

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS )	Case Nos. 506-2004 & 523-2004
OF KEVEN GUERCIO AND )	
DANIEL L. RASMUSSEN, )	
)	<i>Final Agency Decision</i>
Claimants, )	
)	
vs. )	
)	
GREAT NORTHERN BREWING )	
COMPANY, a Montana corporation, )	
)	
Respondent. )	

\* \* \* \* \*

**I. INTRODUCTION**

In this matter, respondent Great Northern Brewery (GNB) appeals a determination of the Wage and Hour Unit that found it owed additional overtime wages to claimants Keven Guercio and Dan Rasmussen. Specifically, the Wage and Hour Unit found that GNB owed Guercio \$18,573.77 in additional wages and overtime for work completed between February 1, 2002 and June 30, 2003. The Wage and Hour Unit found that GNB owed Rasmussen \$22,088.52 in additional wages for work completed between February 1, 2002 and August, 2003. By agreement of the parties, the two cases were consolidated for purposes of prehearing discovery and hearing.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on March 17 and May 2-3, 2005 in Whitefish, Montana. Jack Quatman, esquire, represented Guercio and Rasmussen. Sean Frampton, esquire, and Dan Johns, esquire, represented GNB. Rasmussen, Guercio, Dennis Konopatzke, Gary Como, Minott Weissinger, Kara Laughlin, Ty Tinkey, and Mike Larson appeared and testified under oath. The parties stipulated to the admission of Claimants' Exhibits 1 through 25, Respondent's Exhibits A through HL, Documents 1 through 246 from the Employment Relations Division (ERD) case for Guercio and Documents 1 through 244 from the ERD case for Rasmussen. After the hearing, the parties were

permitted to file simultaneous post-hearing briefs in the matter. Based on the evidence adduced at hearing as well as the arguments contained in the post-hearing briefs, the hearing examiner makes the following findings of fact, conclusions of law, and final order in this matter.

## II. ISSUE

Were Guercio and Rasmussen exempt employees under the Fair Labor Standards Act?

## III. FINDINGS OF FACT

1. The parties stipulated, and the hearing examiner so finds, that the employer in this matter is subject to the Fair Labor Standards Act , 29 USC Sec. 201 et. seq.

2. MacKenzie River Partners founded the Great Northern Brewing Company in 1994. Minott Weissinger was at all times pertinent to this proceeding the president of MacKenzie River Partners. Wessinger hired Rasmussen, a master brewer, prior to 2002, at an annual salary of \$50,000.00. Wessinger hired Rasmussen to “run the show,” i.e., run the operations and packaging at GNB and serve as the lead person at GNB.

3. Later on, Rasmussen participated in hiring Guercio on a part time basis to sell merchandise of GNB and to run the tasting room.

4. During 2001, MacKenzie River Partners (MRP) decided that GNB was no longer profitable and decided to sell or shut down the business either in late 2001 or early 2002. Weissinger informed Guercio and Rasmussen this and they expressed an interest in purchasing GNB. They also told Wessinger that they were looking for a partner who could finance their purchase of GNB.

5. Konopatzke had been a regular customer of GNB while it was owned by MRP. He developed a rapport with Guercio during his patronage of GNB.

6. During the late fall of 2001, Guercio approached Konopatzke with the idea of Guercio and Rasmussen buying GNB. Guercio and Rasmussen told Konopatzke that they thought the business worth between \$4,000,000.00 and \$5,000,000.00, but that MRP might sell the business for around \$1,000,000.00. Konopatzke thought that purchasing GNB under these circumstances would be a good deal.

7. At first, Konopatzke acted more as a facilitator for Guercio and Rasmussen's purchase of GNB. However, Konopatzke eventually became involved with Guercio and Rasmussen's acquisition with the aim of creating a partnership between the three. This was because Guercio and Rasmussen simply did not have the financial wherewithal to purchase the business. Konopatzke had no experience in the brewery business, but had the financial backing to purchase the business. Konopatzke relied on Guercio and Rasmussen's experience to determine the feasibility of the venture.

8. At Konopatzke's suggestion, Guercio and Rasmussen prepared a business plan in late 2001 projecting sales of both beer and merchandise for all four quarters of 2002, 2003, 2004, and 2005. Respondent's Exhibit EO. The plan shows, and the testimony of all parties in the hearing confirm, that not only beer sales but product merchandising (i.e., T-shirt sales, glassware sales, etc) were the two main components of revenue. The facility itself was comprised of a tasting room, where beer and other merchandise were sold, and the brewery, where GNB's various beers were produced.

9. In February, 2002, Konopatzke met with Weissinger at the MRP Office in San Francisco, California to explore Rasmussen's, Guercio's and Konopatzke's purchase of GNB. Konopatzke followed up with a letter dated February 14, 2002, describing Great Northern Brewing Partners' (comprised of Guercio, Rasmussen, and Konopatzke) desire to purchase the brewery. The letter also indicated that the parties "assumed responsibility for the operating expenses [of the brewery] effective February 1<sup>st</sup>, in the interim while we complete our purchase of the brewery." Document 120, page 1.

10. In conformity with the February 1, 2002 letter, GNB began a due diligence period (a period of time when Konopatzke, Guercio, and Rasmussen reviewed the economic viability of purchasing GNB). That due diligence period culminated in Great Northern Brewing Partners' purchase of GNB in June, 2002. During the due diligence period, Rasmussen received a salary from MRP until June 7, 2002. Document 123. Rasmussen also acted as MRP's on site manager during the due diligence period. All parties to the transaction agreed that in order to maximize profit, GNB should remain open and operating during the due diligence period.

11. The Respondent GNB incorporated in March, 2002. Konopatzke obtained a line of credit from American Bank in Whitefish, Montana for GNB. Konopatzke, as president of GNB, Rasmussen, as general manager of GNB, and Guercio, as operations manager of GNB, all had authority to sign checks drawn on this line of credit.

12. During the due diligence period, Rasmussen and Guercio agreed that they would each receive a salary of \$40,000.00 per year from GNB. Guercio began drawing his salary during March 2002. Consistent with Rasmussen remaining on payroll with MRP for the due diligence period, Rasmussen did not begin to draw salary from GNB until June 7, 2002.

13. Guercio and Rasmussen also began hiring personnel for the brewery. Konopatzke played no role in interviewing and choosing potential employees. That function was left up to Rasmussen or Guercio who interviewed, hired, and set the rates of pay for new employees. Konopatzke merely okayed the financial aspect of hiring new personnel, i.e., whether or not the position could be funded.

14. Guercio and Rasmussen, keenly aware of the importance of sales and marketing to GNB's profitability, approached Ty Tinkey about working as a salesman for the brewery. At the time, Tinkey worked for Fun Beverages, a local beer distributor. Guercio and Rasmussen informed Tinkey that they were part owners of the brewery. They offered Tinkey a base salary of \$25,000.00 per year plus commissions. Tinkey agreed to accept the position.

15. Guercio and Rasmussen also hired Mike Larson as a full time employee to conduct packaging operations at the brewery.

16. Guercio and Rasmussen also hired other part-time employees, all of whom they had known prior to hiring. These part-time employees worked in both packaging and in the tasting room. Rasmussen and Guercio also set their rate of pay. Rasmussen managed the employees in packaging while Guercio managed the employees in the tasting room.

17. In helping to set up the brewery, Konopatzke utilized the services of Gary Cuomo, an accountant employed at one of Konopatzke's other businesses. Cuomo was assigned to assist in the financial set up of the brewery and actually spent two days per week over a ten month period working at the brewery. While he was there, he noticed that brewery personnel went to Guercio and Rasmussen with questions or to resolve problems. Cuomo observed that Tinkey looked to Guercio for direction while Larson looked to Rasmussen for direction.

18. In setting up the signatories on GNB checking accounts and applying for credit, Guercio and Rasmussen held themselves out holding various management positions with GNB. *See, e.g.*, Document 105, signed by Rasmussen as vice-president

of GNB. In other applications, Rasmussen held himself out as general manager while Guercio held himself out as the operations manager.

19. Guercio and Rasmussen unquestionably “called the shots” at GNB. Guercio created and ran the marketing facet of GNB. He developed merchandising plans for GNB. He approved and ordered bottle labels, logos, and merchandise. He managed the tasting room, and he enlisted and discharged various distributors. For example, Guercio ordered design and printing from Dog Sonic Design and Illustration totaling \$11,635.00 without Konopatzke’s knowledge or approval. Holding himself out as the director of operations, Guercio awarded an exclusive beer distributorship to Thompson Distributing in July, 2002. He also terminated Roach and Smith’s beer distributorship on that same date. Rasmussen acquired materials for brewing, brewed beer, supervised the packaging, bottling and sales, approved time sheets, and signed accounts payable checks and payroll checks.

20. On one occasion, Guercio and Rasmussen decided that the brewery was in need of a truck and bought it, using GNB funds, without Konopatzke’s input. They did not notify Konopatzke of the purchase until after the purchase had occurred.

21. Neither Guercio nor Rasmussen were told when to work. Instead, they set their own hours. Rasmussen decided when he would work and when to brew batches of beer. Guercio ran the tasting room, including setting schedules for other part time employees who worked in the tasting room.

22. GNB lost money from the time the business was taken over from MRP. Unfortunately, the loss was compounded when the brewery unknowingly produced a batch of tainted beer. Because GNB was continuing to lose money, Konopatzke decided to hire a bookkeeper, Kristi (her last name was not disclosed at the hearing), in October 2002 to help reign in expenses. Unlike Cuomo, whose attention was divided between GNB and Konopatzke’s other business, the new bookkeeper would only have responsibility for GNB.

23. GNB continued to lose money even after hiring Kristi. In December 2002, Konopatzke decided that Larson had to be let go from his employment in an effort to cut back on costs. Rasmussen insisted on being the one to impart the news to Larson. In addition, Rasmussen, without input from Konopatzke, informed Larson that he might be hired back in a part time capacity.

24. Konopatzke decided that Guercio’s value to the business lay in his ability to sell. Konopatzke believed that Guercio might have greater incentive to sell if his

pay were based on the sales. He asked Guercio to develop a business plan for the merchandising side of the brewery, but Guercio did not do so. Beginning on December 15, 2002, Konopatzke changed Guercio's pay from salary to draw against commission. The plan was to pay Guercio \$1,342.00 per month as the draw against commission, the same amount he had previously been paid while salaried at \$40,000.00 per year. The change in pay status upset Guercio.

25. Guercio and Rasmussen continued to exercise managerial control over GNB. For example, on December 23, 2002, Guercio rejected a vendor's invoice for labels, noting that the company which produced the labels "jumped the gun and did all set up for future biz [sic] before we wanted." Guercio told Kristi to "not pay for any of the charges until we produce labels." In February 2003, again holding himself out as director of operations, Guercio appointed Shelby Distributors as exclusive distributor of GNB beer. As late as April 21, 2003, Guercio was asked to proof and approve packaging being provided by a vendor for GNB product.

26. After being changed to draw against commission, Guercio continued to be paid bi-weekly. However, he began receiving two checks, one to compensate him for the number of hours he worked in the tasting room and the second, a draw against commission for his sales work. Both checks combined equated to his previous salaried bi-weekly net pay of \$1,342.00. However, it is not clear that after that time whether he was salaried or hourly. (Documents 229 through 244).

27. When Konopatzke decided to change Guercio's method of compensation, Rasmussen, asserting his authority over employment matters at GNB, staved off the effort, telling Konopatzke in a February 6, 2003 e-mail that Guercio "is on the pay roll until this gets resolved." Claimants' Exhibit 21.

28. In January 2003, Kara Laughlin replaced Kristi as GNB's bookkeeper. She worked at GNB every day, approximately 20 hours each week. While she was there, Guercio continued to run and supervise the tasting room and Rasmussen supervised the brewery and hired at least one person (Evan). Both Guercio and Rasmussen set their own schedules. Indeed, Kara believed that Guercio and Rasmussen were part owners.

29. Sometime after January 2003, Kara, at Konopatzke's behest, required Guercio and Rasmussen to requisition major purchases. Konopatzke's approval was required for those major purchases. Minor purchases could be made out of petty cash.

30. Guercio continued to be upset with the fact that he had been changed from a salary to draw against commission. Both he and Rasmussen were upset that they were required to requisition supplies. Guercio was perturbed enough that he mockingly requisitioned such things as toilet paper and other items that clearly could have been purchased through petty cash. In July 2003, Guercio left GNB.

31. In June 2003, Rasmussen, at his request, switched from being compensated as a salaried employee to being compensated as an hourly employee. In July 2004, Rasmussen left his employment at GNB.

32. The part-time employees employed by GNB between May 16, 2002 and December 15, 2002 (the time that Guercio's compensation changed from salaried to draw against commission) worked the hours shown in Attachment "A" which is incorporated into this statement of facts as if fully set forth herein.

#### IV. DISCUSSION<sup>1</sup>

The parties stipulated that GNB is subject to the Fair Labor Standards Act (FLSA). Among other things, FLSA requires employers to pay non-exempt employees at a rate of one and one half the employees' regular rate of pay for all hours worked in excess of 40 hours per week. 29 U.S.C. §207 (a)(1). Bona fide executive and administrative employees are exempt from the overtime requirements imposed under FLSA. 29 U.S.C. §213(a)(1).

The burden of proving an exemption rests on the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. The employer must do so by presenting evidence to show that the employee falls "plainly and unmistakably within the exemption's terms." *Id. at* ¶16, *citing Public Employees Ass'n v. D. of T.*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21. Questions involving exemption from overtime are narrowly construed to carry out the purposes of the FLSA. *Reich v. Wyoming* (10<sup>th</sup> Cir., 1993), 993 F.2d 739, 741 .

*A. Guercio and Rasmussen Were Exempt Executive Employees Until December, 2002.*

29 CFR § 541.1 defines an exempt executive employee as a person

(A) whose primary duty consists of the management of the enterprise in which he is employed; and

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<sup>1</sup>Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

(B) who customarily and regularly directs the work of two or more other employees therein; and

(C) who has the authority to hire or fire other employees or whose suggestions or 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

(D) who customarily and regularly exercises discretionary powers; and

(E) who does not devote more than 20 percent of his hours of work in the workweek to activities which are not directly or closely related to the performance of the work described in A through E; and

(F) who is compensated for his services on a salary basis at a rate of not less than \$155 per week.

The claimants argue that their positions at GNB fail to meet five out of the six requirements contained in 29 CFR § 541.1. However, an employee who makes at least \$250.00 per week and who meets the criteria set out in 29 CFR § 541.1 subpart (a) (primary duty is management) and subpart (b) (supervises at least two full time employees or their equivalent on a regular basis) is deemed to be an exempt executive without considering subparts (c), (d), (e), and (f).<sup>2</sup> 29 CFR § 541.1(f).

Guercio's and Rasmussen's individual salaries each exceeded the \$250.00 per week threshold for application of the short test. Moreover, Guercio's change in compensation after December 15, 2002 was not substantive. Although he received a separate check for hours spent in the tasting room and commissions, his draw against commission alone far exceeded the \$250.00 threshold discussed in 29 CFR 541.119. Further, Guercio never contested at hearing that he received at least the equivalent of his \$40,000.00 salary after the method of his compensation was changed. He was thus "salaried" for purposes of both the executive and administrative exemptions. 29 CFR 541.119 and 29 CFR 541.214. Having determined that Guercio and Rasmussen were highly salaried individuals for purposes of the short test, the remaining issue for purposes of the executive exemption is whether the claimants had management as their primary duty and whether they managed two or more full time employees.

FLSA requires consideration of five factors in order to determine whether an employee's primary duty is management: (1) time spent performing managerial duties, (2) the relative importance of the employee's managerial duties as compared with the employee's other duties, (3) the frequency with which the employee

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<sup>2</sup> This test is commonly referred to as the "short test" to determine exempt executive status.



exercises discretionary powers, (4) the employee's relative freedom from supervision, and (5) the relationship between the employee's salary and the wages paid to subordinates for the non-exempt work performed by the employee. 29 CFR § 103; *Kemp, op. cit.*, ¶22. In applying this test, time alone is not the sole test if the other four factors support the conclusion that the employee's primary duty is management. *Kemp, supra*. See also, *Baldwin v. Trailer Inns*, (9<sup>th</sup> Cir. 2001), 266 F. 3d 1104, 1115.

It is apparent that Guercio, Rasmussen and Konopatzke went into this business venture with the expectation that they were to be partners and that at some point Guercio and Rasmussen would become part owners through their "sweat equity." This intention of the parties casts considerable light on the nature of Guercio's and Rasmussen's duties at GNB. Far from being simply hourly employees, they were the primary management of the entity and clearly exempt executive employees. Guercio's exempt status lasted until at least the time his compensation scheme was changed from salary to draw against commission. Rasmussen's exempt executive status existed at all times pertinent to this case.

Konopatzke exercised no supervision over Guercio's and Rasmussen's day to day tasks. At most, Konopatzke managed the "purse strings" of the entity. He did not tell Guercio and Rasmussen how to do their jobs. They decided when to work and what work was to be done. The fact that the dictates of the business determined when some tasks would be done (i.e., when beer had to be brewed to fill an order) does not change the fact that Guercio and Rasmussen were unsupervised. Guercio and Rasmussen were salaried at \$40,000.00 per year, a rate of remuneration that far exceeded that of the other employees. Guercio and Rasmussen exercised substantial discretionary powers (such as whom to hire for the business and which distributors to retain and which to release).

Guercio and Rasmussen shared virtually co-equal management power over the operation with Konopatzke. They were the "hands-on" people of the partnership, utilizing their expertise and management skills in an effort to make GNB a profitable enterprise. Guercio hired part-time personnel, scheduled workers, developed marketing plans and decided what merchandise GNB should sell. This, in conjunction with his management duties, demonstrates that he was an exempt employee. 29 CFR 541.103 (In some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management

duties as the day-to-day operations require. He will be considered to have management as his primary duty). *See also, Stein v. J.C. Penney*, (WD Tenn, 1983), 557 F. Supp. 398 (employee who spent more than 50% of his time in conducting non-exempt work found to be exempt where he (1) developed merchandising plans, (2) purchased merchandise, (3) determined merchandise presentations, (4) supervised sales and customer service in certain areas).

Rasmussen hired personnel, scheduled workers, signed pay checks, and was the “go to” guy of GNB. He resolved issues among workers. While Guercio and Rasmussen were engaged in some non-exempt duties, their primary duties were no different from those of a “working manager.” *Kemp, Op cit. See also, Donovan v. Burger King Corp.*, (2<sup>nd</sup> Cir. 1982), 675 F.2d 516, 521; *Dalheim v. KDFW-TV*, (5<sup>th</sup> Cir. 1990), 918 F. 2d 1220, 1227 (Under the short test, the employee’s primary duty will usually be what he does that is of principal value to the employer, not the collateral tasks that he may also perform, even if they consume more than half of his time.) Here, Guercio’s and Rasmussen’s primary duty at GNB, and their principal value to GNB, was their management work.

The claimants contend that the vast majority of their time was spent in performing non-exempt duties. Time, however, is not the only consideration. 29 CFR 541.103. As the respondent points out, a similar argument was made in *Baldwin, supra*. There, the claimants argued that over 90 percent of their time was taken up with completing non-exempt tasks. The 9<sup>th</sup> Circuit Court of Appeals accepted as true their position on the percentage of time spent on non-exempt tasks and *nonetheless* held that the employees were exempt under the short test. In doing so, the court reasoned

“[i]n interpreting the primary duty requirement, although the percentage of time spent on nonexempt tasks is relevant, it is not alone dispositive. We do not presume that the executive exemption fails merely because the proportion of time on exempt managerial tasks is less than fifty percent, where, as here, managerial duties are packaged in employment with non-managerial tasks, and the management function cannot readily and economically be separated from the nonexempt tasks.”

266 F.3d at 1115. Like the managers in *Baldwin*, Guercio and Rasmussen were managers in this enterprise and GNB has convincingly demonstrated this prong of the exemption.

The evidence further shows that until December, 2002, Guercio and Rasmussen until December, 2002, managed the equivalent of two full time positions. *Murray v. Stuckey's, Inc.*, (8<sup>th</sup> Cir 1995), 50 F. 3d 564. Like the managers in *Stuckey's*, Guercio and Rasmussen had supervisory powers over at least two full time equivalent positions. Tinkey's full time work and Larson's full time work, combined with the hours of work put in by the part-time employees prior to January, 2003, equates to at least two full time positions that Guercio and Rasmussen each supervised during that time period.

*B. GNB Has Shown That In Any Event Guercio and Rasmussen Were Exempt Administrative Employees.*

As previously mentioned, the burden to demonstrate an exemption rests with the party attempting to prove the exemption. GNB has failed to show that Guercio and Rasmussen were exempt executive employees after December, 2002. This is because GNB has failed to show that they each in fact managed the equivalent of two full time employees after that time. However, even if Guercio and Rasmussen were not exempt executive employees, they were nevertheless exempt administrative employees during all times material to this case.

As is true of the executive exemption, the administrative exemption also has a "short test." To meet the requirements of the administrative short test, GNB must show that Guercio and Rasmussen were (1) compensated on a salary or fee basis of not less than \$250.00 per week, (2) that their primary duty consisted either of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers. 29 CFR 541.2(e)(2), 29 CFR 541.214(a). See also, *Martin v. Cooper Electric Supply Company*, (3<sup>rd</sup> Cir. 1991), 940 F. 2d 896. For the reasons stated above in the discussion on the executive exemption, both Guercio and Rasmussen were highly paid salaried employees within the meaning of 29 CFR 541.214. What remains, then, is the question of whether their primary duty consisted either of the performance of office or nonmanual work directly related to management policies or general business operations of GNB.

The amount of time spent in engaging in manual versus non-manual work, while a factor to be considered, is not dispositive. Rather, "The employee's 'primary duty' is that which is of principal importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time." *Demos v. City of Indianapolis*, (7<sup>th</sup> Cir. 2002), 302 F. 3d 698 705. See also, 29 CFR 541.206; 29 CFR 541.103 (Time alone is not the sole test, and in situations where the employee does not spend over 50 percent of his time in administrative duties, he might nevertheless

have administrative duties as his primary duty if the other pertinent factors support such a conclusion). As the *Demos* court articulated, these other factors include “the relative importance of those duties to the employer, the frequency that the employee exercises discretion, and the employee's autonomy and authority in his or her organization.” 302 F. 3d *at* 704-05.

Here, while it is clear that Guercio and Rasmussen were engaged in some manual work, their administrative functions were their primary duties at GNB. The hearing examiner finds that the testimony of Laughlin, Konopatzke, and Tinkey is persuasive on this point. Guercio’s and Rasmussen’s testimony is not credible for the simple reason that their insistence on maintaining at the hearing that they were primarily relegated to manual tasks is inconsistent with their avowed proprietary interest in the success of the brewery and their willingness to repeatedly hold themselves out as owners and/or managers of the business at all times pertinent to this case. In addition, Guercio’s and Rasmussen’s credibility is lessened because of their insistence at the hearing that Konopatzke hired Tinkey when it is evident that they hired Tinkey and set his rate of pay.

Guercio and Rasmussen were the expertise in the business and, to a large extent, the motivating force behind the whole enterprise. They had virtually unfettered authority and control over business decisions and employees and, until approximately December, 2002, ran the entity almost as they saw fit. Even after December, 2002, they continued to be the day to day administration for GNB, exercising discretion on a daily basis.

Guercio, for example, did not just work in the tasting room after Konopatzke changed his method of compensation. He must have spent at least 50% or more of his time engaged in marketing and promoting GNB products sales to outside vendors and setting up other promotions. Compare, for example, his pay check for hours spent in the tasting room during the last two weeks of December, 2002 (Claimants’ Exhibit 23, document 230) to the hours claimed on his time sheet (Claimants’ Exhibit 23, document 192). His pay check stub shows that he spent 60 hours in the tasting room. On his time card, however, he claims more than 127 hours of work. This discrepancy leads to the conclusion that the majority of Guercio’s time was spent in engaging in his primary duty: working on the promotion, sales, and marketing plans that would help to sell more of GNB’s product, all duties consistent with notion that Guercio was an administrative employee. *See* 29 CFR 541.205 (The administrative operations of the business include the work performed by so-called white-collar employees engaged in “servicing” a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, *promoting*

*sales*, and business research and control)(emphasis added). *See also, Herr v. McCormick Grain-Heiman Co.* (DC Kan 1994), 2 W & H 2d (BNA) 828 (holding that employee grain merchandiser working for a grain producer whose primary duty was promoting sales of grain was administratively exempt under FLSA). Even if Guercio did not spend at least 50% of his time on administrative duties, it is clear to the hearing examiner that his primary duty was generating and promoting sales outside of GNB. He was thus administratively exempt.

Rasmussen was the “go to guy” of the whole operation. He signed pay checks, prepared tax information, dealt with and advised other employees, developed business plans, and generally “ran the show.” The evidence adduced at the hearing in this case plainly and unmistakably shows that both Guercio and Rasmussen were exempt administrative employees throughout their tenure at GNB.

### C. *Attorney’s Fees Cannot Be Awarded In This Administrative Proceeding.*

The claimants’ attorney has requested that attorney’s fees be awarded in this proceeding. While the issue is moot because claimants have not prevailed, in no event would attorney’s fees be recoverable in this administrative proceeding. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Con. Co.* (1984), 208 Mont. 420, 680 P.2d 932 (attorney’s fees are not recoverable at the administrative stage of a wage and hour claim).

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq.; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. GNB at all times material to this claim was an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. Guercio and Rasmussen were exempt executive employees in their respective under the FLSA prior to January, 2003.

4. In addition, Guercio and Rasmussen were exempt administrative employees under the FLSA at all times material to this case.

5. Because Guercio and Rasmussen were exempt employees, they are not entitled to FLSA protection and this claim must be dismissed.

6. Because Guercio and Rasmussen were exempt employees, the issues in this case related to whether or not GNB employed Rasmussen between February and June, 2002 and the dispute over the actual number of hours which Guercio and Rasmussen worked are moot.

**VI. ORDER**

Guercio and Rasmussen's claims are hereby dismissed.

DATED this 26th day of August, 2005.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Officer