

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1786-2021
OF NATASHA CAMERON,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY
)	DECISION
)	
LEPROWSE CONTRACTING, INC.,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On August 31, 2020, Claimant Natasha Cameron (Tasha) filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (the Department) alleging LeProwse Contracting, Inc. (LeProwse) owed her \$4,335.45 in wages and \$400.45 in reimbursement¹ for work performed during the period of October 2, 2019, through July 25, 2020. On April 20, 2021, the Wage and Hour Unit issued a Redetermination, concluding that LeProwse owed Tasha a total of \$7,403.50 in wages and penalties.

LeProwse filed an appeal on April 22, 2021. On June 9, 2021, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for hearing.

A hearing was held on November 3, 2021. Tasha participated in the hearing through counsel with sworn testimony from herself. LeProwse participated in the hearing through counsel with sworn testimony from Paul LeProwse (Paul) and Gia LeProwse (Gia). The full Administrative Record herein, consisting of Documents 1 through 110, was admitted into evidence as Administrative Exhibit 1. Also admitted into evidence were Respondent's Exhibits A and K.

¹ Tasha, through counsel, did not maintain or otherwise present any evidence regarding her reimbursement claim in either the present matter or at the Wage and Hour Unit.

The parties were given the opportunity to submit post-hearing briefing. Upon expiration of that timeframe on February 7, 2022, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether Respondent owes wages for work performed, as alleged in the complaint filed by Claimant, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Tasha's claim concerns a final, 26-hour paycheck for which she claims she was not remunerated, as well as 144.5 unpaid overtime hours she asserts she worked but was not properly compensated for between October 2, 2019, and July 23, 2020. Of those hours, she asserts she was paid at her regular rate for 46 hours, and was not paid at all for the remaining 98.5 hours.

2. LeProwse is a construction company specifically involved in the concrete business.

3. Tasha began working for LeProwse on or about August 13, 2018, and worked there until July 25, 2020. Her title was that of office manager (duties which she shared with Gia), and her pay rate was \$20.00 per hour, with variable hours expected to range between 20-40 hours per week.

4. The testimony and evidence make it clear LeProwse did not hire Tasha as a salaried employee, did not make her a salaried employee subsequent to hiring, and did not expect her to regularly work 40 hours per week.

5. At all relevant times herein, Paul was president of LeProwse. Paul had primary responsibility for assigning work to employees.

6. Gia is Paul's spouse and, prior to Tasha's hiring, was the sole office manager for LeProwse. Although Gia had previously performed Tasha's office manager duties, LeProwse hired Tasha after Gia determined that, due to personal illness, she was unable to work full-time and needed someone to assist with the front-office duties.

7. Over the course of Tasha's employment with LeProwse, she and Gia developed an extremely antagonistic relationship.

8. Tasha's duties varied from day-to-day, but primarily involved processing payroll, handling e-mails, typing up and communicating bids, checking the mail, and answering phones.

9. Tasha did not act in a managerial role, did not supervise any employees, and could not hire or fire anyone.

10. Tasha did not have any particularly specialized training or knowledge which was required to perform her position.

11. Tasha's primary duties did not involve the performance of office or non-manual work directly related to the management or general business operations of either LeProwse or its customers, and she exercised little, if any, independent judgment with respect to matters of significance.

12. Tasha kept regular timecards, but none of her timecards evidence any indication of approval by a supervisor. Indeed, after approximately December, 2018, a signature line for supervisor approval was removed from Tasha's timecards (albeit even those with a signature line do not contain supervisor signatures). (Admin. Ex. 46.) It is unclear whether the change was made solely by Tasha or whether it was with input from Paul and/or Gia.

13. As part of Tasha's responsibilities doing payroll, Tasha was also responsible for issuing her own paychecks, which were based on her timecards.

14. With regard to her financial duties, only Tasha and Gia had access to LeProwse's QuickBooks accounting software.

15. Although Paul was nominally responsible for approving paychecks, he did not closely review them, if at all. Tasha regularly used a stamp of Paul's signature on paychecks, including all examples of Tasha's own paychecks provided as evidence herein. (Admin. Ex. 1 at 90, 93-100.)

16. Tasha's initial work hours were variable, but were less than 40 hours per week based on records showing the weeks ending September 5, 2018, through April 10, 2019. (Admin. Ex. 1 at 37-40.) Beginning the week ending April 17, 2019, however, Tasha's paychecks began to increase and suggest work in excess of 40 hours, with specifically noted overtime rates applied from the weeks ending April 30, 2019, through June 12, 2019. *Ibid.* Thereafter, starting with the week ending June 18, 2019, Tasha's pay evened

out at an exact 40 hours per week, or \$800.00, which continued through the end of her employment (with the sole exception of the week ending July 9, 2019, which showed a paycheck for \$660.00 and would have been the first full pay period following a memo from Gia, discussed below). *Ibid.*

17. Through their own lack of supervision, no one in authority at LeProwse was aware Tasha had effectively begun paying herself a consistent “salary” in April, 2019, regardless how many hours she worked. This fact is evidenced by Gia’s handwriting on LeProwse’s payroll records produced for the present litigation which places a line across the dates² when Tasha’s base pay moved to \$800.00/week and states, “Made self salaried employee” and “Employer unaware.” (Admin. Ex. 1 at 37.) As discussed elsewhere herein and shown by Tasha’s continued use of “banked” time, she was never a salaried employee.

18. At some point, Gia noticed Tasha was writing checks to a savings account for the company which should not have existed, and which then went from savings to an expense reimbursement account with monies going to Tasha.

19. Tasha drafted timesheets which show use of “banked” hours during weeks in which Tasha worked less than 40 hours. (Admin. Ex. 1 at 61-62, 65-66, 68-69, 72, 83, 87.) “Banked” hours are almost all written with a separate pen than the rest of the timesheets (as shown by use of different colors and ink types), calling into question whether the notations were made contemporaneous with the timesheets themselves.

20. None of Tasha’s timesheets show hours worked in excess of 40 hours per week.

21. On July 1, 2019, Gia sent a memo to “Office Staff” which stated in relevant part as follows:

Overtime- No overtime, all duties to be completed in 40 hour week.

There is no banking of hours, receipt reimbursements without prior approval with Gia, or savings accounts with LeProwse Contracting.

² The line is placed under a row for Tasha’s paycheck on April 30, 2019, likely because the author only saw the \$800.00 figure and did not notice separate entries for overtime starting that week as described in FOF #16.

All office supply needs are to be presented to Gia, Office Manager, and the company will purchase them.

All employees must keep a time card to include when leaving the facility and returning for any reason.

LeProwse Contracting provides fuel for company vehicles only, with the exception of running errands for the company in your own vehicle. Keep track of your miles and you will be reimbursed per mile if you use your own vehicle.

(Resp. Ex. A.)

22. Gia's July 1, 2019, memo regarding use of "banked" hours was issued because of observations she had made, including overtime entries in Quickbooks. The memo does not indicate any awareness on the part of LeProwse that Tasha was actually working hours in excess of 40 hours per week and "banking" unpaid time.³ Rather, the memo only shows awareness Tasha was using an ostensible "bank" so she would be paid for time off work. Gia's memo does, however, indicate that Tasha was considered an hourly employee by its reference to overtime and the use of time cards.

23. Tasha's only evidence she worked hours in excess of 40 on any given week come from a notebook she personally maintained, which also showed expenses (unreimbursed expenses were part of Tasha's original claim, though are not presently at issue). (Resp. Ex. K.) The notebook was not produced until the hearing in this matter when the source of her counsel's summary of overtime hours (Admin. Ex. 1 at 24-26) became an issue. The time period covered by the notebook runs from October 2, 2019, through July 9, 2019. (Resp. Ex. K.)

24. There was no credible evidence presented showing Tasha was operating under an arrangement regarding overtime hours that was contrary to the law, such as receipt of "under the table" pay or a forced arrangement to take overtime as time off or at a 1:1 rate.

25. Tasha's source notebook for her "banked" hours appears as though it was mostly drafted at the same time, as evidenced not only by consistency of

³ As noted, until the week ending June 18, 2019, Tasha was either reporting less than 40 hours worked each week or, starting in April and running through June 12, 2019, was paid overtime. As a result, it was essentially impossible for Tasha to have worked enough unpaid overtime to "bank" any significant number of hours prior to Gia's memo.

appearance but also the fact that some entries are lined out as mistakes (suggesting they were not made contemporaneous to their occurrence), some are entered out of order by date, and some entries contain notations or corrections squeezed in which should have fit had Tasha not likely been drafting the document all at once, line-by-line with after-the-fact notations. (Resp. Ex. K.)

26. Several entries in Tasha’s notebook are for amounts which were “paid-out.” *Ibid.* It appears these entries represent amounts Tasha paid out to herself, although there are no corresponding records evidencing how those monies were paid out or specifically what items the payouts were meant to cover, including overtime. *Ibid.* Although it is clear that some payouts represent use of “banked” hours (e.g., an \$80.00 payout noted on October 31, 2019, for 4 hours of trick-or-treating), to the extent any of the “paid-out” entries list check numbers, those check numbers do not appear to correspond with Tasha’s paycheck numbers. (Resp. Ex. K; Admin. Ex. 1 at 37-40.) “Paid-out” entries are usually even amounts, while reimbursements are noted as separate entries. (Ex. K.)

27. In total, and excluding items explicitly marked as reimbursements or amounts noted as “paid-out” for use of “banked” time, Tasha’s notebook shows payouts of approximately \$3,500 from October, 2019, through July, 2020, which is roughly equal to the amount of overtime claimed by Tasha.

28. The summary of Tasha’s hours presented by her as evidence of her overtime shows the following (net hours, which were added by the Hearing Officer, indicate net overtime claimed for any given workweek since use of banked hours reduced total hours worked):

<u>Date</u>	<u>Hours Used</u>	<u>Hours "Banked"</u>	<u>Net Hours</u>	<u>Description</u>
Sunday, October 6, 2019		5	5	Cleaned Office
Monday, October 7, 2019		2	2	Worked Until 6:30
Sunday, October 13, 2019		6		Cleaned Office
Saturday, October 19, 2019		6	12	Worked on Tool Claim
Sunday, October 20, 2019		3		Cleaned Office
Monday, October 21, 2019		2		Worked Until 6:30
Tuesday, October 22, 2019	3			Chaperone Brody’s Field Trip
Wednesday, October 23, 2019		4	6	Worked Until 8:30 - Legal
Sunday, October 27, 2019		5		Cleaned Office
Thursday, October 31, 2019	4		1	Trick-or-Treating

<u>Date</u>	<u>Hours Used</u>	<u>Hours "Banked"</u>	<u>Net Hours</u>	<u>Description</u>
Sunday, November 3, 2019		4		Cleaned Office
Monday, November 4, 2019		1		Worked Until 5:30
Wednesday, November 6, 2019	2		3	Doctor's Appointment
Sunday, November 10, 2019		3		Cleaned Office
Monday, November 11, 2019		2	5	Worked Until 6:30
Sunday, November 17, 2019		5		Cleaned Office
Monday, November 18, 2019		2		Worked Until 6:30
Tuesday, November 19, 2019		1		Worked Until 5:30
Thursday, November 21, 2019		2		Worked Until 6:30
Saturday, November 23, 2019		5	15	Legal
Sunday, November 24, 2019		4		Cleaned Office
Monday, November 25, 2019		2		Worked Until 6:30
Wednesday, November 27, 2019	1			Left Early - Brody Sick
Thursday, November 28, 2019	8			Thanksgiving
Friday, November 29, 2019	4		0	Boy's Doctor Appointments
Friday, December 6, 2019	2			Boy's Doctor Appointments
Friday, December 6, 2019		1		Worked Until 5:30
Saturday, December 7, 2019		5	4	Cleaned Office
Sunday, December 8, 2019		1	1	Vacuumed Quick
Sunday, December 15, 2019		2		Cleaned Quick
Monday, December 16, 2019		1	3	Worked Until 5:30
Sunday, December 22, 2019		3		Cleaned Storage Room
Tuesday, December 24, 2019	8			Christmas Eve
Wednesday, December 25, 2019	8		0	Christmas Day
Monday, December 30, 2019		1.5	1.5	Worked Until 6:00
Monday, January 6, 2020		2		Legal
Tuesday, January 7, 2020		3		Legal
Wednesday, January 8, 2020		4	9	Legal
Sunday, January 12, 2020		5		Cleaned Office
Monday, January 13, 2020		1		Worked Until 5:30
Wednesday, January 15, 2020		3		Legal
Thursday, January 16, 2020		3		Legal
Saturday, January 18, 2020		5	17	Legal
Monday, January 27, 2020		1		Worked Until 5:30
Saturday, February 1, 2020		2		Painted
Sunday, February 2, 2020		4	7	Painted/Pictures

<u>Date</u>	<u>Hours Used</u>	<u>Hours "Banked"</u>	<u>Net Hours</u>	<u>Description</u>
Sunday, February 9, 2020		4		Legal & Cleaned
Wednesday, February 12, 2020	1			Boy's Dentist Appointment
Saturday, February 15, 2020		3	6	Cleaned Office
Sunday, February 16, 2020		2		Sanded & Painted
Monday, February 17, 2020		2		Worked Until 6:30 Left Early for Hair
Friday, February 21, 2020	1		3	Appointment Tax Stuff/Painted/Filled
Sunday, February 23, 2020		4		Holes
Monday, February 24, 2020		2		Worked Until 6:30
Tuesday, February 25, 2020		2	8	Legal
Saturday, March 7, 2020		4	4	Hanging Pictures/Printing Pictures
Sunday, March 8, 2020		1	1	Printing/Hanging Pictures
Monday, March 16, 2020		2	2	Worked Until 6:30
Monday, April 20, 2020		2	2	Worked Until 6:30
Monday, June 8, 2020		2.5		Worked Until 7:30 Blakey Doctor's
Wednesday, June 10, 2020	2		0.5	Appointment
Monday, June 15, 2020		2.5	2.5	Worked Until 7:30
Thursday, July 9, 2020	2		0	Boy's Dentist Appointment
	46	144.5	120.5	
Overtime Hours Worked @ \$20/hr.	144.5			
Hours Used @ \$20/hr.	46			
Overtime Hours Not Compensated For	98.5			

(Admin. Ex. 1 at 24-26.) The summary of Tasha's hours ultimately covers an unknown time period and not logically sound (see Discussion herein).

29. Although Tasha testified Paul was aware of the notebook, given his apparent lack of involvement in financial matters, it is highly unlikely he had any actual knowledge of its contents or purpose. The only evidence showing Tasha presented something like the notebook to LeProwse comes from two notes from Tasha to Paul and Jason LeProwse which, based on reference to questions about reimbursements and accusations of stealing, had to have been authored close to the end of Tasha's employment in June or July, 2020. (Resp. Ex. A at 2, 5.)

30. During the period at issue, Gia often observed Tasha arriving at work at or after 8:30 a.m., taking time off for lunch and other breaks, and leaving at or before 4:30 p.m.

31. Based on her own experience, Gia did not believe the amount of time claimed by Tasha for cleaning was reasonable. In response, Tasha alleges LeProwse agreed to have her come in on Sundays to clean and would pay her “under the table.” Tasha did not supply any evidence of under-the-table compensation.

32. Although Tasha was sometimes present at work on weekends, she was usually observed to be there due to a social relationship with one of the mechanics or tending to a flower garden, which was not part of her job duties but rather a voluntary undertaking for her own enjoyment.

33. Tasha’s overtime hours show an unlikely increase of work during the winter—LeProwse’s slowest season—and a decrease in spring and summer when construction work would have been resuming. This reduction includes a significant decrease in office cleaning work.

34. In or around July, 2020, Gia discovered that approximately 100 checks given to Tasha for payroll were missing. (Resp. Ex. A at 12.) It was not discovered until after Tasha’s departure from LeProwse that the blank checks were discovered in a locked cabinet of Tasha’s, of which five or six had been used.

35. Tasha left her work with LeProwse on July 23, 2020.

36. Upon Tasha’s departure from LeProwse, LeProwse alleges she changed passwords and locked Gia out of QuickBooks, although LeProwse did not dispute that Tasha’s access to QuickBooks had been limited by Gia immediately prior to Tasha’s departure.

37. After Tasha’s separation from work, LeProwse remitted a final paycheck to Tasha for 26 hours of work at a rate of \$20.00 per hour, for a gross amount of \$520.00 and a net amount of \$406.51. Tasha could not cash the check, however, due to insufficient funds (NSF). A second check was

issued to Tasha for a net amount also of \$406.51, but a gross amount of \$490.00 for only 24.3 hours worked.⁴ (Admin. Ex. 1 at 13-14.)

IV. DISCUSSION

A. Tasha Was Not an Exempt Bona Fide Executive, Administrative, or Professional Employee

As an initial matter, LeProwse argues Tasha was an exempt employee and not subject to overtime requirements because she was employed in a bona fide administrative or executive capacity. To guarantee consistent analysis and treatment of such employees, Montana has adopted the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which are applicable to bona-fide executive, administrative, and professional employees. Admin. R. Mont. 24.16.211.⁵

The least onerous and most obvious exempt category in which Tasha could potentially fit is that of a bona fide administrative employee. For the relevant time-period of this claim, the Code of Federal Regulations provides that an “employee employed in a bona fide administrative capacity” must be “compensated on a salary basis at a rate of not less than \$684 per week.” 29 C.F.R. § 541.600(a); *see also* 29 C.F.R. § 541.200(a)(1). While Tasha meets this requirement on a dollar basis, the evidence shows she was not, in fact, salaried. Tasha was hired at an hourly rate of \$20.00. Tasha may well have begun paying herself a set amount, but, as set forth in the factual findings herein, LeProwse never intended to compensate her as a salaried employee. Indeed, the very fact Tasha was using ostensibly “banked” time to cover hours she was not working is evidence that Tasha would not have otherwise been paid for time not worked. *See* 29 C.F.R. § 541.602(b) (regarding permissible deductions; deductions for personal leave of a salaried employee may only be made for full-day absences).

Even if Tasha was deemed salaried, she clearly does not meet the other elements of a bona fide administrative employee. Such employees must also meet the following two criteria:

⁴ No evidence was presented by either party at hearing regarding the final paycheck, and only Tasha addressed the matter in her post-hearing brief by way of a demand for payment of the additional hours and associated penalties. It should be noted, however, that regardless of whatever hour amount was stated on the check, \$490.00 represents payment for 24.5 hours, not 24.3 hours of work.

⁵ Although the FLSA is applied here through application of Montana law, neither of the parties presented any evidence showing the claim as a whole is covered under the FLSA. *See* 29 U.S.C. §§ 201 *et seq.*

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a)(2)-(3) (emphasis added).

The evidence shows that while Tasha did perform non-manual work, that work had nothing to do with the management or general business operations of LeProwse. Rather, Tasha's duties were purely clerical, and involved taking and transmitting messages, communicating bids, and processing payroll. Tasha did not exercise discretion or independent judgment with respect to any matters of significance. Although LeProwse points to some of Tasha's actions with regard to her own pay as evidence of her independent discretion, it also accuses her of wrongdoing for those same actions. Without making any judgment as to whether Tasha's actions constituted wrongdoing, there is a difference between discretion resulting from lack of sufficient oversight versus actual discretionary authority. To the extent Tasha had any discretion, it was only due to lack of oversight. Tasha therefore does not qualify as a bona fide administrative employee. *See* 29 C.F.R. § 541.200.

For the same reasons as stated above, Tasha does not meet any other categories of exemption. She does not, for example, have any particularly specialized training or knowledge which was required to perform her position. This factor eliminates the possibility she could be considered a professional employee. *See* 29 C.F.R. § 541.300. Similarly, Tasha did not manage LeProwse, did not customarily and regularly direct the work of at least two other employees (or even one), and had no authority to hire or fire anyone. These factors eliminate the possibility she could be considered an executive employee. *See* 29 C.F.R. § 541.100.

With it clear Tasha was not an exempt employee not subject to overtime, the only remaining question concerns how many overtime hours she actually worked for which she was not compensated.

B. Tasha Failed to Offer Sufficient Proof She Worked Compensable Overtime Hours

Montana law provides, “. . . every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in

lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable, except as provided in § 39-3-205.” Mont. Code Ann. § 39-3-204.

With regard to overtime, “[a]n employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1½ times the hourly wage rate at which the employee is employed.” Mont. Code Ann. § 39-3-405(1). An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *America’s Best Contractors, Inc. v. Singh*, 2014 MT 70, ¶ 25, 374 Mont. 254, 321 P.3d 95 (citing *Garsjo v. Dept. of Labor & Indus.*, 172 Mont. 182, 189, 562 P.2d 473, 476-77 (1977) (citing and adopting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)) (other citations omitted).

To meet this burden, the employee must produce sufficient evidence showing the amount and extent of such work as a matter of just and reasonable inference. Once an employee has shown as a matter of just and reasonable inference that wages have been earned but not paid, the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference drawn from the evidence of the employee. If the employer fails to produce such evidence, the employee is entitled to judgment in his or her favor, even though the amount is only a reasonable approximation.

America’s Best Contractors, Inc., ¶ 25 (internal citations omitted).

Employers are required to keep records of employees’ hours. Admin. R. Mont. 24.16.6102(1)(g); *see also Arlington v. Miller’s Trucking, Inc.*, 2015 MT 68, ¶ 16, 378 Mont. 324, 343 P.3d 1222 (citations omitted). “When an employer fails to record an employee’s hours, the employee’s records may be used to determine the amount of time worked.” *Arlington*, ¶ 16. An employer need not have authorized work so long as they were aware of it and allowed it to happen: “In general, “hours worked” includes all the time an employee is required to be on duty or on the employer’s premises or at a prescribed workplace, and all time during which he is suffered or permitted to work for the employer.” Admin. R. Mont. 24.16.1002(3).

Before delving into whether Tasha met her burden of showing she worked the hours she claimed, the logical soundness of her claimed time must first be addressed. Tasha attempts to incorporate ostensibly “banked” overtime hours from some unknown time prior to the period covering her present claim into weeks covering the claim, even though those hours were taken as time off. Because those hours were not actually worked in the weeks to which they were applied, they cannot be used in calculating overtime hours. See Mont Code Ann. § 39-3-405(1) (cannot employ any employee for a workweek longer than 40 hours without overtime compensation); see also Mont. Code Ann. § 39-3-201(3) (“employ” means to permit or suffer to work). In a similar vein, because there was no evidence presented where the “banked” time came from, it is impossible to say whether Tasha’s “banked” time arose from a method of calculation where hours not actually worked were included in determining whether she earned additional “banked” time (i.e., overtime) in any given week.

Also with regard to the logical soundness of Tasha’s hours, the Hearing Officer is at a loss as to why Tasha would have used any “banked” hours during so many weeks where she also claimed to be working more than 40 hours even without use of “banked” hours. The parties both agreed Tasha’s schedule was relatively loose. If she worked less than 8 hours on any given day but ultimately worked more than 40 hours in a week, why use “banked” time at all? Indeed, looking at Tasha’s time before she began to claim overtime and then began reporting a consistent 40 hours per week, her hours and “banked” time are reasonably similar to when she first started working for LeProwse. The only conclusion the Hearing Officer can therefore come to is that Tasha did not, in fact, work the overtime she claimed, and was merely using “banked” time to pad weeks in which she did not actually work a full 40 hours. This logic would also explain why only “banked” time ever showed up on her timesheets, and why overtime was not raised as an issue by Tasha until LeProwse began to more closely investigate its finances.

Curiously, Tasha never produced a total number of “banked” hours, the starting balance of those hours, nor the ending balance. One is simply left to assume that all “banked” hours were somehow used up during the period of Tasha’s claim. The Hearing Officer finds a more likely explanation to be that, as stated above, there were no “banked” hours except in the sense that the term was used on timesheets as a justification for pay for hours not worked. In addition, because Tasha presented no evidence as to when the “banked” hours were worked, she has effectively produced no evidence showing those hours were worked at all.

Evidence of hours worked is the crux of the problem in this case. None of the timecards produced by Tasha show any evidence of overtime. On the

contrary, they show only time off which was then filled in with “banked” hours to round out a full, 40-hour workweek. To the extent Tasha claims she was fearful of reporting overtime because of Gia’s July 1, 2019, memo, it does not stand to reason that she would have continued to report “banked” hours (which were also prohibited under the memo) while at the same time being too fearful to report overtime. Furthermore, Tasha’s notebook showing ostensible overtime hours was never produced in the present litigation until the hearing herein. Although Tasha claimed to have shown the notebook to individuals at LeProwse, no one had any recollection of seeing it at hearing. The notebook itself does not bear any indicia of reliability with regard to when it was produced, and all indications are that it was produced at a time far after the creation of the associated time sheets.

This is not a case in which LeProwse failed to keep record of Tasha’s hours and her own records may therefore be used to determine the amount of time worked. *See Arlington*, ¶ 16. LeProwse has payroll records showing all hours worked by and amounts paid to Tasha, which were based on her own reported hours worked. The record of Tasha’s work hours was maintained by Tasha herself, who was also in charge of payroll for LeProwse. Of all the timecards placed into evidence by Tasha, not a single one indicated she had worked overtime, and there are no apparent gaps in the time records. Indeed, it was not until the hearing itself that, by happenstance, Tasha produced her own, handwritten record of hours not kept by LeProwse (not to be confused with the summary of hours used to establish her claim). There is no reason to now rely on different records provided by Tasha when she has given the Hearing Officer no reason to believe her original time cards were not accurate.

On the whole, although Tasha does provide evidence by way of her notebook and testimony that she worked overtime hours, the weight of that evidence in the balance falls far below Tasha’s burden to show she worked hours for which she was not properly compensated as a matter of just a reasonable inference. As such, and for all of the reasons stated above, her claim of unpaid overtime fails in its entirety.

C. LeProwse Did Not Dispute Monies Owed for Tasha’s Final Paycheck

After Tasha’s separation from LeProwse, the employer remitted a final paycheck to her for 26 hours of work at a rate of \$20.00 per hour, for a gross amount of \$520.00 and a net amount of \$406.51. Tasha could not cash the check, however, due to insufficient funds. A second check was issued to Tasha for a net amount also of \$406.51, but a gross amount of \$490.00 for only 24.3 hours worked.

Tasha made a claim in her Complaint with regard to her final paycheck, and the Wage and Hour Unit awarded an additional \$30.00 in unpaid wages, a 55% penalty of \$16.50 if not paid by May 5, 2021, and a 110% penalty of \$539.00 for the issuance of an NSF check. Neither party addressed the issue of the final paycheck at the hearing in this matter, and only Tasha addressed it in her post-hearing brief as a part of her demand. Given, however, that the appeal was undertaken by LeProwse and it failed to dispute that it issued a check with insufficient funds or that Tasha was due wages for an additional 1.7 hours, the Hearing Officer finds it appropriate to affirm the award of these wages and associated penalties. As such, Tasha is owed \$30.00 in unpaid regular wages for 1.5 hours of work (\$520.00 - \$490.00 = \$30.00, or 1.5 hours @ \$20.00/hr.), a 55% penalty of \$16.50 on those wages, and a 110% penalty of \$572.00⁶ relating to the \$520.00 insufficient funds check. See Mont. Code Ann. § 39-3-204; Admin R. Mont. 24.16.7556(1)(d), 24.16.7566.

V. CONCLUSIONS OF LAW

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

2. Tasha was not a bona fide administrative, executive, or professional employee while employed by LeProwse. See 29 C.F.R. §§ 541.100 *et seq.*

3. Tasha failed to meet her burden of proving by a preponderance of the evidence she performed work without proper overtime compensation as a matter of just and reasonable inference. Mont. Code Ann. § 39-3-405(1); *Singh*, ¶ 25. LeProwse properly compensated Tasha for all overtime hours. Mont. Code Ann. § 39-3-405(1).

4. Tasha has met her burden of proving by a preponderance of the evidence she was not properly compensated for her final paycheck and penalties are appropriate. Mont. Code Ann. § 39-3-204; Admin R. Mont. 24.16.7556(1)(d), 24.16.7566; *Singh*, ¶ 25.

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⁶ The Wage and Hour Unit applied this penalty to the \$490.00 check which was subsequently submitted by LeProwse to the Department after the initial \$520.00 NSF check. Because it was the \$520.00 check that was issued with insufficient funds, the penalty herein applies to that check.

VI. ORDER

LeProwse Contracting, Inc. is hereby ORDERED to tender a cashier's check or money order in the amount of \$618.50, representing wages and penalty, made payable to Natasha Cameron, and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision.

DATED this 23rd day of June, 2022.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.