HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal Nos. 258-00 and 259-00

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellants: LINDA BECKER AND MARY IDA STINES,

And

Agency: DEPARTMENT OF SAFETY, DENVER FIRE DEPARTMENT, and the City and County of Denver, a municipal corporation.

NATURE OF APPEAL

Appellants seek review and reversal of action by the Denver Fire Department ("Department"), the Director of Career Service ("Personnel Director") and the Auditor requiring Appellants to refund certain overtime previously paid to them. In the case of Ms. Stines, she also seeks review and reversal of the Department's denial of her request for an exemption to carry forward vacation balances in excess of the 336-hour maximum. The Appellants each filed grievances objecting to the actions of the Department. Their grievances were denied and they then perfected this appeal pursuant to Career Service Rules.

The issues and the underlying facts and circumstances were similar in both cases. Consequently, for the sake of judicial economy and efficiency, the Hearing Officer ordered these two appeals consolidated for purposes of hearing and decision.

INTRODUCTION

For purposes of these Findings and Order, Ms. Becker shall be referred to as "Appellant Becker" or "Becker". Ms. Stines shall be referred to as "Appellant Stines" or "Stines". The Department of Safety and the Denver Fire Department shall be jointly referred to as the "Department" unless otherwise designated. The City and County of Denver shall be referred to as the "City". The rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation. The Director of Career Service shall be referred to as the "Personnel Director" or "Director".
A hearing on this appeal was held on January 24, 2001, before Michael L. Bieda, Hearing officer for the Career Service Board. Both Appellants were present and were pro se. Assistant City Attorney Linda Davison, Esq. represented the Department and the City.

The following witnesses testified at the hearing:

Ida Stines
Linda Becker
Tracy Howard, Deputy Manager of Safety
Charles C. McMillan, Division Chief over Operations
Richard Gonzales, Chief, Department of Safety

The following exhibits were offered and admitted into evidence by stipulation:
1-13, A-S, AA, BB, CC, EE.

**ISSUES ON APPEAL**

1. Whether or not Appellant Stines should be required to refund overtime pay for the period of January through February 2000.

2. Whether or not Appellant Becker should be required to refund overtime pay for the period starting in 1999 through February 2000.

3. If so, what is an appropriate payback schedule?

4. Whether the Appellant Stines should receive an exemption allowing her to carry forward vacation hours in excess of the 336-hour maximum.

**JURISDICTION**

**STINES**

As to Appellant Stines, she was formally advised in writing on October 12, 2000 that she had received “unauthorized overtime payments” totaling $2,702 for work performed in January and February, 2000. She filed her first step grievance on October 20th. The Department response is dated October 24th, but contains no certificate of mailing or delivery as prescribed by CSR §19-22 (a) (2) (a). The second step grievance

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\(^{1}\) CSR §19-22 (a)(2)(a) provides:

Time Limitation and Form of Appeal
is dated November 3. It also contains no certificate of mailing or delivery. The Department acknowledges in its response that it was received on November 6th. The second step response is dated November 15, but does not contain either a certificate of mailing or delivery. The appeal was filed on November 27th. As to the timeliness of the portion of the appeal pertaining to the overtime payments, the Department has not challenged timelines or jurisdiction.

The Hearing Officer concludes that as to the overtime payments, the Appellant Stines timely filed the appropriate grievance and appeal and the Hearing Officer therefore has subject matter jurisdiction, pursuant to CSR §19-10 (a)(3), and §19-27, to either affirm, reverse, or modify the actions of the Department2.

The Department did challenge the timelines of the appeal of the vacation time carry-over. The Hearing Officer finds that this issue has in fact been brewing since early 2000. However, the record indicates that the Department has never taken a final action on this issue. In an internal correspondence to Stines from the Director of Finance for the Department, the Department indicated that it was still reviewing the issue. [Exhibit B-8]:

The Denver Fire Department is attempting to make a final

1) Time Limitation
   Every Appeal shall be filed at the office of the Career Service Authority within ten (10) calendar days from the date of notice of the action, which is the subject of the appeal.

2) The computation of the ten (10) calendar days shall be as follows:
   (a) The date of notice of the action shall be the date on the certificate of hand-delivery if hand-delivered to the appellant or the date on the certificate of mailing of notice if sent by U.S. Mail or interoffice mail.

2 CSR §19-10(a)(3) provides:

Actions Subject to Appeal
An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

a) Actions of the Personnel Director: Actions of the Personnel Director or a designated representative, which meet any of the following criteria:

3) The action is one, which the Personnel Director is not required to perform, and involves personal discretion or judgement.

CSR §19-27 provides:

Decisions of the Hearing Officer

The Hearing Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.
attempt to resolve the year 2000 accrual overage through the
Employee Relations Section of the Career Service Authority.
Therefore, until such time that Career Service Authority
provides a formal recommendation on this issue, the
submitted leave and any previous leave submittals must be
deducted from a beginning balance of 336 hours effective
January 1, 2000. We hope to have a final clarification
response within the next 2 weeks.

Ms. Stines never received notification that this issue was finally resolved. The
Department admits that while no final action has been taken, that at the time of this
appeal, the Department position had not changed since that outlined in Exhibit B-8, and
that the Agency's position has in fact now solidified to one contrary to that of Appellant
Stines. She has therefore included it as part of her appeal.

The Hearing Officer finds and concludes that since there was never a final action
by the Department until this appeal, the appeal of this issue is timely. Nor is the appeal
premature, since the issue has ripened during the course of the grievance and appeal
process. Therefore, as to the vacation time issue, Appellant Stines timely filed the
appropriate grievance and appeal and the Hearing Officer has subject matter jurisdiction,
pursuant to CSR §19-10 (a)(3), and (d), and §19-27, to either affirm, reverse, or modify
the actions of the Department and the Director. The Department Motion to Dismiss is
therefore denied.

BECKER

As to Appellant Becker, she was formally advised in writing on October 12, 2000
that she had received unauthorized overtime payments totaling $8,616 for work she
actually performed on the project during 1998, 1999 and early 2000. The alleged basis
for the demanded refund was that she was temporarily acting in an "exempt" position and
received both the salary increase of that position and "unauthorized overtime." Becker is
in fact a non-exempt employee, and as such is normally entitled to receive compensation
for overtime worked. However, during the period in question she was temporarily
"backfilling" in an exempt position. Unless authorized by the Personnel Director, she
would not normally receive overtime in this temporary position. She was in fact paid
overtime which the Auditor has now challenged and requested a refund on behalf of the
City.

Becker filed her first step grievance on October 20th, 2000. The Department
response denying the grievance was dated October 30th, but contains no certificate of
mailing or delivery. The second step grievance is dated November 8th. It also contains
no certificate of mailing or delivery. The Department dated its response denying the
second step grievance November 15th, but it likewise does not contain either a certificate
of mailing or delivery. The appeal was filed on November 27th. The Department has not
challenged the timelines or jurisdiction of the Becker appeal.

The Hearing Officer finds and concludes that the Appellant Becker timely filed the appropriate grievance and appeal and the Hearing Officer has subject matter jurisdiction, pursuant to CSR §19-10 (a)(3), and CSR §19-27, to either affirm, reverse, or modify the actions of the Department as to her appeal.

**FINDINGS OF FACT**

**FINDINGS COMMON TO BOTH APPEALS**

The issues in all cases stem from the 1999 conversion by the City of Denver and the Denver Fire Department from its then existing employee payroll and personnel software systems to the new "ASPEN" software system. This system was to include a new sophisticated employee data system known as "PeopleSoft". Coupled with that conversion was the further complication of bringing the City and Department computer systems into compliance with the new millennium ("Y2K") requirements. Together this project is referred to herein as the "ASPEN/Y2K project" or simply the "project".

This conversion process was a long and arduous one. It involved long hours of data input, testing, correction and review. Not suprisingly, the project proved to be more complicated than anticipated. Originally it was thought the project would be completed well in advance of Y2K, requiring some nine months in all to complete. The project was actually commenced in 1998. According to the uncontroverted testimony, it ended up actually taking eighteen months to complete and extended well beyond January 1, 2000. The project required the participation and involvement of a number of employees in the Department, including both Appellants.

The Department encountered a number of problems that delayed the completion of the ASPEN project. These included the establishment of new Human Resource procedures and forms for the Department, additional training for staff, delay of "open enrollment" for health and medical benefits, and the completion of new enrollment forms. The timing of the project further exacerbated the situation. The evidence established that the fall is the busiest time of year for the human resources department due to the open enrollment, salary changes, union due changes, employee group deduction changes and upcoming payoffs for clothing, weapons and sick leave. In the fall of 1999 the pressure increased to complete the project before year's end. These all contributed to the delay of the completion of the project.

The Denver Fire Department and its employees are responsible for protecting the safety and wellbeing of the citizens of the City of Denver. At all times they must be ready to act on a moments' notice and be able to respond to fires, accidents, and other emergencies and disasters, both natural and manmade. According to the testimony of
Chief Richard Gonzales, any problems in the smooth and efficient operation of the Department pose a potential safety hazard for the public. Indeed, as the name suggests, the Fire Department is part of the larger Department of Safety, which also oversees the Denver Police Department and the Denver Sheriff's Department.

As early as December 1998 it became apparent to the Personnel Director that the ASPEN project and the looming Y2K complications were of such a critical nature as to constitute an emergency situation. This is acknowledged in a written memorandum from the Personnel Director to the Manager of the Department of Safety, dated December 15, 1998, [Exhibit C-12]. Because of this emergency the Personnel Director went on to authorize the entire Department of Safety, including the Denver Fire Department, to pay overtime to employees assigned to work on the Project. The memorandum does not set a deadline as to when the authority expires. Nor does it enumerate any specific employees. By its very nature then, it leaves both of these issues to the discretion and judgement of the Fire Chief and the Director of the Department of Safety.

There is no evidence that the Personnel Director ever revoked this authorization. More importantly, there is no evidence that any revocation or changes to the authorization were ever communicated to the Department. There is however, evidence that the Personnel Director may have intended to terminate the overtime approval as of December 31, 1999. He in fact indicated as much in a memorandum dated April 16, 1999 to Ms. Cheryl Cohen, Manager of the Department of Revenue, and copied to Mr. Don Mares, Auditor. [Exhibit C-14]. However there is no evidence that it was ever provided to the Department, and all of the witnesses deny having ever received the memorandum or any directive prior to March 2000 advising that the authorization for overtime was to terminate on December 31, 1999.

In reliance upon this open-ended authorization the Department authorized both Appellants to work and receive overtime pay through February 2000. There is no question that the Appellants worked the time claimed as overtime. Nor is there any question that both the Department and the Appellants relied upon the authorization they had received to allow the overtime. Since the ASPEN project continued well into the year 2000, and based upon this authorization, the Department paid overtime in January and February to both Stines and Becker.

Under the personnel scheme of the Department of Safety, the Denver Fire Department has two types of employees, "sworn" employees also referred to as "uniformed" employees, which consist of the professional fire fighters. The other type is a

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3 The second page of the memorandum indicates: "cc: Tim Martin (payroll director of Aspen) Dani Brown (Career Service Employee), Employee Relations, CSA, Chris Veasey (Human Services) and Margaret Browne."
"civilian" employee, which consists primarily of the administrative staff. The "uniformed" employees are not under the Career Service System of employment, but instead are controlled by the Civil Service Board. They are also under the direct control of the Chief. The "civilian" employees such as the Appellants are Career Service employees and fall under the control of the Career Service Board, the Personnel Director of Career Service and the Fire Chief.

The Department has its own high standards of conduct, which apply to both the "uniformed" and "civilian" employees. These standards of conduct are much higher than those of other employees within the Career Service system. Thus, the "civilian" employees are held to the same high standards of conduct as the "sworn" employees, but do not necessarily enjoy the same benefits.

This dual system has the potential to create confusion and conflict. For example, the Fire Chief has the authority and often does approve overtime for uniformed officers in the Department. This is seen as a necessity and a matter of public safety. Otherwise, a firefighter who has reached his maximum allotted hours for the month might have to be sent home in the middle of a fire or other emergency, putting the public at risk. Or the employee might have to work long extra hours to protect the public, without just compensation. Neither alternative would be acceptable or in the best interests of the public.

However, the Chief does not have the same authority with respect to "civilian" employees like the Appellants, even though they are also an integral part of the Department and their overtime may be just as necessary in order to avert an emergency. In that case the Chief must first seek approval from the Personnel Director for the overtime. This approval requirement should be largely pro forma, since such overtime pay for "civilians" is still paid from the budget allotted to the Department the same as uniformed employees.

The witnesses testified that the entire ASPEN and Y2K project created an emergency situation for the Department. A failure to have the payroll system function properly would have resulted in errors in pay and benefits, or worse yet, interruptions in pay and benefits to Department employees, both uniformed and civilian. Not only would this create a serious conflict between management and employees, but it would also have an adverse effect on employee morale. The Personnel Director apparently recognized this potential emergency when he granted the Department authority to pay overtime to the employees working on the project.

The evidence also clearly established that both Stines and Becker were working on the ASPEN/Y2K project. Stines was actually on site where the project was being implemented, which was away from the Department's main office. Becker remained at the main office, but was engaged in backup work, which was directly related to ASPEN and Y2K requirements. In particular, Becker was providing vital data to Stines and other
project personnel on each individual Department employee to be input into the new system. She was also providing a check on the data, comparing the data in the new system with that in the old. The new system results had to be compared to the existing system, which was also part of Becker's function. At all times relevant, the Department believed that it had received the authority to grant overtime pay to both of the Appellants.

After the completion of the ASPEN/Y2K project in February of 2000, the question of the overtime for Stines came up as the result of a complaint filed by a disgruntled ex-employee of the Department. The Department had previously terminated this ex-employee. Ms. Stein had also supervised her. This individual filed complaints about Stein's and Becker's overtime with the Personnel Director, the Mayor, the Manager of Safety, and the Colorado Attorney General, among others. These complaints alleged a number of improprieties by Stines and Becker, including the improper payment of overtime. These complaints triggered a review of Stines' and Becker's overtime history, as well as Stines' vacation cap extension. They also resulted in the Director's letter dated July 6, 2000, to the Manager of Public Safety. [Exhibit M-1].

STINES

Appellant Stines has been a Career Service employee for approximately 30 years and has Career Service status. She is a Personnel Supervisor for the Department of Safety, assigned to the Denver Fire Department. She is considered a "civilian" employee of the Department as opposed to a "uniformed" officer. She is also an "exempt" employee and normally is not compensated for overtime.

On October 14 of 1998 she was assigned to go to the site of the ASPEN project and work on it and Y2K compliance on behalf of the Department. The assignment was supposedly for only nine months, but turned out to be twice that long. She finally returned to the headquarters of the Department and resumed her normal duties in April of 2000. During the period of October 1998 to April 2000 she worked exclusively on the ASPEN/Y2K project. She testified that she worked overtime and was paid time and a half. Her supervisors reviewed and approved all overtime. She submitted time slips showing her overtime to her supervisors, Chief Charles McMillan and Larry Butler, Director of the Division of Finance. She testified that she worked all overtime claimed and "a lot more" that she did not claim and was not paid for. In fact, her overtime included some weekends.

During January and February 2000, which is the period in dispute as to Stines, she was paid $2,702 in overtime. This is the period for which authorization is questioned.

With respect to the vacation time issue, her supervisors at ASPEN advised her that because of the emergency nature of the ASPEN and Y2K projects, she would be working overtime until the completion of the project. She was also instructed that she was not to take any vacation time until the project was completed. In fact, Stines followed
instructions and did not take vacation time during her tenure at ASPEN. This is confirmed by a review of her time records as well as memorandums from Fidel Montoya, Manager of Safety, dated April 25, 2000 and June 6, 2000 [Exhibit 6, #1, and #5]. The fact that Appellant Stines was discouraged or prevented from taking the time off by her superiors is also confirmed in these documents.

A request was made by the Department to the Personnel Director to allow her to carry forward vacation balances in excess of the maximum of 336 hours allowed under Career Service Rules. The Personnel Director approved this waiver on December 11, 1998, shortly after she started on the ASPEN and Y2K projects. Pursuant to Career Service Rules he indicated that "the accrual limit must be used within one year of the approval date." [Exhibit B-7] Stines actually accrued an additional 176 hours of leave time over and above the 336-hour maximum during 1999. She did not and was not able to take that leave due to the unanticipated demands of ASPEN and Y2K. Appellant estimates the value of the unused vacation time at $4,000.

The Personnel Director has previously, under similar circumstances, granted an extension of the one-year deadline for the use of the excess vacation time. This was done in September 1999 for Emit Hurdelbrink and the Department of General Services, Information Services division. [Exhibit P].

BECKER

Appellant Linda Becker has been an employee with the Department for approximately 10 years and has attained Career Service status. There was no evidence provided as to her history as a Career Service employee. She is a payroll technician. She is also considered a "civilian" employee of the Department. Normally she is a "non-exempt" employee and is therefore entitled to be compensated for overtime. However, during the period in question, which is approximately November of 1998 to February 2000, she was backfilling for Stines in an "exempt" position.

During this period she was told that she would be entitled to overtime pay while working on the project. Chief McMillan confirms this fact in an internal correspondence to Becker on November 2, 2000. [Exhibit BB]. She submitted time slips showing her overtime to her supervisors, Chief Charles McMillan and Larry Butler the Director of the Division of Finance. She testified that in fact she worked all of the overtime claimed. She was paid $8,616 in overtime during this period. Her supervisors authorized all overtime worked and paid to Becker. The witnesses for the Department acknowledge that the overtime to Becker was paid in lieu of hiring two on-call temporary employees. Chief Gonzales acknowledged that this was an informed decision by management and resulted in substantial savings and benefit to the Department. Management determined that paying Becker the overtime was more efficient and cost effective than training temporary staff on the old and new systems.
DISCUSSIONS AND CONCLUSIONS OF LAW

Analysis

Under Career Service Rules, the Personnel Director has authority to allow exempt employees to be paid overtime. Likewise, the Personnel Director may exempt employees from the vacation cap. In this case, the Personnel Director found good cause under the rules to grant exemptions in both categories to the Department of Safety. In a memorandum dated December 15, 1998, the Personnel Director found that an emergency situation existed which justified the payment of overtime to "positions or classifications doing ASPEN work". [See Exhibit C-12]. Later, in a memorandum dated April 16, 1999, the Personnel Director advised the City Auditor that he had authorized the overtime and explained his rational. The Personnel Director advised the Auditor that except in very "narrow circumstances", his office denies requests for overtime pay to employees exempt under FLSA (Fair Labor Standards Act). He further explained that "exceptions may be made to our standard rule when not doing so would place the City at great risk of failing to meet important objective or when an emergency condition clearly exists."

The Personnel Director cited the payment of overtime at Denver International Airport during snowstorms as an example of an emergency condition justifying an exception. He found that the ASPEN Y2K project was a similar situation. He felt that the

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4 CSR § 10-33 (b)(2) provides:

Employees in executive, administrative, or professional classes:
Employees in executive, administrative or professional classes shall be excluded. [sic] from overtime with the following exceptions:
(2) An appointing authority or employee may request the Personnel Director to recommend an exception to overtine exclusion for a specified period of time for any of the following:
   (a) a class or group of classes within the City and County of Denver; or
   (b) a group of positions within a class where working conditions are distinctly different than working conditions of other positions in the same class.

5 CSR § 11-23 (f) provides:

Maximum credits: A maximum of two-hundred-eighty-eight (288) hours of vacation leave shall be credited to an employee with up to ten (10) years service and three-hundred-thirty-six (336) hours of vacation leave to an employee with ten (10) or more years service unless the Personnel Director approves an emergency request, by the appointing authority, to exceed the maximum accrual due to workload.

If an exemption is approved, the employee must use the excess over two hundred-eighty-eight (288) hours or three-hundred-thirty six (336) hours, whichever applies, within one year of the approval date.
city must take every reasonable effort to meet Year 2000 compliance. He concluded: "the state of the ASPEN project will require that ASPEN employees work hours beyond their normal work schedule to assure completion of critical work by designated timelines." [Exhibit C-15]. The Personnel Director also advised the Auditor that the overtime approval period terminated on December 31, 1999. However, that limitation was never communicated to either the Fire Department or the Department of Safety.

On February 29th, 2000, as a result of the review triggered by the disgruntled employee, a request was made by the Manager of Safety, Fidel "Butch" Montoya, Jr. to the Personnel Director for an extension of the overtime approval for Stines. [Exhibit D-8]. Apparently this request was never specifically addressed. However, the Personal Director later denied a request from Montoya that ASPEN employees be allowed to extend their vacation cap. He indicated that "there is no evidence that an emergency existed that prohibited employees from taking vacation time off." [Exhibit D-11].

Under Career Service Rule CSR §19-10(a)(3) which was cited earlier, the Hearing Officer has the authority to review the actions of the Personnel Director that involve personal discretion or judgement. Clearly the decision in this case to deny the Appellants overtime pay and an extension of the vacation cap involved the exercise of discretion and are therefore reviewable by the Hearing Officer. The Personnel Director previously determined that an emergency existed which mandated the allowance of overtime and the extension of the vacation cap. The facts amply justified that decision when it was first made in 1998, with the ASPEN/Y2K project looming. In fact he recognized that the work was "critical".

The evidence established that the "crises" was not over on January 1, 2000, even though the system passed into the new millenium without major incident. There is no evidence that the situation changed from December 1999 to January 2000. The ASPEN project was still in the process of being completed. Therefore, the emergency that justified the overtime pay and the extension of the vacation ceiling also still existed. In the exhibits, the ASPEN and the Y2K compliance projects were in fact referred to interchangeably. They were multifacets of the same project. In fact, the Personnel Director does not make a distinction between the two in his memorandum of December 12, 1998 [Exhibit C-12]. He authorizes the overtime for employees assigned to work on the "ASPEN" project. He does not limit it to a "Y2K" project. Thus he recognizes the emergency nature of ASPEN.

Likewise, in the April 12 1999 memorandum to Cheryl Cohen of the Department of Revenue, the Personnel Director explains his rational for granting overtime in terms of the "ASPEN" project.

As far as the Department was concerned, nothing changed with the advent of Y2K. Until the automated personnel system know as "ASPEN" was completed, tested and fully implemented, a potential safety issue was ever-present, in the form of payroll,
benefits and leave failures and interruptions for all Department employees. The Department had seemingly cleared the Y2K hurdle, only to be still faced with the continuing ASPEN problem. Accordingly, in reliance upon the authority previously granted by the Personnel Director, the Chief of the Department authorized and caused to be paid, overtime for Stines in the year 2000 in the amount of $2,702.

Although the Hearing Officer is vested with the authority to review the discretionary decisions of the Personnel Director as they relate to employees, such authority is best used only sparingly. The rules are silent on the standards to be applied in such a review. However, as a matter of sound policy, the Hearing Officer should not take such authority lightly. A discretionary decision of the Personnel Director should be reviewed when it works a manifest injustice on an employee, unduly interferes with the management of another city agency, or if it is made without the full benefit of all the pertinent facts and information. In this case, all of these conditions exist.

It is difficult to know exactly what information the Personnel Director did or did not have available when making his decisions in this regard. He did not testify at hearing. However, from the documentation it appears that he may not have been aware that the Department had not received his April 16, 1999 memo [Exhibit C-14] to the City Auditor wherein he indicated his intent to terminate the overtime for ASPEN employees on December 31, 1999. He may not have been aware that the employees and the Department had relied upon his previous authorization. He may not have been aware of the impact of his decision on the individuals, as well as the running of the Department.

The Personnel Director's decision to terminate overtime on December 31, 1999 in and of itself may have been reasonable. Had the Departments involved received that communication and acted accordingly, no controversy would now exist. Occasional miscommunications are not uncommon and are even understandable in a large organization like the government of the City and County of Denver. Many decisions are made each and every day by a variety of agencies. The problem arises where, as here, a potential injustice has occurred as a result of a miscommunication.

It is also unclear to what extent the Director was made aware of the particular circumstances surrounding the Appellants' situation and the impact of his decision to deny overtime extensions. The nature of the position requires the Director to paint with broad strokes. Those strokes can sometimes work an injustice in individual circumstances. Such is the case here.

The Appellants' supervisors, all the way to the Chief of the Department, authorized the overtime for both Appellants. They reasonably believed they had received the authority to do so. The overtime was vital to the efficient management of the Department. The Department acted in good faith. Stines and Becker worked the overtime in good faith. Both were paid in good faith. The City and the Department received the benefit of their services and efforts in the form of a fully functioning and Y2K compliant ASPEN
personnel system. The department received the benefit of having their employees' records converted seamlessly and without interruption. All parties benefited from the work performed by Stines and Becker. The Department had the resources to pay them. It would be unjust enrichment for the City to now enjoy those benefits of Appellants' efforts without compensating them. To require them to refund the overtime they worked would constitute a manifest injustice to both employees.

Moreover, to require an after-the-fact refund for overtime worked would also constitute a broken promise by the City to these two employees. That promise may have been the result of a miscommunication between Agencies, but it is a promise nonetheless. In the case of Becker, the City's objection to her overtime payment is that she was not working on the Aspen project and therefore there was no authority for her to receive overtime. This contention by the City is contrary to the overwhelming weight of the evidence.

The Department, pursuant to the apparent written authority granted to it by the Personnel Director in the December 1998 memorandum, determined that Becker's work was an integral part of the project. Accordingly she fell under the umbrella of the employees authorized to receive overtime pay. She was paid in good faith. She worked the overtime in good faith. The City and the Agency received substantial benefits of her efforts. They did not have to hire and train part time temporaries. To require her to refund $8,616 due to miscommunication or misunderstanding by the various parties would also constitute a manifest injustice. Likewise there would be unjust enrichment by the City at the expense of the employee. To allow the present action to stand would also be a deprivation of property without just cause, a confiscation. Surely not a result the Personnel Director would condone had all of the facts been known.

Career Service rules also provide that the rate of pay for overtime is one and one-half times the hourly rate. The rules are confusing as to which classes are eligible and which provisions apply here. However, a review of the December 15, 1998 memorandum

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6 CRS §10-33 b)(3) provides:

Based on community practice, limited overtime at the rate of one and one-half (1-1/2) times the hourly rate shall be paid to incumbents in the classes receiving overtime contained on the career Service Board's approved list of classes receiving overtime.

CSR § 10-34 b) (1) provides:

Payment for Overtime

Employees in salary range classes: Employees in salary range classes who are eligible and who are required to work overtime (other than holiday overtime) shall receive compensation as follows:

(1) Exempt employees eligible to receive overtime: at the rate of one and one-half (1 1/2) times the straight time hourly rate of pay applicable to that position.
from the Personnel Director to the Department reveals that no mention of the rate of pay is made. In his letter of July 6, 2000 the Personnel Director indicates that he believed he had authorized overtime only on an "hour for hour" basis. In fact, he did so indicate his intentions to limit overtime to "hour for hour" in his April 16, 1999 memorandum to Cheryl Cohen. However, just like the December 31, 1999 termination date, this was never communicated to the Department.

In his response of August 11, 2000, [Exhibit C-16] Manager of Safety Zavares indicates that past practices of the department and Career Services have been one and one-half times the hourly rate. He also acknowledges that CSR §10-33 and §10-34 are confusing, but states that the Department had represented to the Appellants that they would be compensated for overtime at the rate of one and one-half times the hourly rate. The Department based this representation upon the authority of the Director and its own interpretation of the applicable rules and past practices.

The fact that these "civilian" employees are held to the same high standards of conduct as "sworn" officers also weighs in favor of them being treated the same as other employees of the Department when it comes to overtime pay. Under these circumstances, the rules and past practices of the Department which permit overtime for the other 900 employees might even be found by a court of law to supersede conflicting Career Service Rules.

Based upon these facts, the Hearing Officer concludes that the rules and past practices of the Department and the Career Service support overtime pay for both Appellants in the amount of one and one-half the hourly rate.

Finally, there is the question of the vacation cap for Stines. The Career Service Rule requires that the excess be used within one year. However, the rule does not prohibit multiple extensions where warranted. Here, had the project been completed as anticipated, Stines would have had ample time to take her excess vacation time within the one-year extension granted by the Personnel Director. However, the project took much longer than anticipated. Due to the continuing emergency nature of the project, Stines continued to work substantial overtime and was not allowed to take her vacation time during the entire year after the extension was granted. For her to have done so would have been a direct violation of her standing orders and may have constituted insubordination. It would have also have been contrary to the emergency need for overtime. It is inconsistent to find an emergency need for overtime but at the same time expect the employee to take excess vacation.

The evidence establishes that extensions similar to the one requested have been granted to other employees in similar circumstances. Appellant Stines may not now be penalized for following orders. There has been no showing that she should be treated differently than other employees similarly situated. To do otherwise would result in a further manifest injustice. It would also be a deprivation of a valuable property right
without just cause or compensation. It might also be discriminatory and confiscatory.

ORDER

The action of the Department, the Auditor and the Director of requiring that Mary Ida Stines refund the sum of $2,702 as overtime pay is hereby REVERSED. She shall not be required to make a refund of any overtime pay.

The action of the Department, the Auditor and the Director of requiring that Linda Becker refund the sum of $8,616 as overtime pay is hereby REVERSED. She shall not be required to make a refund of any overtime pay.

The action of the Department, the Auditor and the Director of requiring that Mary Ida Stines forfeit 176 hours of vacation time is hereby REVERSED. She shall have one year from the date of this order, (unless this order is appealed) to use and enjoy the 176 hours of excess vacation time that she has accumulated in addition to the 336 hours. Due to the large number of hours to be used and her integral position with the Department, further extensions may be granted pursuant to CSR §11-2 (f) and such extensions shall not be unreasonably withheld.

Dated this 29th day of April 2000.

Michael L. Bieda
Hearing Officer for the Career Service Board