

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re: BELLWETHER HARBOR
INVESTMENTS LLP dba HOTEL
BELLWETHER

Citation and Notice of Assessment No.
W-673-17

OAH Docket No. 09-2017-LI-00564

No. 2018-023-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 March 26, 2018, having considered the petition for administrative review filed by the Department of Labor & Industries (the Appellant), briefing filed by the Appellant and filed by Bellwether Harbor Investments LLP (Employer), and having reviewed the record created at hearing issues this Director's Order.

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 March 26, 2018.
2. On April 24, 2018, the Appellant timely petitioned for administrative review with the Director.

3. The Director adopts and incorporates the Initial Order's findings of facts No. 4.1 through 4.11, 4.16 through 4.23.

4. As banquet chef, William (Liam) Griffin (Wage Claimant) was responsible for executing banquet events on the day of, including directing and coaching kitchen staff on aspects of food preparation, such as plating. The Wage Claimant did not order food for banquet events and did not decide what menu items would be served.

5. In his capacity as Banquet Chef, the Wage Claimant regularly attended brief weekly Banquet Execution Meetings with other management staff, as well as other management meetings, which lasted from a few minutes to one hour. When the Executive Chef was unavailable, the Wage Claimant attended certain other management meetings in his stead. These meetings were generally the only occasion on which the Wage Claimant's job duties required him to perform work outside the kitchen.

6. Because of his culinary training, the Wage Claimant would be asked to prepare certain sauces and handle food preparation tasks that "required a bit more technical skill to execute rather than just preparing vegetables." But he did not independently develop menu items beyond providing input to Executive Chef Grogan.

7. The testimony and documentary evidence of the parties conflicted on material points. Based on the evidence presented, and giving due regard to the credibility findings of the administrative law judge, the Director finds credible the Wage Claimant's description of his job duties and that his description of his job duties is generally consistent with the testimony of the Employer witnesses. The Wage Claimant's job duties overwhelmingly concerned hands on food preparation. The Employer did not present evidence sufficient to rebut the Wage Claimant's assertion that he spent 90 to 95 percent of time preparing food and directing others in how to prepare food, such as how to place vegetables on a plate.

8. Bellwether Harbor Investments LLP did not keep proper and accurate record of hours worked by the Wage Claimant because they considered his position to be overtime exempt. General Manager Haupt testified that his understanding that the banquet chef was an overtime exempt position was based on his industry research. Griffin testified that he had held positions at other hotels where he was treated as overtime exempt, but that his job duties in those other positions involved far more supervisory responsibilities than his position at Hotel Bellwether.

II. CONCLUSIONS OF LAW

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

2. The Director adopts and incorporates the Initial Order's conclusions of law no. 5.2 through 5.3, 5.5 through 5.13.

3. To make a prima facie case for unpaid wages, the party seeking wages must prove that the employee has performed work and the employer did not properly compensate them and there is evidence to show the extent of that work by reasonable inference. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

4. The weight of evidence establishes the Wage Claimant was not a "bona fide executive" as defined in WAC 296-128-510. To qualify as a "bona fide executive" under this regulation, a person's employment must meet all the identified requirements of the "short test" of WAC 296-128-510(6). In *Solis v. SCA Restaurant. Corp.*, the court considered a chef who spent most of his time at the restaurant cooking food. 938 F. Supp. 2d 380, 391 (E.D.N.Y. 2013). He played no role in hiring or firing employees or determining their salaries or work schedules. *Id.* He didn't order food or negotiate with suppliers. *Id.* While there was testimony that he would direct other employees in preparing dishes and cleaning, the court held that this was insufficient

evidence to establish that his primary duty was management. *Id.* at 397. Like the chef in *Solis*, the Wage Claimant's primary duty in his role as banquet chef was preparing food to execute banquet events, not management and the "working supervisor" model applies to this work. The Wage Claimant was not an exempt executive in his position as a banquet chef because his primary duty was food preparation, not management. The Employer did not disprove the Wage Claimant's assertion that he spent at least ninety percent of his time performing food preparation tasks and/or assisting others in preparing food. The Wage Claimant could not hire and fire employees or formally discipline employees. His management responsibilities were limited to brief weekly organizational meetings. The Wage Claimant was a working supervisor who directed others who worked alongside him performing manual and routine work, such as cutting vegetables, making sauces and plating food. Because his primary duty was not management, he is not exempt from overtime under WAC 296-128-510(6).

5. The weight of the evidence establishes that the Wage Claimant was also not exempt from overtime under the professional exemption in WAC 296-128-530. Griffin's work neither required specific knowledge of an advanced type nor the consistent exercise of discretion or independent judgment. While there was testimony that Griffin's culinary training made him a desirable candidate for the promotion to banquet chef, his job description does not list any mandatory education. Griffin spent less than half the time studying for his associate's degree in culinary arts, compared to the time the Hotel Bellwether's executive chef spent obtaining his bachelor's degree, showing that Griffin's training was not "advanced." The Department's determination that Griffin did not have advanced culinary training accords with the federal Department of Labor's guidance that a four-year degree is necessary for a chef to be considered an exempt professional.

6. Griffin's job duties principally involved the routine tasks of food preparation. Griffin's discretion was limited to offering input on menu items, and perhaps substituting in a special dietary item, but only if the client did not care what was served. Griffin did not plan menus: the banquet event staff did that. He didn't even order food unless the executive chef was absent. Making choices on how to plate food, how many asparagus should go on a plate, for example, are not tasks that require unique imagination or talent or the consistent exercise of discretion and independent judgment as required by WAC 296-128-530, even if they are important to successfully executing a banquet event. In all crucial aspects of his job, Griffin was executing not inventing: he relied on the banquet event order for event specifics and needed to defer to the opinions of the executive chef.

8. The Employer did not keep records of the Wage Claimant's hours. Special rules apply to evaluating the evidence and the burden of proof when an employer has failed to keep adequate records. *Anderson*, 328 U.S. at 680. Washington, like federal law, requires employers to keep records about the hours worked by its employees. RCW 49.46.040, .070; WAC 296-128-010. Under *Anderson*, an employee should not be punished for the inability to prove with precision the hours worked by the employees, because the employer failed to keep adequate records:

Due regard must be given to the fact that it is the employer who has the duty under [FLSA] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof. 328 U.S. at 687.

9. The *Anderson* court provided for a shifting burden of proof if the employer does not keep adequate records:

[W]e hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be approximate." 328 U.S. at 687-88.

10. Under *Anderson*, although the preponderance of the evidence standard applies, the burden of proof is relaxed when an employer does not keep adequate records. *Lamonica v. Safe Hurricane Shutters, Inc.* 711 F.3d 1299, 1315 (11th Cir. 2013). *Anderson* applies here. The Wage Claimant was subject to the Minimum Wage Act under RCW 49.46.010, .020 and .130 and the recordkeeping statutes and rules apply to him. RCW 49.46.040, .070; WAC 296-128-010.

11. The Employer did not rebut the inference that the Wage Claimant worked the number of hours he claimed. The Employer offered general testimony, that the Wage Claimant left early on Sundays for example, but did not negate the Department's claims with specific evidence about dates and times he left early or did not work.

18. The Department calculated wages owed by taking the Wage Claimant's weekly salary, dividing by his total hours worked to come to a fluctuating hourly rate. The overtime rate was then applied to any hours over 40 worked in a week. The Department relied on the Wage Claimant's reconstruction of hours worked, except when the Employer provided leave slips demonstrating the Wage Claimant took paid leave that day. The Department credited the Employer for any payments made to the Wage Claimant, as reflected in the Employer's payroll records.


19. The Department has shown by a preponderance of the evidence that the Wage Claimant is not an overtime exempt employee and that the Employer violated RCW 49.46.130

and RCW 49.48.010 by failing to pay the Wage Claimant overtime wages in the amount of \$3009.06. The Department's June 9, 2017 Citation and Notice of Assessment is affirmed.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the Citation and Notice of Assessment is affirmed. The Employer is ordered to pay wages to William Griffin in the amount of \$3009.06. The Employer is ordered to pay interest of one percent per month under RCW 49.48.083(2) for these wages (except for the period of March 25, 2018, to the date this order is served). The Employer is ordered to make these payments within thirty days of service of this Director's Order.

Served the date this order is mailed.



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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 25 day of October 2018, via U.S. Mail, postage prepaid, to the following:

Jim Haupt
Bellwether Harbor Investments, LLP
Db a Hotel Bellwether
1 Bellwether Way
Bellingham, WA 98225

Katy Dixon, AAG
Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

William Griffin
3420 W. McLeod Road, No. 79
Bellingham, WA 98225

DATED this 25 day of October 2018, at Tumwater, Washington.

Lisa Deck

Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Bellwether Harbor Investments, LLP dba
Hotel Bellwether,

Appellant/Employer.

Docket No. 09-2017-LI-00564

INITIAL ORDER

Agency: Labor and Industries

Program: Wage Payments

Agency No. W-673-17

1. ISSUES PRESENTED

- 1.1 Did Bellwether Harbor Investments, LLP dba Hotel Bellwether violate RCW 49.46.130, by failing to pay overtime wages to Wage Claimant William Griffin for 375 hours at the regular overtime rate of pay of \$20.86 per hour, for overtime hours worked during the period of September 1, 2015 to January 21, 2017, as alleged in the Citation and Notice of Assessment for Wage Payment Violations, No. W-673-17, issued on June 9, 2017?
- 1.2 If a violation occurred, what is the amount of wages owed, including interest?
- 1.3 If a violation occurred, should Bellwether Harbor Investments dba Hotel Bellwether be liable for a penalty of \$1,000.00 as per RCW 49.48.083?

2. ORDER SUMMARY

- 2.1 Bellwether Harbor Investments, LLP dba Hotel Bellwether did not violate RCW 49.46.130, by failing to pay overtime wages to Wage Claimant William Griffin. The Department's Citation and Notice of Assessment for Wage Payment Violations, No. W-673-17, dated June 9, 2017, is REVERSED.
- 2.2 Bellwether Harbor Investments, LLP dba Hotel Bellwether is not liable for wage restitution or interest to Wage Claimant William Griffin, and no penalty is assessed.

3. HEARING

<i>Hearing Date</i>	February 27, 2018
<i>Administrative Law Judge</i>	Jane Cantor Shefler
<i>Appellant</i>	Bellwether Harbor Investments, LLP dba Hotel Bellwether
<i>Appellant Representative</i>	James Haupt, General Manager
<i>Appellant Witnesses</i>	Michael Grogan, Executive Chef; Joe Vinson, Accounting and Human Resources Manager; Cory DeWispelaere, Restaurant Manager; Elizabeth Crawford, Director of Sales and Catering

<i>Appellant Exhibits</i>	Appellant Exhibits A – I and Exhibit K were admitted at hearing. Exhibit J was proffered, but not admitted.
<i>Agency</i>	Department of Labor and Industries
<i>Agency Representative</i>	Katy Dixon, Assistant Attorney General
<i>Agency Witnesses</i>	Alix Campbell, Industrial Relations Agent; William Griffin, Wage Claimant
<i>Agency Exhibits</i>	Department Exhibits 1 through 17 were admitted.
<i>Wage Claimant/Party Intervenor</i>	William Griffin
<i>Court Reporter</i>	Sharon Westling, Central Court Reporting

4. FINDINGS OF FACT

Based on the evidence presented, the Administrative Law Judge makes the following findings of fact:

Jurisdiction

- 4.1 The Department of Labor and Industries (“Department”) issued a Citation and Notice of Assessment on June 9, 2017, finding that Bellwether Harbor Investments LLP dba Hotel Bellwether (“Appellant” or “Employer”), violated RCW 49.46.130, by failing to pay Wage Claimant William (“Liam”) Griffin (“Wage Claimant”) overtime wages due for the period of September 1, 2015 to January 21, 2017. The Department assessed the Appellant a penalty of \$1,000.00. *Exhibits 1 and 3.*
- 4.2 The Appellant filed a letter of appeal on June 28, 2017. *Exhibit 7; Exhibit A.*
- 4.3 The matter was referred to the Office of Administrative Hearings on September 15, 2017.

Wage Claim

- 4.4 The Wage Claimant is a chef with more than 20 years’ experience. He is a graduate of the California Culinary Academy, Le Cordon Bleu, with an Associate of Occupational Studies (AOS) degree. Prior to his employment with Hotel Bellwether, he was the Chef de Cuisine/Kitchen Manager at a winery in Temecula, California. He was also the owner and executive chef of a catering business. *Exhibit K.*
- 4.5 The Appellant operates Hotel Bellwether in Bellingham, Washington. The facility has an extensive restaurant and banquet program. The overall culinary program, including restaurants, banquets and other events, generates over \$2.3 million in sales annually. In 2016, the banquet department generated over \$950,000 in revenue. *Exhibit 7, pages 1 – 2; Exhibit A, pages 1 -2; Testimony of James Haupt (“Haupt Testimony”).*
- 4.6 The Appellant initially hired the Wage Claimant as a cook in March 2014, at a rate of pay of \$13.00 per hour. *Exhibit 7, page 49; Exhibit C, page 9.*

- 4.7 In June 2015, the Wage Claimant was promoted to Banquet Chef. His rate of pay was increased to \$15.00 per hour. *Exhibit 7, page 50; Exhibit C, page 10.* He was promoted to this position based upon his culinary degree and his experience and expertise as a chef, together with his demonstrated management skills. *Exhibit 7, page 2; Exhibit A, page 2; Haupt Testimony.*
- 4.8 Effective September 1, 2015, the Wage Claimant's pay structure was changed to a salary of \$34,500 per annum. *Exhibit 7, page 51; Exhibit C, page 11.* A few months later, his salary was increased to \$38,000 per annum, effective January 1, 2016. *Exhibit 7, page 52; Exhibit C, page 12.*
- 4.9 The Wage Claimant left his employment with Hotel Bellwether for a few months in 2016, but returned as Banquet Chef on or about August 16, 2016. Upon his rehire, the Wage Claimant's salary was increased to \$42,000 per annum. He also received 5% of the Banquet service revenue. *Exhibit 7, page 53.*
- 4.10 Once he was placed on salary, and particularly after he was rehired in August 2016, the Wage Claimant did not complain about the salary pay structure nor did he request overtime compensation. *Haupt Testimony.*
- 4.11 As Banquet Chef, the Wage Claimant was second only to the Executive Chef, on par with the Sous Chef. He was a key member of the banquet department. He worked closely with others in managerial positions, including James Haupt, General Manager; Michael Grogan, Executive Chef; Cory DeWispelaere-Rusch, Food and Beverage Manager; and Elizabeth Crawford, Director of Sales and Catering. *Exhibit 7, pages 2 and 41 – 45; Exhibits A and E – H; Testimony of Michael Grogan ("Grogan Testimony"); Testimony of Cory DeWispelaere-Rusch ("DeWispelaere-Rusch Testimony"); Testimony of Elizabeth Crawford ("Crawford Testimony").*
- 4.12 The Wage Claimant was responsible for the success or failure of all aspects of the banquet cuisine. He was responsible for banquet menu development and production, including food preparation, timing of service, and plating. *Exhibit 7, page 41; Exhibit E, page 1; Exhibit 16; Testimony of William Griffin ("Griffin Testimony"); Grogan Testimony.*
- 4.13 In his capacity as Banquet Chef, the Wage Claimant regularly attended Banquet Execution Meetings with other management staff, as well as other management meetings. *Exhibit 7, page 44; Exhibit G; Exhibit 7, page 45; Exhibit H; Griffin Testimony; Grogan Testimony; DeWispelaere-Rusch Testimony; Crawford Testimony.* When the Executive Chef was unavailable, the Wage Claimant attended certain other management meetings in his stead. *Crawford Testimony; Grogan Testimony; Griffin Testimony.*
- 4.14 As the "second-in-command," the Wage Claimant also managed the hotel kitchen when the Executive Chef was unavailable. *Grogan Testimony.* For example, he was solely responsible for management of the hotel kitchen on Sundays, which was the Executive Chef's regular day off. *Exhibit G.*

- 4.15 As a chef, the Wage Claimant executed menu items which required more technical skills than those of line cook. *Exhibit 16, page 1*. In this capacity, he worked in the kitchen with the Executive Chef and the line cooks. He prepared foods which required professional knife skills or a particular expertise, such as sauce preparation. *Grogan Testimony*. The Wage Claimant was proud of his position as a chef and wanted staff to refer to him as "Chef Laim." *Exhibit G*.
- 4.16 The Wage Claimant did not have authority to hire, fire or formally discipline kitchen staff. However, he routinely supervised and coached the kitchen and service staff on the proper execution of food preparation or other production aspects of an event. *Exhibit 7, page 41; Exhibit E, page 1; Exhibit 7, page 43; Exhibit F; Griffin Testimony; Grogan Testimony*. Depending on the size of the event, the Wage Claimant supervised as many as 12 kitchen and service staff. *Exhibit 16, page 2*.
- 4.17 The Wage Claimant filed a Worker's Rights Complaint Form on February 13, 2017. He asserted that he was owed wages for the period of January 1, 2015 to January 15, 2017. He asserted that he was owed \$30,000 for 1,000 hours worked. He claimed that his duties "never fundamentally changed" throughout his employment and that he "had no managerial responsibilities or department or people" under him. *Exhibit 4*.
- 4.18 Alix Campbell, Industrial Relations Agent, was assigned to investigate the Worker's Rights Complaint. She requested documentation from both the Wage Claimant and the Employer to determine hours worked and the rate of pay. *Exhibit 6, pages 1 and 3*.
- 4.19 While developing his documentation, the Wage Claimant revised his claim to encompass the period beginning September 1, 2015. *Exhibit 6, page 1*. The Wage Claimant did not have any contemporaneous records showing actual hours worked. He submitted a handwritten calendar showing hours worked based solely on his recollection. *Exhibit 17; Griffin Testimony*.
- 4.20 Because the Wage Claimant was on salary during the period at issue, the Employer did not require him to use a timeclock and thus, did not have documentation of actual hours worked. In response to the Department's request for documentation, though, Executive Chef Grogan compared the Wage Claimant's calendar submission with the Banquet Event Order agenda for the period beginning September 1, 2015 through January 17, 2017. He also reviewed the Wage Claimant's documented leave. *Exhibit 14, pages 4 and 10 – 39; Exhibit C, pages 1 – 8 and 16 – 44; Exhibit E, page 1*.
- 4.21 Through this review, the Employer discovered several discrepancies between its records and the calendar prepared by the Wage Claimant. *Exhibit C, pages 13 – 15*. For example, the Wage Claimant claimed that he worked extended hours on days when there were no banquet events or which were his regular days' off. He also claimed he worked on days when he was on leave. *Exhibit 14, pages 6 - ; Exhibit C, pages 13 – 15*. One specific example is that the Wage Claimant recorded 6 hours worked on January 9, 2017, when he did not work at all. *Exhibit 7, pages 41 - 42; Exhibit E*.

- 4.22 Ms. Campbell calculated hours worked and wages owed using a combination of the documentation submitted by both the Wage Claimant and the Employer. The Employer did not have records for the entire period at issue. Ms. Campbell relied upon the Wage Claimant's calendar for those dates or hours that the Employer did not have any documentation to contradict the Wage Claimant's reconstruction. *Exhibit 6, pages 9 – 11; Exhibit 15, page 10; Campbell Testimony.*
- 4.23 Based upon her investigation, Ms. Campbell determined that the Wage Claimant was not a manager, but rather a "working supervisor" and not exempt from overtime. Accordingly, she recommended issuance of the Citation and Notice of Assessment here under appeal. *Campbell Testimony.*

Credibility

- 4.24 The testimony and documentary evidence of the parties conflicted on material points, particularly the managerial responsibilities and the hours worked by the Wage Claimant. Based upon the evidence presented, and having carefully considered and weighed all the evidence, including the demeanor and motivations of the parties, the reasonableness of the testimony and the totality of the circumstances presented, the Administrative Law Judge finds that the testimony of the Employer witnesses was more credible than that of the Wage Claimant. The Wage Claimant was disingenuous in his efforts to downplay the extent of his responsibilities as Banquet Chef. He characterized his role as a "lead" supervisor or coach, without any real authority, denying his managerial duties as head of the banquet kitchen. *Griffin Testimony.* The testimony of each Employer witness was consistent with his or her prior written statement, and each presented a more credible description of the Wage Claimant's responsibilities and role as the Banquet Chef. (*See, e.g. Exhibit 7, pages 41 – 45; Exhibits D – H.*)

5. CONCLUSIONS OF LAW

Based on the facts above, the Administrative Law Judge makes 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 49.48.084.

Department Investigation of Wage Complaints

- 5.2 The Department of Labor and Industries is responsible for implementing and enforcing the provisions of RCW 49.46 and 49.48 and Title 296 Washington Administrative Code (WAC), pertaining to wages, in the exercise of the police powers of the state for the purpose of protecting the immediate and future health, safety and welfare of the people of the state.
- 5.3 If an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). If the Department finds that the employer has violated one or more

wage payment requirements, it should issue a citation and notice of assessment, which may include ordering the employer to pay all wages owed plus 1% interest per month on all unpaid wages. RCW 49.48.083(2). If the Department determines that the employer has complied with the law, the Department shall issue a Determination of Compliance. RCW 49.48.083(1).

Burden of Proof

- 5.4 In appealing a Citation and Notice of Assessment, the party challenging the Department's decision has the burden of proof, by a preponderance of the evidence. The standard of review of a Citation and Notice of Assessment by the Administrative Law Judge is *de novo* (anew). RCW 49.48.084(3).
- 5.5 A preponderance of the evidence is that evidence sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Mendoza v. Dept. of Agriculture*, 2006 Wash.App.LEXIS 2363 (Ct. App.Wa.II, No. 34262-6-II), citing *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

Applicable Washington State Wage Laws

- 5.6 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).
- 5.7 RCW 49.46.020 requires that every employer shall pay to each of his or her employees a rate of minimum wage for hours worked. *See also*, Chapter 296-126 WAC.
- 5.8 RCW 49.46.010(7) defines "wage" as:

[C]ompensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules by director.
- 5.9 Employers must pay employees for all hours worked. Under Department Administrative Policy ES.C.2, "hours worked" is defined as:

[A]ll hours during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises or at a prescribed work place.

See also, WAC 296-126-002(8).
- 5.10 An employer is required to pay overtime when an employee works over 40 hours in a work week. RCW 49.46.130(1). The overtime rate is not less than one and a half times the regular rate at which the worker is employed. *Id.* A work week is defined as a fixed and regularly reoccurring seven day period. WAC 296-128-015.

5.11 Certain classes of employees, including executive, administrative or professional employees, are exempt from the minimum wage and overtime pay requirements. RCW 49.46.010(3)(c); RCW 49.46.130(2)(a); WAC 296-128-510 – 530.

5.12 WAC 296-128-510 defines an individual employed in a “bona fide executive” capacity as any employee:

- 1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
- (2) Who customarily and regularly directs the work of two or more other employees therein; and
- (3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
- (4) Who customarily and regularly exercises discretionary powers; and
- (5) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this section: Provided, That this paragraph (5) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and
- (6) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week exclusive of board, lodging, and other facilities: Provided, That an employee who is compensated on a salary rate of not less \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

5.13 WAC 296-128-530 defines an individual employed in a “professional” capacity as any employee:

- (1) Whose primary duty consists of the performance of work:
 - (a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized

intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(b) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the intention, imagination, or talent of the employee; or

(c) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

- (2) Whose work requires the consistent exercise of discretion and judgment in its performance; and
- (3) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) Who does not devote more than 20 percent of his hours worked in the work week to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this section; and
- (5) Who is compensated for his services on a salary or fee basis at a rate of not less than \$170 per week exclusive of board, lodging, or facilities: Provided, That this paragraph (5) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law, medicine, or dentistry and who is actually engaged in the practice thereof: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

Analysis

- 5.14 The weight of evidence establishes the Wage Claimant was not a “bona fide executive” as defined in WAC 296-128-510. To qualify as a “bona fide executive” under this regulation, a person’s employment must meet all the identified

requirements. In his employment as Banquet Chef, the Wage Claimant met all the requirements of the regulation, except that he did not have the authority to hire or fire other employees. WAC 296-128-510(3). For this reason alone, he cannot be considered a “bona fide executive” exempt from the overtime requirements of the Washington State wage law.

- 5.15 The weight of the evidence, though, establishes the Wage Claimant was a “professional” employee under the provisions of WAC 296-128-530:
- a. The Wage Claimant’s work as Banquet Chef required specific knowledge of “an advanced type” in a specific field of learning. While his AOS degree may not technically qualify as a “prolonged course” of study, this degree was a condition of employment as Banquet Chef. His specialized training, knowledge and skills as a chef are distinct from training in the “performance of routine mental, manual or physical processes.” His work as a Banquet Chef required creativity in menu development and production and depended upon his “intention, imagination, or talent.” WAC 296-128-530(1)(a) and (b);
 - b. As Banquet Chef, the Wage Claimant’s work required the “consistent exercise of discretion and judgment in its performance.” The Wage Claimant’s exercise of discretion and judgment was reflected in menu development and production, together with his management, supervision, and coaching of kitchen and service staff in the execution of a banquet event. WAC 296-128-530(2);
 - c. The Wage Claimant’s work was varied in character, as opposed to routine mental, manual, mechanical or physical work. The production, from start to finish, of a banquet event, is “of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.” WAC 296-128-530(3);
 - d. The Wage Claimant devoted all of his working hours to activities and responsibilities essential to his performance as Banquet Chef. WAC 296-128-530(4); and
 - e. The Wage Claimant earned a salary of more than \$250 per week. WAC 296-128-530(5).
- 5.16 The Employer has met its burden of proving, by a preponderance of the evidence, that the Wage Claimant was a professional employee, exempt from the overtime requirements of the Washington State wage laws. The Department’s Citation and Notice of Assessment for Wage Payment Violations, No. W-673, dated June 9, 2017, is REVERSED.

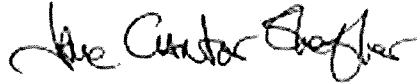
6. INITIAL ORDER

- 6.1 Bellwether Harbor Investments, LLP dba Hotel Bellwether did not violate RCW 49.46.130, by failing to pay overtime wages to Wage Claimant William Griffin.

William Griffin was a professional employee, exempt from overtime wages under RCW 49.46.010(3)(c) and WAC 296-128-530. The Department's Citation and Notice of Assessment for Wage Payment Violations, No. W-673-17, dated June 9, 2017, is REVERSED.

- 6.2 Bellwether Harbor Investments, LLP dba Hotel Bellwether is not liable for wage restitution or interest to Wage Claimant William Griffin, and no penalty is assessed.

Issued from Tacoma, Washington on the date of mailing.



Jane Cantor Shefler
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

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:

Director
Department of Labor and Industries
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.

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 09-2017-LI-00564

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

<p>Bellwether Harbor Investments, LLP dba Hotel Bellwether Attn: Jim Haupt, General Manager 1 Bellwether Way Bellingham, WA 98225 <i>Appellant</i> 91 7199 9991 7037 7728 6850</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 91 7199 9991 7037 7728 6850 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Katy J. Dixon, AAG Attorney General's Office MS: TB-14 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 <i>Agency Representative</i></p>	<p><input type="checkbox"/> First Class Mail <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>William Griffin 3420 West McLeod Road, #79 Bellingham, WA 98225 <i>Intervenor/Wage Claimant</i> 91 7199 9991 7037 7728 6843</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 91 7199 9991 7037 7728 6843 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Monday, March 26, 2018

OFFICE OF ADMINISTRATIVE HEARINGS



Ricci Frisk
Legal Administrative Manager