

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Alleged Labor Law
Violation of Chafoulias Management
Co., d/b/a Radisson Plaza Hotel,
Rochester

**ORDER DENYING
RESPONDENT'S MOTION
TO DISMISS AND GRANTING
PARTIAL SUMMARY JUDGMENT
TO COMPLAINANT**

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick on Respondent's Motion to Dismiss.

John P. Haberman, Law Offices of Martin L. Garden, 2520 Centre Village, 431 South Seventh Street, Minneapolis, Minnesota 55415, appeared on behalf of Respondent Chafoulias Management Co., d/b/a Radisson Plaza Hotel, Rochester. Susan C. Gretz, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Complainant, Minnesota Department of Labor and Industry (Department). The record was closed on the motion on July 16, 1996, upon receipt of the final briefs.

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. Respondent's Motion to Dismiss is DENIED.
2. Partial Summary Disposition for Complainant is GRANTED as follows:
The Labor Law Violation and Order to Comply issued to Respondent October 3, 1995, is affirmed as to violations of Minn. Stat. § 177.24, subd. 1 (Minimum Wage), and Minn. Stat. § 177.24, subd. 3, and Minn. R. 5200.0080 (Sharing Gratuities).
3. A telephone prehearing conference will be held August 26, 1996, at 1:30 p.m. for the purpose of establishing the procedure and schedule for resolving the

remaining issues in this matter. Counsel shall notify the Administrative Law Judge if that date and time are inconvenient.

Dated this 13th day of August 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Introduction and Issue

This matter was commenced by the issuance of a Notice of and Order for Hearing on January 2, 1996, by the Commissioner of Labor and Industry alleging that Respondent, as an employer operating a hotel and convention center, violated certain provisions of the Minnesota Fair Labor Standards Act, Minn. Stat. §§ 177.21-177.44. In particular, it is alleged that from April 8, 1993, to April 7, 1995, Respondent employed some 54 identified employees and during that period kept a portion of gratuities due those direct service employees in violation of Minn. Stat. § 177.24, subd. 3, and Minn. R. 5200.0080, failed to pay the minimum wage to those employees in violation of Minn. Stat. § 177.24, subd. 1, and failed to record weekly totals on time records in violation of Minn. Stat. § 177.30.

The employees involved in this matter are banquet servers who worked the banquets at the Radisson Plaza Hotel, Rochester, during the period in question. The primary question in this matter is whether or not the "service charges" charged banquet customers by Respondent were "gratuities", otherwise known as "tips". If they are gratuities, Respondent's admitted practice of retaining a portion of the service charge for itself and paying out the remainder as commissions to employees violated the provisions of Minn. Stat. § 177.24, subd. 3, which prohibits employers from requiring employees to contribute a share of gratuities received by the employee to the employer, among other things. Also, there would be a violation of Minn. Stat. § 177.24, subd. 1, which requires Respondent to pay a minimum wage of \$4.25, because the share of the service charge paid to the employees could not be added to their otherwise subminimum wages, thereby bringing them above \$4.25 per hour. If the service charges are not gratuities, then Respondent's practices did not violate the cited statutory provisions.

Facts

From April 1993 through April 1995, Respondent operated banquet facilities in the Radisson Plaza Hotel, Rochester. Banquets are functions such as seminars, award ceremonies, and weddings, together with a meal. Approximately 60 percent of the banquets served were sit-down meals in which a preordered meal was placed in front of the guests attending the function. The remaining 40 percent of the time, groups requested buffet-style meals in which the guests served themselves. Affidavit of Sandra M. Anderson, who was, during the time in question, the Sales/Catering Manager and is now the Director of Sales for Radisson Plaza Hotel, Rochester.

Prior to a banquet, the Sales/Catering Manager would meet with the contact person for the group for whom the banquet was being held. Determinations would be made as to the number of expected guests, the type of room requested, whether a bar was requested and the menu for the event. Thereafter, Anderson would fill out a form entitled "Sales and Banquet Function Information Sheet", sign the original and send it to the contact with the form letter requesting that it be reviewed, corrected if necessary, signed and returned. The Sales and Banquet Function Information Sheet contained a preprinted line labeled "FOOD & BEVERAGE PRICES" followed by a blank. Below that was a preprinted line that stated "PLUS 16% SERVICE CHARGE PLUS SALES TAX". Affidavit of Anderson, Ex. A. Anderson never volunteered any information regarding that notice and it was never conveyed to anyone other than the contact for the group reserving the function. Affidavit of Anderson.

After the function, the customer received a banquet bill from Respondent. Two such bills appear as Exhibit 1 to the Affidavit of Carrie Mueller, Respondent's Human Resources Manager. They indicate a total for the food served, a 5 percent service charge, a subtotal, 7 percent for tax and 11 percent gratuity. This form was used by Respondent until approximately February 24, 1995. At that time, the service charge was changed to 4 percent and the gratuity was renamed "Banquet Service Fee" and changed to 12 percent. Mueller Deposition at 55. During the period in question, the banquet servers had base pay rates below \$4.25 per hour, for example, for the pay period ending December 17, 1993, the banquet servers had base hourly rates of \$3.70 per hour. Mueller Deposition, Ex. 7. The base rate was raised to \$4.25 per hour on January 19, 1995. Mueller Deposition at 48.

During the period in question, banquet servers were paid their base rate plus a portion of the gratuity collected by Respondent. While the 16 percent service charge was broken down into 11 percent gratuity and 5 percent service charge, the entire gratuity amount was not distributed to the banquet servers. About 20 percent of the "gratuity" (later renamed the "banquet service fee") was also retained by Respondent. Thus, something like 9 percent of the total charge was actually distributed to the employees as pay over and above their base wage. Those additional payments, which Respondent has sometimes called commissions, but which were labeled as "GRAT" on its payroll register, were often substantial. For example, for the pay period ended December 17, 1993, an employee named Wendy J. Hutchings had 41.25 hours at her base wage of \$3.70 for a total of \$152.63. (She also had 12.25 hours at \$5.85 per hour, which is apparently working a position other than as banquet server). For that pay period, she had "GRAT" pay of \$306.60. Mueller Deposition, Ex. 7 at p. 68, and Affidavit of Roslyn Wade, Ex. B. Thus, if her gratuity pay of \$306.60 is included as

compensation, she had total banquet wages of \$459.23, which works out to an hourly rate of \$11.13.

Respondent's Motion to Dismiss

In its Motion to Dismiss, Respondent argued that the controlling issue in this case had previously been decided in In the Matter of Alleged Labor Law Violation of Gangelhoff Investments, Inc., d/b/a Holiday Inn, Bemidji, Recommendation of Administrative Law Judge, OAH No. 5-1900-7252-2, dated April 28, 1993. Respondent argued that Gangelhoff decided that banquet service charges were not gratuities. Based on that, Respondent argued that the Department was barred by collateral estoppel from asserting the contrary in this proceeding and that Complainant's allegation failed to state a claim for which relief could be granted. In response to a question raised by the Administrative Law Judge at oral argument, Respondent also argues that the same result is required by Gangelhoff under a stare decisis analysis rather than a collateral estoppel analysis. Respondent's Supplemental Memorandum at 1-3. The Commissioner of Labor and Industry never issued a final Order in the Gangelhoff matter. Instead, no action was taken and the matter was no longer pursued by the Department. Counsel for the Department states that, by implication, it may be considered that the Commissioner adopted the Gangelhoff recommendation. Affidavit of John P. Haberman No. 2, Ex. A. For purposes of this Motion, it has been considered as such.

In Gangelhoff, the hotel added a banquet charge of 33 percent to its banquet bills. The hotel distributed 60 percent of the banquet service charges to its direct service employees (waiters, waitresses and bartenders) and the remaining 40 percent to its set-up and other staff working the banquet. There was no allegation that the hotel siphoned off any of the surcharge as profit or that it was used to evade minimum wage or other labor laws. The Department there argued that the entire banquet service charge was a gratuity and should have been paid solely to direct service staff. The ALJ concluded that the Department had not sustained its burden of proving by a preponderance of the evidence that the banquet service charges were "gratuities" within the meaning of Minn. Stat. § 177.23, subd. 9. In his Memorandum, the ALJ noted that no one had ever considered the 33 percent service charge to be a "gratuity". He found that consistent with common sense as to normal tipping percentages. He stated:

There might potentially be some doubt elsewhere in the industry, in the more common case where hotel surcharges are on the order of 15 percent, but it strains credulity to assert that customers in this rural area thought that the 33 percent fee was a mandatory unshared tip for a few direct servers.

The Gangelhoff decision does not reach the conclusion that Respondent suggests and is based on significantly different facts than the undisputed facts in this case. In Gangelhoff, the ALJ concluded that the Department had not proven by a preponderance of the evidence that the banquet service charges in that case were

gratuities. Gangelhoff, Conclusions of Law No. 4. Thus, the conclusion was fact specific and the facts were significantly different. For example, the service charge was 33 percent, not 16 percent, which, as the ALJ mentioned, was a typical tip percentage. Secondly, the entire amount collected was distributed to employees and the hotel kept nothing for itself. In Gangelhoff, the issue was whether all of the amount collected should have been distributed to direct service persons only and not to other staff. Finally, the amount distributed was not used to bring the employees above the minimum wage level. Thus, Gangelhoff cannot be used as authority for a holding that banquet service charges, as a matter of law, are not gratuities.

Respondent also relies upon federal court decisions that under the federal Fair Labor Standards Act, a service charge is not a tip. Mechmet v. Four Seasons Hotel, Ltd., 639 F.Supp. 330 (ND Ill. 1986), aff'd. 825 F.2d 1173 (7th Cir. 1987). However, the Mechmet decisions are based upon federal statutes and regulations that vary significantly from Minnesota's on this issue. As noted by the Federal District Court in Mechmet, 29 C.F.R. § 531.55 provides:

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity.

639 F.Supp. at 338. Moreover, 29 C.F.R. § 531.55, describes amounts not received as tips as follows:

A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). [Tip credit provisions]. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amount so distributed are not counted as tips received.

In contrast, Minn. Stat. § 177.23, subd. 9, provides:

Gratuities. "Gratuities" means monetary contributions received directly or indirectly by an employee from a guest, patron, or customer for services rendered and includes an obligatory charge assessed customers, guests or patrons which might reasonably be construed by the guest, customer, or patron as being a payment for personal services rendered by an employee and for which no clear and conspicuous notice is given by the employer to the customer, guest, or patron that the charge is not the property of the employee.

In addition, since 1987, Minnesota has had rules interpreting some of the terms in Minn. Stat. § 177.23, subd. 9. Minn. R. 5200.0800 provides, in relevant part:

Subp. 4a. **Obligatory charges.** For purposes of Minnesota Statutes, section 177.23, subdivision 9, obligatory charges which might reasonably be construed by the guest, customer, or patron as a sum to be given to an employee as payment for personal services rendered, include, but are not limited to, service charges, tips, gratuities, and/or surcharges which are included in the statement of charges given to the customer.

Subp. 4b. **Clear and conspicuous notice.** For purposes of Minnesota Statutes, section 177.23, subdivision 9, clear and conspicuous notice that the obligatory charge is not a gratuity is notice clearly printed, stamped, or written in bold type on the menu, placard, the front of the statement of charges, or other printed material given to the customer. Type which is at least 18 point (one-fourth inch) on the placard, or 9 point (one-eighth inch) or larger on all other notices is clear and conspicuous.

Because of these significant differences between the federal and the state wage and hour laws, the Mechmet cases interpreting federal law are not controlling in this matter. Thus, Respondent's Motion to Dismiss, whether based upon a collateral estoppel, stare decisis, or failure to state a claim analysis, all of which are based upon an argument that a banquet service charge is not, as a matter of law, a gratuity, must be denied.

Overtime Issue

As noted above, the original Labor Law Violation and Order to Comply issued by the Department in this matter contained an allegation that Respondent had failed to pay 1 1/2 times the regular rate for all hours exceeding 48 hours worked in a work week in violation of Minn. Stat. § 177.25. The Department has dropped that allegation and it was not included in the Notice of and Order for Hearing. In discovery, Respondent posed an interrogatory asking for the basis for Complainant's decision not to pursue back wages for overtime in this matter. Complainant answered as follows:

It was determined that the federal case law interpreting 29 U.S.C. § 207(I), including Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173 (8th Cir. 1987) may create some confusion among banquet operations as to whether banquet waiters are exempt from overtime under Minn. Rules pt. 5200.0170. Although the Minnesota Department of Labor and Industry is not bound by federal statutes such as 29 U.S.C. § 207(I), it was determined that any clarification regarding the status of banquet waiters as **commissioned employees** under Minn. Rules pt. 5200.0170 is appropriate for rulemaking rather than litigation in this case.

Respondent's Supplemental Memorandum, footnote 2. Respondent argues that this Answer constitutes an admission that banquet employees are commissioned

employees as set forth in the Mechmet decision and an admission that Respondent's position concerning the distinction between commissioned employees and tipped employees is correct. Respondent's Supplemental Memorandum at 3-4. Complainant argues that the confusion to which the interrogatory answer refers could only arise in the case of the overtime provision because Minn. R. 5200.0170, subp. 2, exactly mirrors the federal statute, 29 U.S.C. § 207(l) that was interpreted in Mechmet. Complainant's Supplemental Memorandum at 8. Both provisions state that it is not a violation of the overtime pay requirement if the regular rate of pay is more than 1 1/2 times the minimum wage and more than half the person's compensation for the period represents commissions on goods or services. The Mechmet decisions held that the portion of banquet service charges paid to banquet workers constituted commissions and not gratuities under federal law. That might be a reason to believe Minn. R. 5200.0170, subp. 2, should be read the same. However, there is no reason to extend that interpretation beyond that provision. The minimum wage and tip-splitting statutes and rules are clear on their own terms and not subject to any confusion because of the Mechmet cases.

Summary Disposition for Complainant

At oral argument on June 26, 1996, the Administrative Law Judge inquired as to whether, under the undisputed facts of the case, it would be appropriate to grant summary disposition to Complainant if the law applied to those facts so required. Respondent stated that summary disposition would be inappropriate because there would be fact issues in dispute. At the close of the oral argument, the Administrative Law Judge requested that the parties submit supplemental memoranda addressing issues raised during oral argument and, in particular, whether summary disposition could appropriately be granted against Respondent. Such memoranda were to be filed by mail no later than July 10, 1996.

In its Supplemental Memorandum, Complainant argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Respondent noted that while Complainant had mentioned the issue of summary judgment in its favor in its Memorandum in Opposition to Respondent's Motion to Dismiss, it had not requested such relief at the time. Respondent argues that it has not been allowed the normal ten days to respond to an appropriately filed motion and, in fact, has had no opportunity to respond to Complainant's simultaneously filed Supplemental Memorandum. Respondent also argues that there are several remaining issues of material fact which preclude granting of summary judgment.

Under Minn. R. 1400.5500, which defines the duties of an Administrative Law Judge in a contested case proceeding, the Judge has the duty to "recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons; . . ." This duty is listed in addition to the duty to hear and rule on motions and several other duties. The rule does not require the recommendation of summary disposition to be based upon the motion of any party.

Because of the very similar language, motions for summary disposition in contested case hearings have been treated the same as motions for summary judgment under Rule 56 of the Minnesota Rules of Civil Procedure. In Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588 (1975), the Supreme Court held the trial courts have the inherent power to dispose summarily of litigation when there remains no genuine issue as to any material fact and judgment must be ordered for one of the parties as a matter of law. The same conditions must exist as would justify a summary judgment on motion of a party. However, the normal ten-day period for a reply would not apply because, citing Niazi v. St. Paul Mercury Ins. Co., 265 Minn. 222, 121 N.W.2d 349 (1963), each party should be fully prepared on the facts applicable to the case at the time of the pretrial conference. In Modern Hearing and Air Conditioning, Inc. v. Loop Belden Porter, 493 N.W.2d 296 (Minn. App. 1992), it was held that where a party moves for summary judgment, the District Court may not grant summary judgment sua sponte against the moving party if failure to afford that party a meaningful opportunity to oppose the order is prejudicial. With respect to the facts and issues set forth in Respondent's Motion to Dismiss, there has been no prejudice to Respondent. After the Administrative Law Judge raised the question of applying summary disposition against Respondent at the June 26, 1996 oral argument, both parties were allowed two weeks to file supplemental memoranda on that issue and any others they chose to address. That was more than sufficient time for Respondent.

In its Supplemental Memorandum, Complainant did not raise any new facts regarding the issues raised by Respondent's original Motion to Dismiss. However, Complainant did argue that it was also entitled to judgment as a matter of law on the issue of Respondent's alleged failure to keep weekly totals of hours worked in violation of Minn. Stat. § 177.30, subd. 3, and requested a remedy that any settlements with individual banquet employees must be examined to determine whether they violated the minimum wage law and should be declared null and void. Since these arguments are new and Respondent has not had an opportunity to present any facts or argument regarding them, they are inappropriate for summary disposition at this point.

In support of its Motion to Dismiss, Respondent submitted affidavits and documents setting forth the basic facts of Respondent's banquet service charge system. Those materials and facts have been considered by the Administrative Law Judge and therefore Respondent's motion has been treated as a Motion for Summary Disposition. Reed v. University of North Dakota, 543 N.W.2d 106 (Minn. App. 1996); Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993). In its response to the motion, Complainant submitted affidavits containing additional facts and documents. Taken together, the material undisputed facts are as set forth previously in this Memorandum.

Based upon the undisputed facts in this case, it must be concluded as a matter of law that the banquet service charges collected by Respondent during the period in question constituted gratuities, as that term is defined in Minn. Stat. § 177.23, subd. 9, and Minn. R. 5200.0800, subps. 4a and 4b. That is because they are, to paraphrase the statute, obligatory charges assessed to customers which might reasonably be construed by the customer as being payment for personal services rendered by an

employee and for which no clear and conspicuous notice is given by the employer to the customer that the charge is not the property of the employee. Clearly, a 16 percent service charge might reasonably be construed by the customer as being a payment for personal services rendered by an employee. That's a typical tip percentage. Moreover, Respondent's service charge falls squarely within the terms of Minn. R. 5200.0800, subp. 4a, which states that the term "obligatory charges which might reasonably be construed by the guest, customer, or patron as a sum to be given to an employee as payment for personal services rendered," includes, but is not limited to, service charges, tips, gratuities, and surcharges, which are included in this statement of charges given to the customer. Moreover, no notice whatsoever, let alone a clear and conspicuous notice, was given to customers that the charge was not the property of the employees. Thus, based upon the undisputed facts presented and the clear language of the statute and rule, Respondent's banquet service charges were gratuities.

In its Supplemental Memorandum, Respondent points out that Complainant had argued in its response to Complainant's Motion to Dismiss that a material fact issue existed with respect to whether the service charges were gratuities. Respondent's Supplemental Memorandum at 11. The Administrative Law Judge has concluded otherwise.

Respondent argues that there are fact issues involving whether the service charges were received directly or indirectly by banquet employees. There are two defects in this argument. The first is that the material facts are absolutely clear as to how the banquet employees were paid. They were paid a base hourly wage that was less than the minimum wage plus a portion of the service charge collected by Respondent. The payroll information was submitted by Respondent to a payroll service and the employees received their paychecks. There are no material fact issues there. Secondly, it is not critical to the definition of gratuities in Minn. Stat. § 177.23, subd. 9, as to whether the employees were paid directly or indirectly and, at any rate, it is clear they were paid indirectly.

Respondent's next argument is that it has not been demonstrated in any meaningful way that a banquet customer might construe any of the 16 percent service charge as payment for personal service and that there are no affidavits from customers or any credible testimony from employees. However, this issue does not require the testimony or opinion of customers or employees. It is a legal question as to whether a reasonable person would construe the charges as being a payment for personal services rendered by an employee. Thus, there are no fact issues in this regard.

Respondent also argues that two letters complaining about the Respondent keeping part of the service charge were unreliable hearsay. Those letters have not been relied upon to determine the facts set forth above. Lastly, Respondent complains about the use of Carrie Mueller's deposition testimony as being incomplete and lacking in foundation. The facts set forth in the Memorandum above are based primarily upon the facts presented by Respondent in its Motion to Dismiss, supplemented by the testimony of Ms. Mueller in her deposition. The reliance on her testimony is minimal

and most of the additional facts have been derived from the Respondent's own documents that appear as exhibits to the Mueller deposition. As required, the facts have been considered in the light most favorable to Respondent and all doubts have been resolved in favor of Respondent. Respondent has raised no genuine issues of material fact regarding the use of Ms. Mueller's testimony.

Conclusions

Based upon the undisputed facts in this case, the 16 percent service charges charged by Respondent to banquet customers during the period April 5, 1993 to April 5, 1995, fell within the definition of gratuities set forth in Minn. Stat. § 177.23, subd. 9. Therefore, it follows as a matter of law, based upon the admitted and undisputed facts presented, that Respondent's practice of retaining a portion of the service charge, rather than paying it over to the direct service employees, violates Minn. Stat. § 177.24, subd. 3, and Minn. R. 5200.0800 and Respondent's practice of paying a base wage less than the minimum wage of \$4.25 violates Minn. Stat. § 177.24, subd. 1, because the gratuities can not be counted toward the minimum wage under Minn. Stat. § 177.24, subd. 2. Therefore, the Labor Law Violation and Order to Comply should be affirmed in those regards.

Resolution of the gratuities issue does not resolve all the issues in this case. It still must be determined whether the Department's calculations of amounts due are correct, whether there is a violation of Minn. Stat. § 177.30, subd. 3, regarding record keeping, and whether any settlements between Respondent and individual banquet employees can and should be reviewed. These matters were not raised in Respondent's original Motion to Dismiss and Respondent has not been provided an opportunity to respond regarding them. In order to determine the procedure for resolving the remaining issues, a prehearing conference will be held.

S.M.M.