employment between employees and employers.

When a misunderstanding arises, it is incumbent upon the employee to seek clarification or an understanding of the terms and conditions of employment. Here, Ms. Nganga should have clarified her working hours right away if her hours ended up being different from what she understood. There is no evidence that that occurred in this case. After reviewing the evidence, we find the testimony of the employer to be more credible and accept same as fact where there are material areas of dispute.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

5.1 The Office of Administrative Hearings has jurisdiction over the persons and subject matter of this case under RCW 34.05 and RCW 49.46 and RCW 49.48.

Burden of Proof

- 5.2 Under the Wage Payment Act, also called "WPA," the wage claimant has the initial burden of showing *prima facie* evidence of a wage payment law violation. See, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688, S.Ct. 1187, 90 L.Ed. 1515 (1946) (federal minimum wage law under Fair Labor & Standards Act); *MacSuga v. County of Spokane*, 97 Wn.App. 435, 445-446, 983 P.2d 1167 (1999). The *prima facie* showing must be supported by a preponderance of the evidence.
- 5.3 A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).
- 5.4 Substantial evidence must be presented and must be "sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Ongom v. Dept. of Health*, 124 Wn App. 935, 948-49, 104 P.3d 29 (2005), reviewed on other grounds, 155 Wn.2d 1001, 122 P.3d 185 (2005).

Applicable Law

- 5.5 The Fair Labor Standards Act of 1938 ("FLSA") deals with overtime and minimum wage requirements for employees. The Washington Minimum Wage Act ("WMWA"), RCW 49.46 and the Wage Payment Act, RCW 49.48 ("WPA") are based on the FLSA. The Wage Claimant seeks wages as per the WMWA and WPA.
- 5.6 Wage Payment Act, RCW 49.48 (WPA) authorizes administrative enforcement of wage payment requirements. Upon receipt of a wage complaint that alleges a violation of a wage payment requirement, the Department "shall investigate" and, unless otherwise resolved, "shall" issue either a citation (when finding a wage law violation) or a determination of compliance (when finding no violation) within sixty days. RCW 49.48.083. The Department may extend the time period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the time period. (Id.)
- 5.7 Wage payment requirements are those "set forth in RCW 49.46.020, 49.46.130, 49.48.010, 49.52.050, or 49.52.060, and any related rules

adopted by the department.” RCW 49.48.082(10). These wage payment requirements include, but are not limited to, requirements to pay minimum wages, overtime wages, agreed wages, and wages for final pay periods. RCW 49.48.082(12).

- 5.8 RCW 49.52.050(2) provides that it is unlawful to willfully withhold an agreed wage, which includes any wage an “employer is obligated to pay such employee by any statute, ordinance, or contract.” The provisions of RCW 49.52.050(2) include oral or written agreements for hourly wages in excess of the minimum wage.
- 5.9 Ms. Nganga failed to meet her burden of proof to establish by a preponderance of the evidence that she was not paid all wages due her by the employer. In reaching this conclusion, we examined the testimony and evidence presented by both parties. The employer’s evidence leads us to believe that it is more probable than not that Ms. Nganga was hired to work as a 24-hour caregiver. Ms. Nganga, in fact, worked 24 hour shifts as shown by the evidence she provided.
- 5.10 Furthermore, we note that the employer only hires 24 hour caregivers to address the needs of its residents who require care and supervision 24 hours per day. Ms. Nganga likely would not have been hired if the employer understood she was not available to work 24 hour shifts.
- 5.11 As for Ms. Nganga’s claim that she is due overtime pay by the employer, we note that her claim is not valid. Pursuant to RCW 49.46.010(3)(j), an employee who is required to sleep at the employer’s premises overnight, is excluded from minimum wage and overtime requirements. Ms. Nganga’s job as a 24-hour care provider required her to sleep on the premises of the group home and therefore, is exempt from the minimum wage and overtime laws. See also Department Administrative Policy ES.A.1. located at <http://lni.wa.gov/WorkplaceRights/files/policies/esa1.pdf>
- 5.12 Perhaps some of the questions raised by Ms. Nganga could have been resolved had the employer provided its employees a detailed breakdown of the shifts worked, rate of compensation, mandatory deductions, year to date earnings, etc. This kind of detailed information informs both employees and employers about where employees stand with their earnings.

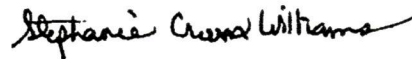
5.13 While this kind of information was not apparent from the check issued to Ms. Nganga, we conclude from the other evidence in the record that Ms. Nganga was properly paid wages due and owing to her for the period of time she worked for the employer. Ms. Nganga failed to meet the burden of proof to establish a violation of the wage payment law pursuant to RCW 49.48.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Department of Labor and Industries' Determination of Compliance dated October 16, 2015 is AFFIRMED.
- 6.2. The Determination of Compliance properly concluded that Ms. Nganga was paid all wages due her based upon her employment with Wellness Village Group LLC Order.
- 6.3. The Determination of Compliance properly concluded there were no violations of the Wage Payment Act pursuant to RCW 49.48.

Issued from Tacoma, Washington, on the date of mailing.



Stephanie Croom Williams
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Administrative Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.²

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

CERTIFICATE OF MAILING IS ATTACHED

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR DOCKET NO. 02-2016-LI-00031

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>Joyce Nganga 121 S 339th Circle, #3 Federal Way , WA 98003 Appellant</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt 91 7199 9991 7036 9384 0853 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Rebecca Echols 800 Fifth Avenue, Suite 2000 MS: TB-14 Seattle, WA 98104 Agency Representative</p>	<p><input type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Wellness Villiage Group, LLC Attention: Wasim Sheikh 4217 139th Pl. NE Mill Creek, WA 98012 Employer</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Wednesday, July 20, 2016

OFFICE OF ADMINISTRATIVE HEARINGS



Holly Vest
Legal Assistant