

DECISION AND ORDER

SUEZANN BOHNER, Appellant,

v.

DEPARTMENT OF PUBLIC WORKS,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 19, 2017 before Hearing Officer Valerie McNaughton. Appellant represented herself, and Assistant City Attorney Richard Stubbs appeared for the Agency, with Latoya Linzey serving as Agency advisory witness. Appellant testified on her own behalf, and also called Latoya Linzey, Marcel Linne, Jay Castle, and Colin Krupczak as witnesses. The Agency recalled Marcel Linne, and also called Blair Malloy and George Delaney.

I. STATEMENT OF THE APPEAL

Appellant Suezann Bohner appealed the Agency's denial of her grievance challenging denial of standby pay. The parties stipulated to the admission of Agency Exhs. 1 – 14 and Appellant Exhibits A – C, E, F, J, and K. Exhibits 15, U, W, Y and Z were admitted during the hearing.

II. FINDINGS OF FACT

Appellant has been employed as a Safety and Industrial Hygiene Professional II (SIHP II) since she was hired in July, 2015. Her duties in that position include applying established safety standards to investigate accidents involving city employees or property, assisting with liability findings, and identifying workplace safety risks. [Exh. 7.] In addition to those duties, all SIHP IIs and other safety personnel have been required for the past seven years to perform a week of after-hour duty officer functions on a rotating basis. Those duties require the safety officers to maintain readiness to physically respond to city emergency calls once every five to eight weeks, in turn with other safety employees. [Exh. Z.] This standby duty was added in 2010, and was formally added to the four safety position specifications as an essential duty in 2014. [Exhs 7-2, U-3, W-2, X-3.] Standby pay is not given for wait time during the assigned week. As a practical result, all but the non-exempt Safety and Industrial Hygiene Professional I (SIHP I) classification are required to be ready to respond to after-hour duties without additional pay. [Exh. Z.]

On Jan. 25, 2017, Appellant filed a grievance based on the Agency's failure to give standby pay for time on duty officer status, alleging that the practice violated specific

Career Service Rules and Charter provisions related to pay. [Exh. 1.] Public Works Deputy Director George Delaney denied Appellant's grievance, stating that "[a]s an employee who is currently in a job class that is exempt, you must look to [CSR §] 9-93 which clearly states you are not entitled to overtime pay except in four specific situations, none of which you meet at this time." [Exh. 2-1.] Bohner appealed that denial to the Career Service Hearing Office under the jurisdiction provided in CSR § 19-10 A.2.b.i., which challenges both the exempt status of her position and the determination that she is ineligible for overtime under CSR § 9-93.

III. ANALYSIS

Appellant bears the burden in this grievance appeal to prove that the Agency violated a Career Service Rule or City Charter provision, and thereby negatively impacted Appellant's pay, benefits or status. CSR § 19-10 A.2.b.i.

After-hour emergency calls within the city come from police, 311 or 911 telephone services. They most often involve accidents, debris in roadways, and requests for city services or equipment. Over the years, the city has handled the need to staff after-hour emergency calls in various ways. In December 2009, budget reductions led Public Works to assign all supervisors in its Safety and two other divisions to take home city vehicles and cover after-hour calls on a geographic basis. [Exh. A.] By 2010, non-supervisory safety employees were included in the order for mandatory standby duty. [Exhs. B, C.] About five percent of the after-hour calls directly involve city employees or assets, although many are referred to other city agencies for personnel or equipment in order to remedy the safety issue presented. [See Exhs. B, C.] In 2010, there were almost 300 emergency calls covered by safety personnel. [Exh. B.] In 2011, that number nearly doubled to just short of 600 calls. [Exh. C.]

City employees may be paid standby pay "only when there is a reasonable anticipation that the employee will have to respond and perform work immediately." CSR § 9-55 A. In contrast to the overtime rate of time-and-a-half for each hour worked, standby pay is 1 ½ times the straight time rate for every eight hours served on standby duty. In order to receive standby pay under this rule, employees must be eligible for overtime under either the Federal Labor Standards Act (FLSA), or under one of the city's overtime exceptions set forth in CSR § 9-93. In addition, employees must be available by phone or pager, must respond within two hours in a non-impaired condition, and must be subject to discipline for breach of any of these conditions. CSR § 9-55 B. Appellant testified, and it is not in dispute, that she met the conditions stated in 9-55 B.2 – B.5. The only issue is whether Appellant was eligible for overtime under either the FLSA or CSR § 9-93.

For this purpose, a review of the safety unit's positions provides needed background. The City and County of Denver's human resources agency was the Career Service Authority (CSA) until re-named the Office of Human Resources (OHR) in 2013. DRMC 18-1. The position of Safety and Loss Analyst was proposed by CSA and approved by the Career Service Board in 1995 to perform occupational safety work. At that time, analysts worked under the supervision of the Safety and Loss Coordinator, a position that also administered the safety and loss programs. In 2007, the Analyst and Coordinator

positions were both split into two other jobs. The Analyst position was divided into a non-exempt, entry-level Safety and Industrial Hygiene Professional I (SIHP I), and an exempt, full-performance level Safety and Industrial Hygiene Professional II (SIHP II). Both require a bachelor's degree in safety engineering, for which "appropriate education and experience" can be substituted. [Exhs. 7, W.] At the same time in 2007, the Safety and Loss Coordinator position was divided into two new classifications: the SIH Administrator for program administration, and the SIH Supervisor for supervisory duties. Both administrator and supervisor positions remained exempt, in keeping with their duties to exercise control over safety program objectives and city-wide safety policies. [Exhs. U, X.]

A. Eligibility under the Fair Labor Standards Act

The Agency argues that the SIHP II position is properly classified as exempt, and thus Appellant is not eligible for overtime under the FLSA, one of the conditions for receiving standby pay listed in CSR § 9-55 B.1. Appellant counters that the classification is improper under the duties test, noting that non-exempt entry-level positions perform the same duties as the full-performance level position, and that she was classified as non-exempt in her previous safety positions. In essence, this portion of the grievance appeal is a challenge to the appropriateness of Appellant's FLSA-exempt status. Only if this question is resolved in support of the exemption is it necessary to determine whether Appellant is qualified to receive standby pay under CSR § 9-93.

The Hearing Office has no specific jurisdiction to resolve a challenge to an FLSA-exempt status, or to order re-classification, as necessary to reverse the Agency action. CSR §§ 19-10, 19-55. The Fair Labor Standards Act is enforced by the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) within regional offices, which investigate, litigate, and enforce the FLSA in accordance with the remedial framework intended by Congress. 29 USCA § 204. Classification by function under the FLSA is not a mechanical task, as shown by the vast body of law interpreting abstract concepts such as the exercise of discretion, work requiring advanced knowledge, and work directly related to management or general business operations, to name just a few prerequisites for an administrative or and professional exemption. Thousands of federal court decisions, and tens of thousands of administrative decisions, have been devoted to applying those factors to specific workplaces and positions. Id. The vast body of law, regulations and decisions in this field make it obvious why Seventh Circuit Judge Richard Posner pronounced a single possible scenario, the administrative exemption, as "pretty vague", a description one commentator found "a gross understatement." See Verkuillen v. MediaBank, LLC, 646 F.3d 979, 981 (7th Cir. 2011; cited in "The Miscellaneous Employee: Exploring the Boundaries of the Fair Labor Standards Act's Administrative Exemption", Blake R. Bertagna, 29 Hofstra Lab. & Emp. L.J. 485, 535 (Spring 2012).

The common law provides an alternative to piecemeal interpretations of the FLSA by any agency having broad grievance jurisdiction under its own rules. An administrative forum may defer to another agency holding concurrent jurisdiction where the matter involves "technical questions of fact uniquely within [the latter] agency's expertise and experience, or in cases where uniformity and consistency require administrative discretion." Arapahoe County Public Airport Authority v. Centennial Exp. Airlines, Inc., 956 P.2d 587, 592 (Colo. 1998) (*en banc*). FLSA exemptions and overtime claims are within the

specialized purview of the Wage and Hour Division, as developed over its 90-year history interpreting the law and regulations by means of the Administrator's letters and administrative precedents. The federal issue presented by this appeal requires resolution of facts and law uniquely suited to that federal agency's jurisdiction, expertise and insight "such as matters turning on an assessment of industry conditions." Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304 (1976.)

Significantly also, the burden of proof and available remedies in this forum are inconsistent with FLSA law. As noted above, Appellant bears the burden of proof in a grievance appeal. In contrast, FLSA exemptions are to be narrowly construed, and it is an employer's burden to prove "plainly and unmistakably" that an exemption applies. FLSA, 29 U.S.C.A. § 213(a)(1); Combs v. Jaguar Energy Svcs., LLC, 187 F.Supp.3d 1258 (D. Colo. 2016). If the exemption status is in error, the Career Service Hearing Office has no authority to correct it by re-classifying the position. In general, the WHD rules and scope of relief are broader and more favorable to the employee. 29 USCA § 209, 211, 216. In addition, a complaint under the FLSA would give notice of the statutory basis for the claimed exemption. While the Agency argued in its closing that the professional exemption applies, there was no evidence of to the actual exemption used by OHR Classifications in support of its 2007 FLSA determination. A change in FLSA exempt status would alter the rights of all current and future incumbents in that position, making a ruling consistent with the FLSA a matter of great importance. Under these compelling circumstances, I defer to the special expertise of the DOL Wage and Hour Division as to the issue of whether the Agency improperly coded the SIHP II classification as FLSA-exempt.

B. Eligibility under § 9-93

Appellant may nonetheless be eligible for standby pay under one of the exceptions enumerated in CSR § 9-93 of exempt employees. In support of the Agency's contention that none of the rule's exceptions apply to Appellant, the Agency presented its previous decisions on similar overtime requests. [Exhs. 4, 5.]

In 2010, Denver's 311 Help Center service hours changed from 24/7 to a closing time of 8 pm. In order to staff nighttime calls, the decision was made to add emergency response to the duties of Public Works safety officers, who were already on call for injury accidents. [Linne, 3:16 pm.] Shortly thereafter, SIHP II Jay Castle filed a grievance over the Agency's assignment of "mandatory emergency response duties" without pay. [Exh. 5-4.] In response, the Agency conducted research to determine if similar positions in the market are classified as exempt or non-exempt, and if overtime is paid to any exempt positions. [Exh. 6-1.]

CSA first matched the Agency's SIHP II position to a job category entitled Safety Engineer/Officer from the Mountain States Employers Council (MSCE) 2010 Colorado Benchmark Compensation Survey. The Safety Engineer/Officer position is "[r]esponsible for developing and carrying out a continuing safety program". [Exh. 6-3.] The initial survey was sent to 35 organizations having a Safety Engineer/Officer position. All 35 answered the survey, and 77% stated the position was classified as exempt.

CSA followed up with a supplemental survey to 36¹ organizations having Safety Engineer/Officer positions for the 2011 MSEC benchmark survey. The respondents were asked whether they pay overtime to their Safety Engineer/Officers; and, if so, the circumstances under which it is paid. Eighteen responded, 17 of which stated they do not pay overtime to those employees. [Exh. 6.] Based on those results, CSA concluded that it was not in alignment with community practice to pay overtime to employees who performed the duties of SIHP IIs.²

The research results may be questioned on several grounds. The position offered as comparable may not be so, as it appears to have as its main duty the administration of the safety program, rather than performance of line safety duties, the essential duty of the SIHP II. The Agency's Safety Unit divides its work into four positions, whereas the Safety Engineer may or may not be the respondents' only safety position. Next, there are issues with the distribution of the initial and supplemental surveys. The initial survey asked the 35 respondents if the Safety Engineer/Official was classified as exempt, and 77% (27 employers) answered yes. The supplemental survey was sent not to the narrowed list of 27 employers having exempt safety engineers, but to an unidentified group of 36 employers. Thus, the second group of respondents could include up to 8 respondents with non-exempt safety engineers.³ Without knowledge about the exempt status of the 17 employers who said they did not pay overtime, the results of the survey may have been that as few as nine out of the 17 employers responding to both questions had exempt safety engineers to whom they paid no overtime. If that is so, a bare majority of 53% of the respondents were used to establish the community practice relied upon in the CSA research.

If all assumptions are made in favor of the proposition that the survey was properly conducted, the result is that 17 of 27 respondents do not pay overtime to their exempt Safety Engineers. That is a result of little more than 60% of all employers in the survey. Given the small sample size, unrepresentative nature of the employers selected,⁴ and age of the survey, that percentage is slim evidence of a current community practice. With a response rate of only 50%, and no clear identity between the respondents of the two surveys, the conclusion drawn by the Agency is in doubt.

¹ The CSA memo summarizing the survey methodology does not state why the supplemental survey, presumably addressed to the 77% subset of organizations that classified the job as exempt, was sent to a larger number of organizations than received the original survey. [Exh. 6-1.]

² In 2012, the Agency sought an overtime exemption under § 9-93 C. or D. for six SIHP IIs, administrators and supervisors to perform emergency response duties for a solid week on a rotating basis. The request was denied in part based on the 2011 survey research. The other grounds for denial were the lack of "distinctly different" duties, a provision later removed from the rule, and limitation to a "specified period of time", both under subparagraph C. [Exhs. J, 4.]

³ The additional employer included in the supplemental survey may have been added in the 2011 benchmark survey.

⁴ Three of the organizations were governments, ten were private employers, and the remainder were special districts or non-profit organizations. [Exh. 6-2.]

An administrative action is presumed to be valid, absent proof that it is arbitrary and capricious. In re Vasquez and Lewis, CSA 08-09, 4 (5/20/09); Velasquez v Dept. of Higher Education, 93 P3d 540 (Colo. App. 2003); Garner v Colorado State Dept. of Personnel, 835 P2d 527 (Colo. App. 1992); Renteria v Colorado State Dept. of Personnel, 811 P2d 797 (Colo. 1991). An action is arbitrary and capricious if the agency 1) fails to use reasonable diligence to determine facts necessary to its decision, 2) fails to give proper consideration to facts relevant to the decision, or 3) bases its action on conclusions that reasonable persons would not reach on the facts before them. In re Foley, CSA 19-06, p. 8 (11/10/06) citing Lawley v. Dept. of Higher Education, 6 P3d 1239, 1252 (Colo. 2001).

Here, the Agency based its denial on the 2011 grievance and survey results which may reasonably be questioned. In any event, it is not in dispute that Appellant was not eligible for overtime under any of the subsections of CSR § 9-93. The Career Service Board had not approved a recommendation from the OHR Executive Director to except Appellant's classification from overtime rules based on community practice under subsection A. Appellant is not an exempt employee of DHHA required by state law to perform health emergency overtime work under subsection B. OHR had not approved her service for declared emergencies under C. And Appellant is not a member of a first level supervisory classification as required by D. For these reasons, Appellant's only remedy is to seek re-classification as non-exempt through the processes provided in CSR Rule 7, and the rule-making process provided by the Career Service Board as a part of its power to administer the classification and pay plan under DRMS § 18-2 and CSR Rule 2.

C. Violation of 40-hour work week

Appellant also contends that the Agency disregarded CSR § 9-71 requiring maintenance of a 40-hour work week. That rule sets the basic standard for the "Hours of Work" section in Rule 9, and states "[t]he five (5) day forty (40) hour week shall be the standard work week for employees of the Career Service." The rules following that general statement empower the mayor and appointing authorities to deviate from that standard in an emergency or when efficiency dictates a different schedule. CSR §§ 9-72 to 9-80. Other rules control pay for overtime hours, pay differentials, and stipends, all of which specifically authorize pay practices for variations in the standard work schedule. See CSR §§ 9-50, 9-60, 9-90. A single rule cannot be interpreted in isolation from its context. Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2441 (2014).

Rule 9 as a whole permits agencies to pay and schedule their employees in accordance with the standards adopted by the board. In addition, OHR Professional Latoya Linzey testified that the standard work week means that exempt employees get paid a salary based on forty hours a week, even though "your duties at times require you to work above that threshold." [Linzey, 3:44 pm.] Finally, the position classifications of the other two exempt employees in the Safety Division include in their description of the working environment, "subject to long irregular hours". [Exhs. F-10, U-7.] While that is not included in Appellant's classification, it is clear that forty is not the outside limit of work hours that can be required for exempt employees, and even clearer that the rule is not intended to establish an employee right to work a maximum of forty hours a week. See Minnick v. City and County of Denver, 784 P.2d 810 (Colo.App. 1989) (holding that an

intent to establish a basis for liability must be clearly expressed in an ordinance). I conclude that the Agency did not violate § 9-91 by requiring Appellant to perform standby duty in addition to her regular forty-hour work week.

D. Violation of City Charter provision

Finally, Appellant contends the Agency violated the Charter's provision mandating like pay for like work. Denver City Charter, § 9.1.1. In the absence of evidence that Appellant was being paid less for performing like duties, this claim is without merit.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I order as follows:

1. The issue of Appellant's proper classification status under the FLSA is deferred for resolution by the DOL Wage and Hour Division, and
2. Appellant failed to prove that the Agency violated CSR §§ 9-55, 9-93 or 9-71 by its decision to deny her overtime under the Career Service Rules, Charter, and other authorities cited by Appellant.

Dated this 5th day of June, 2017.



Valerie McNaughton
Career Service Hearing Officer