

State of New Hampshire
Supreme Court

NO. 2019-0404

2019 TERM

DECEMBER SESSION

Debbie Orloff, and Starlight Lodge Mountainside, LLC

v.

Jennifer Saunders

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

Brief of Plaintiffs/Appellants,
Debbie Orloff and Starlight Lodge Mountainside, LLC

December 3, 2019

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... [3](#)

QUESTIONS PRESENTED..... [6](#)

STATEMENT OF FACTS AND STATEMENT OF THE CASE..... [7](#)

 I. Orloff Establishes an LLC and Buys a Motel..... [7](#)

 II. Couple Hired to Manage the Motel..... [9](#)

 III. Managers’ PO Box..... [12](#)

 IV. Managers Fired for Cause..... [13](#)

 V. Wage Claim and Wage Claim Hearing..... [14](#)

 VI. Orloff Learns of DoL Decision..... [17](#)

 VII. Hearing in Superior Court..... [18](#)

SUMMARY OF ARGUMENT..... [20](#)

ARGUMENT..... [21](#)

 I. Orloff’s Right to Due Process of Law Was
 Violated By Not Being Provided Lawful Service..... [21](#)

 A. Wage Claim Requires Actual Notice..... [21](#)

 B. Orloff Did Not Get Actual Notice..... [26](#)

 II. DoL Held a Second Hearing Without Notice..... [28](#)

CONCLUSION..... [29](#)

CERTIFICATIONS..... [30](#)

ADDENDUM..... [30](#)

 1. DECISION OF THE HEARING OFFICER (Dec. 3, 2018)..... [31](#)

 2. ORDER ON APPEAL OF DoL WAGE CLAIM (Apr. 25, 2019)..... [34](#)

 3. ORDER ON MOTION FOR RECONSIDERATION (June 17, 2019)..... [53](#)

TABLE OF AUTHORITIES

Federal Cases

| | |
|--|----|
| <i>Cornhusker Casualty Co. v. Skaj</i> , 786 F.3d 842 (10th Cir. 2015)..... | 25 |
| <i>Covey v. Town of Somers</i> , 351 U.S. 141 (1956)..... | 21 |
| <i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)..... | 21 |
| <i>Robinson v. Hanrahan</i> , 409 U.S. 38 (1972)..... | 21 |

New Hampshire Cases

| | |
|--|--------|
| <i>Adams v. Sullivan</i> , 110 N.H. 101 (1970)..... | 23 |
| <i>Appeal of New Hampshire Fireworks, Inc.</i> , 151 N.H. 335 (2004)..... | 21 |
| <i>Attitash Mountain Service Co. v. Schuck</i> , 135 N.H. 427 (1992)..... | 27 |
| <i>Bennett v. Town of Hampstead</i> , 157 N.H. 477 (2008)..... | 21, 29 |
| <i>Brown v. Sceggell</i> , 22 N.H. 548 (1851)..... | 21 |
| <i>Bruce v. Cloutman</i> , 45 N.H. 37 (1863)..... | 22 |
| <i>Bugbee v. Thompson</i> , 41 N.H. 183 (1860)..... | 23 |
| <i>Demers v. Bisbee</i> , 106 N.H. 354 (1965)..... | 24 |
| <i>Dupuis v. Smith Properties, Inc.</i> , 114 N.H. 625 (1974)..... | 24 |

| | |
|--|------------|
| <i>Farris v. Daigle</i> , 139 N.H. 453 (1995)..... | 7 |
| <i>State v. Fraser</i> , 116 N.H. 642 (1976)..... | 24 |
| <i>Impact Food Sales, Inc. v. Evans</i> , 160 N.H. 386 (2010)..... | 21, 24, 26 |
| <i>Massachusetts Bonding & Insurance Co. v. Nudd</i> , 103 N.H. 1 (1960)..... | 24 |
| <i>Nault v. Tirado</i> , 155 N.H. 449 (2007)..... | 22, 23 |
| <i>Rogers v. Buchanan</i> , 58 N.H. 47 (1876)..... | 23 |
| <i>Town of Newport v. State</i> , 115 N.H. 506 (1975). | 22, 24 |
| <i>In re Town of Nottingham</i> , 153 N.H. 539 (2006)..... | 24, 28 |
| <i>Whitcher v. Town of Benton</i> , 48 N.H. 157 (1868)..... | 23 |
| <i>Zollar v. Janvrin</i> , 47 N.H. 324 (1867)..... | 24 |

Other State's Case

| | |
|---|----|
| <i>Gates v. Gates</i> , 144 A.2d 782 (Vt. 1958). | 22 |
|---|----|

Constitutions

U.S. CONST., amds. 5 & 14. 21
N.H. CONST., pt. 1, art. 15.. . . . 21

New Hampshire Statutes and Rule

RSA 21:32-a. 24
RSA 275:51, V. 22, 24, 26, 27, 28
RSA 279:16-a 7, 18
RSA 293-A:1.41(c).. 23
RSA 293-A:1.41(i).. 23
RSA 293-A:5.04(a). 23
RSA 304-C:31 7
RSA 510:2 22, 23, 24
RSA 510:14 23
N.H. ADMIN R., LAB 203.04(f). 28

QUESTIONS PRESENTED

- I. Did the Department of Labor err by not providing the employer notice of a wage claim proceeding?

Preserved: COMPLAINT (Dec. 19, 2018); *Super.Ct.Hrg.*, *passim*.

- II. Did the Department of Labor err by holding a second hearing, without notice, after it closed the first hearing due to the non-appearance of the employee?

Preserved: MOTION FOR RECONSIDERATION (May 6, 2019) at 8, *Appx.* at 29; *Super.Ct.Hrg.* at 27-28.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In this case, two motel managers claimed they did not get paid, and filed wage claims with the New Hampshire Department of Labor (DoL). The motel owner did not receive notice, so did not attend the DoL hearing, resulting in a wage claim order. The owner appealed to the superior court, which affirmed.

I. Orloff Establishes an LLC and Buys a Motel

Debbie Orloff is a vice president at a major bank in Boston, and has lived in Exeter, New Hampshire since 2017. *DoL Hrg.* (Nov. 29, 2018) at 24; MOTION FOR RECONSIDERATION (May 6, 2019) at 4, *Appx.* at 25.¹

In January 2018, by filing a certificate of formation with the Secretary of State pursuant to RSA 304-C:31, Orloff established a single-member limited liability company, Starlight Lodge Mountainside, LLC. The LLC's stated purpose was to operate hotels and motels. The formation documents listed Orloff as the LLC's manager and registered agent, with its principal office and mailing address at 55 Kingston Rd., Exeter, New Hampshire. The formation documents provided a 603 telephone number, and an email address that included Orloff's full name. The Secretary of State accepted the entity with perpetual existence, and assigned a business identification number. Later, after the events in this case, the LLC amended its registration to include a second business address, PO Box 1177, Portsmouth, New Hampshire. The LLC filed

¹Pleadings and exhibits comprising the superior court record are contained in the appendix. Documents transferred from the DoL to the superior court, and in turn to this court, comprise the certified record, RSA 279:16-a, and are also included in the appendix. Because the certified record is unpaginated, however, this brief contains no separate citation to the certified record.

Several documents were submitted to the superior court as exhibits to Orloff's motion for reconsideration, which are denoted herein as "Recon.Exh." Because those documents "cast doubt on the very basis for the trial court's ruling," *Farris v. Daigle*, 139 N.H. 453, 455 (1995), they were admissible. While Saunders may not have understood the "role" of the LLC, she was clearly aware of its existence, and never claimed otherwise. Individually and collectively, the exhibits submitted with Orloff's motion for reconsideration (the deed, truck title, and bank account mutual signatory forms) corroborate that awareness.

annual reports, and was duly registered during the pendency of this matter. CERTIFICATE OF FORMATION (Jan. 11, 2018), Exh. 1 & Exh. A, *Appx.* at 123; ACCEPTANCE LETTER (Jan. 11, 2018), *Appx.* at 125; MANAGER/MEMBER FORM (Jan. 25, 2018), *Appx.* at 129; ANNUAL REPORT (Jan. 31, 2019), *Appx.* at 162.²

Also in January 2018, the newly-established entity, Starlight Lodge Mountainside, LLC, acquired a small, 17-room motel, located at 3537 White Mountain Highway, North Conway, New Hampshire. WARRANTY DEED (Jan. 31, 2018), Recon.Exh. D, *Appx.* at 136; TOWN OF CONWAY TAX INVOICE (Mar. 31, 2019), *Appx.* at 170; *Super.Ct.Hrg.* at 55. Along with the motel, the LLC simultaneously acquired the prior owner's pickup truck. CERTIFICATE OF TITLE and BILL OF SALE (Jan. 31, 2018), Recon.Exh.E, *Appx.* at 130. Orloff later testified, "I'm the sole owner and sole member of the entity that owns the hotel." *Super.Ct.Hrg.* at 50. Orloff operates two similar establishments, on the Maine coast and on Cape Cod. *Super.Ct.Hrg.* at 23, 56.

Though no formal trade name was registered, on its sign and in marketing brochures, the motel is called "Starlight Lodge North Conway,"³ without reference to its corporate ownership. *Super.Ct.Hrg.* at 22, 52, 56-57.

²In June 2015, Orloff established a separate, but similarly-named entity, Starlight Lodge Development Group, LLC. Its formation documents listed Orloff as the registered agent, with a business address in Rye, New Hampshire. That entity was dissolved in September 2018. CERTIFICATE OF FORMATION (June 2, 2015), *Appx.* at 122; NOTICE OF DISSOLUTION (Sept. 29, 2018), *Appx.* at 145; *Super.Ct.Hrg.* at 55. Likewise, in January 2019, Orloff established another separate, but also similarly-named entity, Starlight Development Group, LLC. Its formation documents also listed Orloff as the registered agent, with business addresses in Exeter, New Hampshire and Portsmouth, New Hampshire. CERTIFICATE OF FORMATION (Jan. 31, 2019), *Appx.* at 164; ACCEPTANCE LETTER (Jan. 31, 2019), *Appx.* at 163. Neither entity appear otherwise relevant to this matter.

³At the time of purchase, the motel was known as the "Clarendon," although it appears that trade name was abandoned. WARRANTY DEED (Jan. 31, 2018), Recon.Exh. D, *Appx.* at 136; DISCONTINUANCE OF TRADE NAME (Feb. 21, 2018), *Appx.* at 139; REGISTRATION OF TRADE NAME (Mar. 12, 2018), *Appx.* at 140.

II. Couple Hired to Manage the Motel

After the LLC acquired the motel, Orloff placed an advertisement for a management team, and on May 21, 2018, Orloff found a couple for the job. Although Orloff knew he had a criminal record, Orloff hired Jean-Paul Downs, who had experience in gardening, construction, and hospitality. Although Orloff knew Jennifer Saunders faced challenges due to Asperger syndrome, Orloff hired Saunders at the same time. *DoL Hrg.* at 3, 8-9, 16, 20, 23; LETTER FROM ORLOFF TO DOL (Dec. 17, 2018), *Appx.* at 153; ANSWER (Feb. 5, 2019), *Appx.* at 10, 14. The couple lived together at the motel. Saunders testified that “Starlight Lodge North Conway Motel is the place I lived, and [the] place that I worked.” *Super.Ct.Hrg.* at 34.

On June 15, Orloff, as “owner” of the LLC, entered into a management contract with “TBD (Downs/Saunders) Entity, Manager.” CONTRACT MANAGER AGREEMENT (June 15, 2018), Exh. 9, *Appx.* at 143. The Downs/Saunders entity was to provide “management services” at “Starlight Lodge North Conway 3537 White Mountain Highway, North Conway.” The contract listed management duties: “book-keeping, payments, laundry and housekeeping, security, maintenance and grounds, record keeping, guest services, contractor oversight, systems, marketing, and the like.” *Id.* It provided that “Manager shall report to Owner on weekly basis as to business operations.” The contract allowed the manager to live on-site, contained good-conduct and cancellation clauses, and specified that the management entity was responsible for its own taxes in accord with an annual 1099 form to be provided by the owner. *Id.*

The payment arrangement was fixed-fee monthly plus profit-sharing annually:

The entity shall be paid the monthly billed fee of \$1,600 plus a 1% gross bonus provided the threshold of \$180,000 is met in first operating calendar year with a discretionary bonus applied once profitability exceeds \$100,000 of not less than 2%. Payments for entity billings shall be made monthly and bonus, if any, shall be paid after year end upon closing of books.

Id.; *DoL Hrg.* at 9. In her wage claim and in her DoL testimony, Saunders acknowledged this was the parties' payment arrangement. WAGE CLAIM (Oct. 18, 2019), *Appx.* at 146; *DoL Hrg.* at 21.

To enable the managers to register the company truck, in May 2018 Orloff gave Saunders a copy of the truck's title and bill of sale, which identified Starlight Lodge Mountainside, LLC as its owner. EMAIL FROM ORLOFF TO MOTEL (June 4, 2018) (attaching title and bill of sale), Recon.Exh.E, *Appx.* at 130; MOTION FOR RECONSIDERATION. Around the same time, in order to facilitate marketing and licensure, Saunders requested from Orloff a copy of the motel's deed, which Orloff forwarded. The deed likewise identified Starlight Lodge Mountainside, LLC as the owner. EMAIL FROM ORLOFF TO MOTEL (May 30, 2018) (attaching "Deed for north conway for trip advisor"), Recon.Exh.D, *Appx.* at 135.

To enable the managers to pay motel bills and themselves, a few days after she was hired, Saunders went with Orloff to the local TD Bank branch. They met with a bank officer and set up a mutual access bank account. *Super.Ct.Hrg.* at 38; *DoL Hrg.* at 24; MOTION FOR RECONSIDERATION (May 6, 2019) at 7, *Appx.* at 28. The account creation forms note the business account was being established for a "limited liability company," specifically "Starlight Lodge Mountainside, LLC." The forms indicate the physical address of the motel on White Mountain Highway, North Conway, and a mailing address for the LLC of PO Box 1177, Portsmouth. Signed by both, the forms identify

Orloff and Saunders as authorized to deposit and withdraw and generally conduct business using the account. TD BANK FORMS (June 3, 2018), Recon.Exh.F, *Appx.* at 141. The record includes a sample void check for the account, in the upper left corner of which is prominently printed, “Starlight Lodge Mountainside LLC,” at PO Box 1177, Portsmouth, New Hampshire. BUSINESS CHECK (undated), Exh. 2, *Appx.* at 169; *Super.Ct.Hrg.* at 22.

Downs testified, “I’m not good with money. So I left a lot of that to Jen.” *DoL Hrg.* at 15. “Jennifer had the checking account.” *DoL Hrg.* at 13. When there were expenses, Saunders would send an email request to Orloff, who would transfer the appropriate amount of money into the mutual access business account, and Saunders would withdraw it. Saunders routinely wrote checks on the business account. *DoL Hrg.* at 13, 23; *Super.Ct.Hrg.* at 37-38, 40, 58. This was done to pay motel expenses and contractors, *DoL Hrg.* at 9, 15; *Super.Ct.Hrg.* at 58, and also to pay Saunders and Downs their management fee. *DoL Hrg.* at 13; *Super.Ct.Hrg.* at 40, 58. Orloff kept in frequent contact with Saunders about these matters. *Super.Ct.Hrg.* at 34-35.

Despite the management contract, possession and use of the motel deed and truck title, applying her signature to forms establishing the joint bank account, and routine execution of business checks – all of which highlight “Starlight Lodge Mountainside, LLC” – Saunders maintained that she “never really knew what the role of Mountainside was,” and “never understand was [sic] Mountainside, LLC was.” *Super.Ct.Hrg.* at 34, 38. Saunders did not assert, however, that she was *unaware* of the LLC. Saunders claimed to have understood that she worked for Orloff personally. *Super.Ct.Hrg.* at 39.

III. Managers' PO Box

Although many packages were dropped off at the motel's physical location, the postal system would not deliver direct to the motel, and there was no mailbox there. *Super.Ct.Hrg.* at 34, 40. Prior owners or operators of the motel – the parties do not know exactly who – set up at least two post office boxes. One, in Intervale, was unused. The other was PO Box 501, North Conway; it was the address routinely used for motel management. *Super.Ct.Hrg.* at 22, 24, 54.

The managers had keys to the PO Box 501, North Conway post office box, which were kept in a drawer at the motel. Saunders said that the bills she paid on behalf of the motel came to her attention because she retrieved them from the North Conway PO box. *Super.Ct.Hrg.* at 24, 31, 34, 40-41, 58.

| Summary of Addresses | |
|--|---|
| Address | Connection to Case |
| 3537 White Mt. Highway North Conway | Physical Location. Deliveries, but no USPS mail. |
| PO Box 241 Intervale | Unused, not disputed. |
| PO Box 501 North Conway | Manager's mailbox. Wage claim/notice/decision mailed here. |
| 55 Kingston Rd. Exeter | Orloff Residence & LLC address. Registered with Secretary of State. |
| PO Box 1177 Portsmouth | Appeared on checks & bank documents. LLC address as of January 2019. |

IV. Managers Fired for Cause

On August 3, 2018, for reasons not clear from the record, but possibly involving disagreements about how money was spent or about hiring outside contractors, Orloff dismissed Saunders for cause, and barred her from the motel. *DoL Hrg.* at 16-17, 20, 24-25; LETTER FROM ORLOFF TO DOL (Dec. 17, 2018), *Appx.* at 153; COMPLAINT (Dec. 19, 2018), *Appx.* at 4; ANSWER (Feb. 5, 2019), *Appx.* at 10, 14. On that date, a second management contract was executed, identical to the first, except it omitted mention of Saunders. CONTRACT MANAGER AGREEMENT (Aug. 3, 2018), Exh. 10, *Appx.* at 144.

A month later, Orloff discovered that Downs had concealed Saunders on the property, and there were allegations of violence. On September 9, Orloff fired Downs for cause as well. COMPLAINT (Dec. 19, 2018), *Appx.* at 4. Despite these events, Downs later observed, “Yeah, I wish I still had that job.” *DoL Hrg.* at 19.

V. Wage Claim and Wage Claim Hearing

On October 18, 2018, both Saunders and Downs filed wage claim actions, which the DoL consolidated. The form initiating the wage claim, in addition to identifying the claimant, required identification of the employer. Saunders indicated she had worked for “Starlight Lodge North Conway,” with an address at PO Box 501 in North Conway, represented by Debbie Orloff. WAGE CLAIM (Oct. 18, 2019), *Appx.* at 146. Saunders explained, “I mailed a copy of the ... application for the wages to PO Box 501, North Conway, because that’s the only one I know that goes to Starlight Lodge Motel.” *Super.Ct.Hrg.* at 37. Saunders made no effort to search the Secretary of State’s publically-available corporate registration records (which were Saunders’s exhibits in the superior court), until long after the DoL wage claim proceeding. *Super.Ct.Hrg.* at 23, 29; DEP’T OF STATE DOCUMENTS (various dates), Exh. 1; EXHIBIT LIST (Apr. 25, 2019), *Appx.* at 16; MOTION FOR JUDICIAL NOTICE OF EXHIBITS (Apr. 25, 2019), *Appx.* at 19.

The next day, October 19, the DoL issued a Notice of Wage Claim. NOTICE OF WAGE CLAIM (Oct. 19, 2018), *Appx.* at 147. Using the address Saunders provided, the notice was mailed to:

Debbie Orloff
Starlight Lodge North Conway
PO Box 501
North Conway, NH 03860

Subsequent DoL communications, including the notice of hearing and the post-hearing decision, were likewise mailed to the North Conway PO Box. NOTICE OF HEARING (Nov. 9, 2018), *Appx.* at 149; LETTER FROM DOL TO SAUNDERS (Dec. 3, 2018) (forwarding Decision to parties: “CC: Starlight Lodge North Conway, PO Box 501, N. Conway, NH 03860”). Because Saunders’s residence was in transition, she requested the DoL communicate with her by email; DoL appears to have complied. DOL PHONE LOG (Oct. 19,

2018), *Appx.* at 148; EMAIL FROM DoL (Nov. 9, 2018), *Appx.* at 150; E-MAIL LOG (Dec. 3, 2018), *Appx.* at 151; E-MAIL LOG (Dec. 31, 2018), *Appx.* at 159.

On November 9, the DoL issued a Notice of Hearing. The notice identifies the employer as “Starlight Lodge North Conway,” with an address at “PO Box 501, North Conway.” NOTICE OF HEARING (Nov. 9, 2018), *Appx.* at 149. The one-page notice prominently displayed:

IMPORTANT INFORMATION

PLACE: NH Department of Labor
Governor Hugh Gallen State Office Park
95 Pleasant Street
Concord, NH 03301

DATE: November 29, 2018

TIME: 8:30 AM (EST)

Id. The notice also provided internet links for directions to the hearing location and a guide to the hearing process. *Id.*

Nobody appeared for the 8:30 hearing. The hearing office waited 16 minutes, and then marked the case “[n]o appearances, close as paid.” DOL FILE NOTES (Nov. 29, 2018, 8:46am), Recon.Exh.G, *Appx.* at 157; *DoL Hrg.* at 4. Nobody called to excuse tardiness. Saunders arrived at 8:57am. DOL FILE NOTES (clmts appeared at 8:57am”); *DoL Hrg.* at 4-5; *Super.Ct.Hrg.* at 26.

Although the hearing officer noted that the DoL had “already closed the hearing” and “called the next case,” at 9:24am, the hearing re-commenced. DOL FILE NOTES; *DoL Hrg.* at 4. Unprompted, Downs explained they were late because “[t]here was a tractor-trailer rollover on 93 at Exit 23.”⁴ *DoL Hrg.* at 4.

⁴The New Hampshire Department of Safety reported the rollover occurred at 3:25am, five hours before the hearing. See <https://www.nh.gov/safety/divisions/nhsp/news_events/2018/20181129-new-hampton-rollover.htm>.

Later in the superior court, however, Saunders claimed they were late because the DoL “gave a wrong address.”⁵ *Super.Ct.Hrg.* at 41.

The hearing officer noted, “The employer did not appear. They’ve had the same opportunity you had to appear as of right now.” *DoL Hrg.* at 5.

Downs testified first. He explained that the payment amount “was \$1600 a month and that was to be split between the two of us, so it was \$800 bucks each,” plus the couple’s room. *DoL Hrg.* at 9, 14. He said he had already been paid for working on the truck and some other side-jobs, but that for motel management, he had worked 16 hours a day, 7 days a week, for 16 weeks, with no breaks and no days off. He calculated a total of 1,792 hours, for which (subtracting payments already made) he was owed \$11,792. *DoL Hrg.* at 11-14.

Saunders testified similarly. She acknowledged the \$1600 per month payment amount for the couple, generally corroborating the terms of the management contract, and explained how payments were made and checks drawn on the joint LLC bank account. Multiplying hours worked times weeks employed (subtracting payments already made), Saunders calculated she was owed \$7,152. *DoL Hrg.* at 20-24.

On December 3, 2018, the DoL issued a decision. It largely repeated the testimony, and found that Saunders had “proved by a preponderance of the evidence that she is owed the claimed wages in the amount of \$7,152.00.”⁶ WAGE CLAIM DECISION (Dec. 3, 2018), *Addendum* at 31. The decision was mailed to Orloff at the PO Box 501, North Conway address. LETTER FROM DOL TO SAUNDERS (Dec. 3, 2018), *Appx.* at 152.

⁵The New Hampshire Department of Labor has not moved; it is still at 95 Pleasant Street, Concord.

⁶Downs also won his wage claim, in the amount of \$11,792. Execution was stayed by the superior court pending resolution of this appeal.

VI. Orloff Learns of DoL Decision

On December 15, 2018, after the decision was issued, Orloff first learned of the DoL action, when her new managers informed her important documents had arrived at the North Conway PO Box. COURT ORDER (Apr. 25, 2019) at 5, *Addendum* at 34, 38; ORDER ON RECONSIDERATION (June 17, 2019) at 2, *Addendum* at 53, 54; *Super.Ct.Hrg.* at 20, 23; DOL PHONE LOG (Dec. 26, 2018), *Appx.* at 155.

Orloff immediately wrote to the DoL, apprising that she had just lately received notice of the proceeding. Orloff described the payment arrangement under the management contract, said that Downs and Saunders had been paid, and explained that they had been fired for their actions and behaviors. LETTER FROM ORLOFF TO DOL (Dec. 17, 2018), *Appx.* at 153.

As a result, on December 26, 2018, a DoL Inspector phoned Orloff to inquire into the connection between the motel and the North Conway PO Box. Orloff told the inspector, “the PO Box is for the property that she is an owner of.” DOL PHONE LOG (Dec. 26, 2018), *Appx.* at 155.

The DoL treated Orloff’s letter as a motion to vacate or for rehearing, which the DoL denied, on the grounds that the North Conway PO Box “does belong to you, but you do not check that receptacle.” The DoL noted that because mail had been sent “Return Service Requested,” if it had been undeliverable, it would have been returned. LETTER FROM DOL TO STARLIGHT LODGE MOUNTAINSIDE, LLC (Dec. 27, 2018), *Appx.* at 156; *see also* AFFIDAVIT OF HEARING ADMINISTRATOR (Feb. 4, 2019), *Appx.* at 166.

It is notable that the denial of rehearing and subsequent communications from the DoL were addressed to the LLC at its proper PO Box in Portsmouth. *Id.*; *see* LETTER FROM DOL TO SAUNDERS (Dec. 28, 2018) (“cc: Debbie Orloff, Starlight Lodge Mountainside LLC, PO Box 1177, Portsmouth, NH 03801”).

VII. Hearing in Superior Court

Meanwhile, on December 17, 2018, Orloff appealed the DoL wage claim decisions to the Rockingham County Superior Court.⁷ RSA 279:16-a.

In her *pro se* complaints, Orloff exhibited confusion regarding the parties. In her initial complaint, Orloff listed the plaintiff as both Debbie Orloff in Exeter and the LLC in Portsmouth, and the defendant as “Jean-Paul Saunders” – an apparent mashup of Jean-Paul Downs and Jennifer Saunders. COMPLAINT (Dec. 17, 2018). Two days later, Orloff, still *pro se*, filed a second complaint, identifying the plaintiff as Debbie Orloff, but using the LLC’s Portsmouth address. COMPLAINT (Dec. 19, 2018), *Appx.* at 4. Orloff soon hired a lawyer, who made no such errors, appearing for both the LLC and Orloff individually, using both the Exeter and Portsmouth addresses. APPEARANCE OF ATTORNEY BEAUPRE (Jan. 16, 2019), *Appx.* at 160. Saunders, *pro se*, filed three answers, denying and objecting generally. ANSWER (Jan. 16, 2019), *Appx.* at 7; ANSWER (Feb. 5, 2019), *Appx.* at 10; ANSWER (Feb. 5, 2019), *Appx.* at 14.

On February 6, 2019, the Rockingham County Superior Court, (*Marguerite L. Wageling, J.*), held a hearing. Orloff’s lawyer made offers of proof, and both Orloff and Saunders testified. Orloff proffered several grounds for appeal: lack of notice violated the State and Federal constitutions and New Hampshire statutes, the DoL conducted its hearing in violation of statutes and its own rules, and the result of the wage claim proceeding was consequently unfair and unjust. Orloff sought to vacate the DoL decision, or to remand to the DoL for a properly-noticed hearing.

⁷Overlapping superior court appeals were filed in Carroll and Rockingham counties, which have been stayed pending resolution of this case. *Super.Ct.Hrg.* at 18; COURT ORDER (Apr. 25, 2019) at 5, n.4, addendum at 34, 38.

After setting forth the burdens and standards of review, the court upheld the DoL wage claim decision on the grounds that because Orloff, and not the LLC, was Saunders's apparent employer, there was no error.

Orloff's motion for reconsideration was denied, and this appeal followed. COURT ORDER (Apr. 25, 2019), *Addendum* at 34; MOTION FOR RECONSIDERATION (May 6, 2019), *Appx.* at 22. OBJECTION TO RECONSIDERATION (May 13, 2019), *Appx.* at 32; ORDER ON RECONSIDERATION (June 17, 2019), *Addendum* at 53.

SUMMARY OF ARGUMENT

Debbie Orloff first sets forth the law regarding notice generally, and then the specific notice requirements for Department of Labor wage claim proceedings.

The former employee, Jennifer Saunders, listed on her wage claim the manager's post office box, rather than the owner's residential or business address. By not following its service statute, the agency erred by repeating the inaccuracy, resulting in constitutionally inadequate notice.

Orloff then argues that on the day of the hearing, when Saunders was late and the DoL closed the hearing, it erred a second time by opening a second hearing without any attempt to provide Orloff notice.

ARGUMENT

I. Orloff's Right to Due Process of Law Was Violated By Not Being Provided Lawful Service

A. Wage Claim Requires Actual Notice

Under the New Hampshire Constitution, a “fundamental requirement of the constitutional right to be heard is notice of the impending action.” *Appeal of New Hampshire Fireworks, Inc.*, 151 N.H. 335, 338 (2004) (quotation omitted).

It is a first principle of justice, everywhere recognized, that no judgment or decree, affecting the rights of any person, and by which his rights may be concluded, shall ever be rendered without notice to him of the proceeding.

Brown v. Sceggell, 22 N.H. 548, 552 (1851); N.H. CONST., pt. 1, art. 15.

Similarly, under the United States Constitution, “[a]n elementary and fundamental requirement of due process is notice reasonably calculated to apprise interested parties of the pendency of [an] action.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (violation of due process when bank gave notice by publication though it had list of parties directly affected); *see also*, *Covey v. Town of Somers*, 351 U.S. 141 (1956) (violation of due process when municipality provided notice to person known to be incompetent); *Robinson v. Hanrahan*, 409 U.S. 38 (1972) (due process violated when State gave notice to registered address when State knew intended recipient was incarcerated); U.S. CONST., amds. 5 & 14.

“[A]dequate notice is notice that is reasonably calculated to give the defendant actual notice of the issue to be decided at the hearing.” *Bennett v. Town of Hampstead*, 157 N.H. 477, 485 (2008).

Service of notice means to reliably ensure delivery of notice to the intended recipient. Service means, “[t]he formal delivery of a writ, summons, or other legal process, also termed service of process.” *Impact Food Sales, Inc. v.*

Evans, 160 N.H. 386, 392 (2010) (quoting BLACK’S LAW DICTIONARY 1491 (9th ed. 2009)). A person is charged with having received documents that were lawfully served. *Gates v. Gates*, 144 A.2d 782, 784-85 (Vt. 1958).

The purpose of specifying service by a particular type of mail is to ensure delivery to the intended recipient.

The function of a requirement that notice be delivered by registered or certified mail is to assure delivery and to provide a means of resolving disputes between the parties as to whether the notice is duly received.

Town of Newport v. State, 115 N.H. 506, 507 (1975).

New Hampshire’s general service of notice statute provides that “[a]ll writs and other processes shall be served by giving to the defendant or leaving at his abode an attested copy thereof, except in cases otherwise provided for.” RSA 510:2. The wage claim statute requires the DoL to “notify the employer by *servicing* upon the employer a copy of [the] claim.” RSA 275:51, V (emphasis added). Thus, service in-hand, or at the person’s “last and usual place of abode,” is sufficient. *Bruce v. Cloutman*, 45 N.H. 37 (1863).

The party charged with serving notice has a duty to establish the recipient’s correct address. In *Nault v. Tirado*, 155 N.H. 449 (2007), the plaintiff in an automobile collision provided the sheriff with an address for service which the plaintiff had found on the police accident report. Though the defendant had relocated, she had not provided the post office with a forwarding address, and her name remained on a voter registration list. This court nonetheless held that notice was inadequate because service on an abode is defined as the person’s “*present* place of residence, and . . . the unrefuted proof established that the defendant did not reside [at the former address] at the time of the attempted service.” *Nault*, 155 N.H. at 451 (emphasis in original).

For business entities, one of the purposes of registration with the Secretary of State is to provide claimants with a place to effect service. RSA 293-A:1.41(c) (“Notice or other communication to a ... corporation authorized to transact business in this state may be delivered to its registered agent at its registered office or to the secretary of the corporation at its principal office shown in its most recent annual report.”). The law gives plaintiffs many options for making in-hand service on a business entity:

Service of writs against ... corporations may be made upon the clerk, treasurer, cashier, or one of the directors, trustees or managers, if any, in the state, and otherwise upon any principal member or stockholder, or upon any agent, overseer or other person having the care of any of the property or charge of any of the business of the corporation.

RSA 510:2; RSA 510:14. “A corporation’s registered agent is the corporation’s agent for service of process, notice, or demand required or permitted by law to be served on the corporation.” RSA 293-A:5.04(a). Service can be made at “a director’s residence or usual place of business,” or “the corporation’s principal place of business.” RSA 293-A:1.41(i).

Service to someone affiliated – even closely affiliated – with the intended recipient is not adequate. *See, e.g., Adams v. Sullivan*, 110 N.H. 101 (1970) (service on unauthorized agent insufficient); *Whitcher v. Town of Benton*, 48 N.H. 157 (1868) (service to husband “in hand” insufficient to give notice to wife); *Rogers v. Buchanan*, 58 N.H. 47 (1876) (single instance of service insufficient where made to home where multiple defendants lived); *Bugbee v. Thompson*, 41 N.H. 183 (1860) (same).

Where the mode or type of service is specified, such as by registered or certified mail, service must be in strict compliance with the technical requirements. *Nault*, 155 N.H. at 451 (“Strict compliance with the statutory

requirements for service of process is required to provide the defendant with constitutionally sufficient notice of the action.”).

“An agency must ... comply with the governing statute, in both letter and spirit,” *In re Town of Nottingham*, 153 N.H. 539, 555 (2006), and technical violations of notice statutes are excused only when there is actual notice.⁸ *Town of Newport*, 115 N.H. at 507 (“In the face of actual receipt of notice, the mode of transmission becomes unimportant since the purpose of the statute is satisfied.”); *Dupuis v. Smith Properties, Inc.*, 114 N.H. 625, 630 (1974) (“Informality will not nullify the notice so long as defendant receives actual knowledge.”); *Massachusetts Bonding & Ins. Co. v. Nudd*, 103 N.H. 1, 4 (1960).

As noted, New Hampshire’s general service statute requires that “[a]ll writs and other processes shall be served by giving to the defendant or leaving at his abode an attested copy thereof, except in cases otherwise provided for.” RSA 510:2. When a wage claim is filed, the DoL had a duty to comply with its service statute, which specifies that “[s]ervice may be by *certified mail with return receipt*.” RSA 275:51, V (emphasis added). “Certified mail” and “registered mail” are deemed synonymous. RSA 21:32-a.

United States postal policy makes clear the distinction between “return service,” which the DoL used, and “return receipt,” which is required by the statute. “Return Service Requested” merely “provides address correction services.” <https://about.usps.com/publications/pub8/pub8_v05_revision_

⁸Notice lawfully provided does not become inadequate if the person being served participated in escaping service. *State v. Fraser*, 116 N.H. 642, 643 (1976) (service adequate where intended recipient did not inform court of change of address); *Demers v. Bisbee*, 106 N.H. 354, 357 (1965) (recipient ignored notice of registered mail); *Zollar v. Janvrin*, 47 N.H. 324 (1867) (recipient had duty to check for notice at place notice was placed).

However, “the fact that a defendant has actual knowledge of *attempted* service does not render the service effectual if the process was not served in accordance with the requirements of the statute.” *Impact Food Sales, Inc. v. Evans*, 160 N.H. 386, 396 (2010) (emphasis added) (citing *Adams v. Sullivan*, 110 N.H. at 103-04 (1970)).

092017_006.htm>. “Return Receipt Requested,” however, provides information about whether the intended recipient actually received the mail:

Do you need to know who signed for your mail?
Use Return Receipt service. A Return Receipt provides evidence of delivery (to whom it was delivered and the date of delivery). You also receive the delivery address, if it’s different from the address on the mailpiece.

<https://about.usps.com/publications/pub370/pub370_v10_revision_012016_tech_005.htm> See also, *Cornhusker Casualty Co. v. Skaj*, 786 F.3d 842, 847 (10th Cir. 2015) (distinguishing between return receipt, return service, and regular mail).

B. Orloff Did Not Get Actual Notice

In the present case, Saunders made no effort to serve Orloff personally or at her Exeter abode, in accord with New Hampshire's general service statute. Saunders did not even comply with the lesser requirements of the DoL service statute, which permits service "by certified mail with return receipt." RSA 275:51, V. Because neglect of these technical requirements resulted in lack of actual notice, service was inadequate.

Saunders made no attempt to establish a correct address until sometime during the superior court proceeding. She did not consult the Secretary of State's publically-available corporate registration records, even though she was aware of both Orloff and the LLC – both of which would have provided obvious clues to establish a lawful place of service. Service on either Orloff or the LLC, in either Exeter or Portsmouth, would have provided lawful actual notice. Saunders made no effort to serve Orloff at those places.

At most, Saunders limited service by using an address she knew existed for the convenience of the motel manager. Because service on a person affiliated with the intended recipient is not adequate, service at the North Conway PO Box was not sufficient.

While Saunders is at fault for inhibiting proper service by failing to establish a correct address, the DoL compounded the error by disregarding its service statute. When the DoL receives a wage claim, it has a duty to "notify the employer by serving upon the employer a copy of such claim," which "may be by certified mail with return receipt." RSA 275:51, V. Putting aside service in hand or at abode, the DoL cannot produce a green return receipt card to prove notice. *Impact Food Sales*, 160 N.H. at 389 (plaintiff's lack of green return receipt card is proof that defendant did not receive notice).

The DoL's use of "return service" (as opposed to "return receipt"), and the absence of the wage claim having been actually returned, means, at most,

the mail arrived at the manager's North Conway PO box. That does not constitute proof that it was received by Orloff or the LLC.

Had the DoL complied with its statute, the green receipt card would have remained unreturned, thereby alerting the agency to Saunders's initial error. That probably would have led to a routine search of Orloff's name in the Secretary of State's records – which would have disclosed the LLC registration documents Saunders later easily found – and the administration of constitutionally adequate notice.

Finally, the superior court's decision turned largely on whether Orloff or the LLC was the employer. The distinction, however, is immaterial. Notice would have been equally adequate had Saunders served either Orloff or the LLC, both of which Saunders was at least aware. By mailing only to the manager's PO box, Saunders – and then the DoL – did not provide lawful notice, thus robbing Orloff of her due process right to appear and contest the allegations.

The remedy for DoL proceedings conducted outside the statute is to “vacate ... the decision... , or ... remand the matter ... for further findings.” RSA 275:51, V; *see also, Attitash Mountain Serv. Co. v. Schuck*, 135 N.H. 427 (1992) (telephonic hearing held in violation of rule requiring parties' assent). Accordingly, this court should vacate the superior court order, and remand to the DoL for a hearing of which all parties are properly notified.

II. DoL Held a Second Hearing Without Notice

It is “well settled that an administrative agency must follow its own rules and regulations.” *Town of Nottingham*, 153 N.H. at 555 (quotation omitted). In the conduct of wage claim hearings, DoL rules provide:

[T]he hearing shall proceed in the absence of any party who, after due notice of hearing, fails to be present or fails to obtain a continuance. The hearing shall begin 15 minutes after the scheduled start time if a party to the hearing has not arrived and has not contacted the department as to the reason for being late. If a hearing concludes before the non-appearing party arrives, the non-appearing party shall not be allowed to submit testimony or evidence in the matter.

N.H. ADMIN R., LAB 203.04(f).

Saunders appeared more than 15 minutes late, so the hearing was concluded. When Saunders showed up a little while later, the DoL commenced a new hearing. While Orloff disagrees with the superior court, and believes that violation of the 15-minute rule was inappropriately excused, Orloff does not press that issue here.

Orloff contends, rather, that once the hearing was closed, it cannot have been merely restarted on the hearing officer’s whim. A new hearing required new notice. By holding a new hearing without new notice, the DoL for a second time violated its notice statute, RSA 275:51, V, which requires that the DoL serve the employer.

If the second hearing had been properly noticed, there is a chance Orloff would have received notice, and would have had an opportunity to present her defense.

Because the DoL held a hearing without even the pretense of notifying Orloff, however, any result it reached was in error, and in violation of Orloff's state and federal constitutional and statutory rights of notice "reasonably calculated to give [her] actual notice." *Bennett v. Hampstead*, 157 N.H. at 485.

CONCLUSION

The DoL held two hearings without providing notice to Orloff or to Starlight Lodge Mountainside, LLC. Had the agency followed its own statute and rules, the error would have been easily avoided. Orloff would have attended the hearing, and the outcome would likely have been different. This court should reverse.

Respectfully submitted,

Debbie Orloff, and
Starlight Lodge Mountainside, LLC
By their Attorney,
Law Office of Joshua L. Gordon

/s/ Joshua L. Gordon

Dated: December 3, 2019

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on December 3, 2019, copies of the foregoing will be forwarded by postal mail to Jennifer Saunders, *pro se*, at PO Box 538, Littleton, NH 03561, and by email at silencd@protonmail.com.

/s/ Joshua L. Gordon

Dated: December 3, 2019

Joshua L. Gordon, Esq.

ADDENDUM

- 1. DECISION OF THE HEARING OFFICER (Dec. 3, 2018). [31](#)
- 2. ORDER ON APPEAL OF DoL WAGE CLAIM (Apr. 25, 2019). [34](#)
- 3. ORDER ON MOTION FOR RECONSIDERATION (June 17, 2019). [53](#)