

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

Consolidated Appeal Nos. 28-08, 29-08, 30-08, 31-08, 32-08, 46-08

DECISION AND ORDER

IN THE MATTER OF THE CONSOLIDATED APPEALS OF:

**CLINT DOSTAL, MICHAEL PICKETT, JAMES D. ADAMS, BRIAN K. PRIDDY,
SAMMY BARBOZA, ROBERT J. HALES, Appellants,**

vs.

**DEPARTMENT OF AVIATION, DENVER INTERNATIONAL AIRPORT,
and the City and County of Denver, a municipal corporation, Agency.**

The hearing in these consolidated appeals was held on August 8, 2008 before Hearing Officer Valerie McNaughton. All Appellants were present throughout the hearing, and were represented by Appellant Robert J. Hales. The Agency was represented by Assistant City Attorney Robert Nespor. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following order:

I. STATEMENT OF THE CASE

These consolidated appeals were filed by six employees of the City and County of Denver's Department of Aviation. Appellants filed separate grievances of the Agency's denial of shift differential pay for all hours worked in their schedules. [Exh.s 1 – 5, 10.] The Agency denied the grievances. [Exhs. 6, 7, 13.] Appellants filed appeals of the Agency action pursuant to Career Service Rule (C.S.R.) § 19-10 A.2.b.i., alleging that the denials violated C.S.R. § 9-61, and negatively impacted their pay. The appeals of Appellants Clint Dostal, Michael Pickett, James D. Adams, Brian K. Priddy and Sammy Barboza were consolidated for hearing on May 29, 2008. On June 9, 2008, Appellant Robert J. Hales filed an appeal based on the same issue, and it was consolidated with the other five appeals by order dated July 31, 2008.

Agency Exhibits 1 – 14 and Appellant's Exhibits B, C and F were admitted by stipulation of the parties. Appellant's Exhibits I - K were admitted during the hearing.

II. ISSUES

This appeal raises the issue of whether Appellants proved by a preponderance of the evidence that the Agency violated C.S.R. § 9-61, issued May 19, 2006, by failing to pay Appellants shift differential pay for all hours worked in their work schedules.

III. FINDINGS OF FACT

Appellants Dostal, Pickett, Adams, Priddy and Barboza are Electricians in the High Tech unit within the Agency's Operations Division. At all times relevant to this appeal, their regular work schedules have been 8:30 p.m. to 7:00 a.m., hours which span the evening and night shifts.¹ Prior to the Agency action appealed from, Dostal and the other electricians were paid the 12% night shift incentive differential rate for all ten hours in their work schedule, including the two and a half hours between 8:30 and 11:00 p.m. that are in the evening shift.

Appellant Hales is an Aviation Operations Representative with the Agency. His regular work schedule is 12:00 noon to 10:00 p.m. Prior to the March 2008 memo which led to this appeal, Mr. Hales was paid the 7% evening shift differential rate for his entire ten-hour shift, although the first three hours fell within the day shift.

Before the March memo, the Aviation Department paid its employees evening or night incentive pay for all hours of their work schedule if 1) they performed an operational function, and 2) at least one-half of their work schedule fell within either the evening or night shift.

On March 14, 2008, the Agency issued a notice to all employees that it would "begin using a new interpretation for shift differential eligibility . . . based on two key factors: only employees performing 'operational' functions are eligible for shift differential, [and] any work performed between 3:00 p.m. and 11:00 p.m. is eligible for evening shift differential, and any work performed between 11:00 p.m. and 7:00 a.m. is eligible for night shift differential." [Exh. 9-1.] Thus, operational employees were henceforth to be given incentive pay only for hours worked during the Agency's evening or night shifts, rather than for their entire work schedules.

The parties stipulated that, in keeping with this new interpretation, the five Electrician Appellants were thereafter paid the 7% evening differential for the time worked from 8:30 p.m. and 11 p.m., and the 12% night differential for the remaining 7 ½ hours of their work schedules. As a result, they lost the additional 5% incentive pay for the first two and a half hours of their work schedule. Appellant Hales was paid evening differential only for his hours between 3 p.m.

¹ Their 10-hour work schedules include a half-hour lunch break, for which they are not paid. [Testimony of Agency Human Resources Manager Jim Thomas.]

and 10 p.m. His pay was reduced by the 7% incentive pay for the first three hours of his work schedule, since those hours are on the day shift.

Agency Human Resources Manager Jim Thomas testified that the Aviation Department operates the Denver International Airport, which functions 24 hours a day and seven days a week. The Agency has six divisions: Maintenance and Engineering, Operations, Business and Technologies, Business and Revenue Development, Marketing and Public Relations, and the Office of the Manager of Aviation. The Department of Aviation has identified three work shifts for purposes of determining shift differential pay. The day shift is 7 a.m. to 3 p.m., evening shift is 3 to 11 p.m., and night shift is 11 p.m. to 7 a.m. [Exh. 9-3.] The Agency uses over 170 different work schedules for individual employees to accommodate its complex operational needs. Calculation of pay involves exemption status changes, numerous non-standard work schedules, and different rates of pay for overtime, on-call status, and shift differential.

Until March 2008, payroll was done by payroll staff using paper time cards and leave slips. Shift differential was paid to operational employees whose schedules had more than 50% of their hours in the evening or night shifts. This was done to simplify the payroll task given the number of variables affecting airport pay. Since schedules change frequently to accommodate airport needs, Mr. Thomas determined that any other payroll method would be all but impossible.

In late 1999, the city purchased the Kronos electronic timekeeping system, Release 3.4, to comply with the requirements of CSR Rule 9 for time accounting. The system also provided the capability of master schedule management. In 2007, the city bought the Kronos upgrade, known as Release 5.2, which added automated payroll and audit functions.

In 2006, the Career Service Board amended the 2004 shift differential rule twice. [CSR § 9-61, effective April 1, 2006, amending § 9-91, and § 9-61, effective May 19, 2006.] The May rule is the amendment in effect at all times relevant to this appeal.

Mr. Thomas testified that there was a lot of confusion about how the amended rule was to be applied. That year, a team in Aviation, including Mr. Thomas, drafted various scenarios to make sure the Airport was applying shift differential in keeping with the intent of the rule. That effort was triggered by the Agency's need to write software rules so that Kronos 5.2 could accurately calculate pay, including incentive pay.

In September 2006, the team began a series of meetings with Career Service Authority Employee Relations staff Pete Garritt and Roberta Monaco to present their scenarios and gain a better understanding of the rule. Linda

Misegadis from the Controller's Office also attended the meetings to monitor the efforts of the airport team with the intent to have the rest of the city adopt the resulting Kronos application. The team met with CSA for about a year, during which time the team refined their scenarios a number of times to accurately apply the rule to airport work schedules. CSA staff explained that subsection C.2. was intended to limit an agency's definition of an evening or night shift to those periods including 50% or more of hours from either 3 to 11 p.m. or 11 p.m. to 7 a.m. As a result, the Airport team realized their practice of applying the 50% standard to individual work schedules was incorrect.

Once the team's scenarios conformed to the CSA interpretation of the rule, it obtained approval from senior management to implement the new interpretation of shift differential. The team then outlined the changes needed to Kronos 5.2 for the system developers, who then wrote the program applying those changes. The change was first implemented in December 2007 with the payroll staff, and was thereafter applied to other Agency work units.

On March 16, 2008, the Agency distributed a memo announcing that, effective that day, it would begin to use the new interpretation of shift differential in all of its divisions. [Exh. 9.] Day, evening and night shifts within the Agency were stated to be the same time frames as the standards in § 9-61 C. 2. Shift differential would be paid 1) only to operational employees, and 2) only for time worked during the evening or night shifts. This was intended to make the Agency's payment practice consistent with the rule, and permit Kronos 5.2 to electronically calculate pay including shift differential. As a result, the Agency stopped paying shift differential based on an individual employee's work schedule, and instead paid it for hours worked during the Agency-defined evening and night shifts. Operational employees thereafter earned evening shift differential only for the hours they worked between 3 p.m. and 11 p.m. in their regular work schedule. Night shift differential was paid only if operational employees worked from 11 p.m. to 7 a.m. in their regular work schedule.

Mr. Thomas testified that the Aviation Department was the first to convert to the electronic payroll function provided by the Kronos update. Thereafter, the rest of the city adopted the Kronos configuration developed by the Airport's system developers, which included the new interpretation of shift differential. [Testimony of Mr. Thomas.]

As a part of his duties as CSA Human Resources Supervisor, Pete Garritt has had a significant role in drafting proposed amendments to the Career Service Rules for consideration by the Career Service Board from 2004 to the present. He testified that the shift differential rule has changed substantially from 2004 to the present.

Under the 2004 rule, if an eligible employee worked shifts that had more than 50% of its time between certain specified hours, differential was paid "for the

hours worked during this entire shift.” [C.S.R. § 9-91 C., Nov. 20, 2004.] On April 1, 2006, the rule was amended to permit an agency to establish day, evening, night, and snow emergency shifts for its various work units, division or departments. A shift was eligible for differential if it was an evening shift starting from 1:30 to 9:59 p.m., or a night shift starting from 10 p.m. to 5:59 a.m. Shift differential was to be paid to eligible employees who are “assigned to work an eligible shift for all hours worked during such eligible shift.” [C.S.R. § 9-61 D, issued Apr. 1, 2006.]

Mr. Garritt observed that the April 2006 version did not work well, as it was found to be susceptible to manipulation of shift start times. On May 19, 2006, the rule was amended again. Mr. Garritt stated that this version of the rule was intended to compensate employees for the inconvenience of working certain hours, and allow agencies some flexibility in defining their evening and night shifts, as long as 50% of the scheduled hours were within the evening or night shifts. The new rule used the same words as the April amendment to describe the hours to be paid at the differential rates. [CSR § 9-61 H., issued May 19, 2006.] At the time of the hearing, a fourth version of the rule was pending before the Board. Under that rule, “shift differential shall be paid for all hours worked by an eligible employee in a work day” under certain stated conditions. Between the date of the hearing and the issuance of this decision, that amendment was passed by the Board. [C.S.R. § 9-61, Sept. 12, 2008.] This appeal raises issues under the rule in effect on May 19, 2006.

During the 2006 – 2007 meetings with the Agency team, Mr. Garritt advised the team that the rule intended to authorize differential pay only for the hours worked during the agency-defined evening and night shifts. He testified that this was the interpretation used by the rest of the city agencies, although he observed there continued to be some confusion about how the rule was to be implemented in various agencies, including the Department of Aviation.

The parties stipulated that as a result of the March 2008 memo, the five Electrician Appellants are now paid the 7% evening differential for 2 ½ hours of their shift, instead of the 12% night differential. They also stipulated that Appellant Hales is now paid no evening differential for the three hours from noon to 3 p.m. in his work schedule.

Appellant James Adams testified that he lost 1% of his base pay, and 1 ½ % of his overtime pay as a result of the Agency implementation of the interpretation contained in the March memo. He stated that 95% of the airport maintenance shifts are 6 a.m. to 4 p.m., 4 pm. to 2:30 a.m., and 8:30 p.m. to 7 a.m. Under the Agency’s new interpretation of the rule, Mr. Adams has observed that the airport is paying more for salaries because many evening shift employees are now earning night shift differential for the hours they work into the night shift.

James Johnson is an Aviation Emergency Dispatcher who operates the police radio band at the airport, working an eight or ten-hour shift. He is the only dispatcher working at the airport. He testified that he feels penalized for working at the airport, since he has earned a total of \$400 to \$500 less in salary than other city dispatchers as a result of the March change to shift differential. He does not know if the other dispatchers' employing agencies have yet converted to Kronos, or whether their individual work schedules affected their shift differential.

ANALYSIS

As proponents of the order that the Agency's policy on shift differential violates § 9-61, Appellants bear the burden of proof on that issue. C.R.S. § 24-4-105(7); *cf. Dept. of Institutions v. Kinchen*, 886 P.2d 770, 707 (Colo. 1994).

The relevant Career Service Rule on shift differential permits agency appointing authorities to establish work shifts "based on the business needs of the department or agency." § 9-61 A. "The four work shifts that may be used are the: 1. Day shift; 2. Evening shift; 3. Night shift; and 4. Snow emergency shift." § 9-61 B. The start and end times of evening, night, and snow emergency shifts must be provided in writing to the Personnel Director. § 9-61 E. The rule also mandates that:

To be considered eligible for shift incentive differential, a shift must:

1. Be regularly scheduled as part of the normal business operations of the department or agency . . . and
2. Meet the following definitions of night or evening shifts:
 - a. A night shift must have at least fifty percent (50%) of its hours occur between 11:00 p.m. and 7:00 a.m.
 - b. An evening shift must have at least fifty percent (50%) of its hours occur between 3:00 p.m. and 11:00 p.m. . .

§ 9-61 C.

"Shift incentive differentials shall be paid to eligible employees who are assigned to work an eligible shift for all hours worked during such eligible shift." § 9-61 F.1. The differential rate is to be paid "for the hours worked during the entire evening [or night] shift." § 9-61 H.

Thus, differential pay is given only if both the employee and the shift assigned are eligible under the rule. It must then be determined whether the employee is paid the additional amount for all hours of his work schedule, or only those hours the Agency defines as the evening or night shift. Appellant claims the former is the correct interpretation, and the Agency claims the rule intends the latter reading.

The parties agree that the Agency defined its evening shift as 3 to 11 p.m., and the night shift as 11 p.m. to 7 a.m. [Exh. 9-3.] It is not disputed that the Agency uses over 170 different assigned work schedules to handle the varied functions of the 24/7 international airport. The Agency concedes that Appellants are employees eligible for shift differential under subsection F.2. The Agency paid Appellants differential for their entire work schedules until March 2008, after which they were paid only for those hours worked that were within the Agency's definition of a qualifying evening or night shift. The only issue is the hours for which differential should be paid.

Appellants argue they should be paid for all hours of their work schedule. They state that the change in the Agency's shift differential policy violates § 9-61 by failing to apply the 50% standard to individual work schedules. In support, they cite subsection C, which requires that a night or evening shift must have at least 50% of its hours between certain stated times. Since at least half of their hours were in the evening or night shifts, they reason, they should be paid differential "for all hours worked during such eligible shift", in accordance with the language of subsection F.

Appellants also argue that the change announced in the March memo was inconsistent with past practice under the rule, and occurred to accommodate the new computer upgrade, rather than to provide consistency with § 9-61. They believe that the shift differential rule is intended to compensate employees for working a certain shift, rather than only particular hours. Appellants state that denial of differential for their hours outside the evening and day shifts effected an unauthorized modification of the Career Service Rules.

The Agency counters that the rule requires extra pay only for the hours worked during the Agency-defined evening or night shifts. It states that the Agency's new interpretation merely conformed its practice with § 9-61, which requires a three-step process: 1) determine how the Agency defines an evening and night shift, 2) determine if the defined shifts are eligible for shift differential under subsection C, and 3) pay differential only for those hours worked during an eligible evening or night shift, in accordance with subsection F and H.

Words and phrases in a rule "shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." C.R.S. § 2-4-101.

Under the Career Service Rules, Rule 9 is intended "to explain the establishment and administration of pay practices, except merit increases, and hours of work." CSR Rule 9, Purpose statement. "Pay practices include . . . differentials." § 9-10 A.

An analysis of the shift differential rule reveals that the April 2006 amendment significantly changed the concept of a shift eligible for differential pay. Before that time, a shift was simply defined as "a period of work regularly scheduled by an agency or department". § 9-91 A. Under the May 2006 rule, an eligible evening or night shift was required to cover at least half of certain specified hours. Differential was to be paid "to eligible employees who are *assigned to work an eligible shift* for all hours worked *during such eligible shift*." § 9-61 F. (emphasis added). The subsection specifying the rate of pay used similar language: the differential rate was to be paid "for the hours worked *during the entire [evening or night] shift*." § 9-61 H. These phrases are contained in the same rule and describe the same concept - the period of time for which differential is to be paid. Terms which have been statutorily defined must be given that definition whenever it appears in the statute. C.R.S. 2-4-101; R.E.N. v. City of Colorado Springs, 823 P.2d 1359 (Colo. 1992). See also Howe v. People, 496 P.2d 1040 (1972) (Use of words with common meaning does not render a statute internally inconsistent). I find that subsection F and H mean the same thing: differential should be paid for hours worked during an eligible shift as defined in the rule.

An appointing authority has the power to establish a ten-hour a day, four days a week schedule "[w]hen the work program of an agency is such that the interests of the City as well as the efficiency of the organization can better be served by such a schedule." CSR § 10-20. "Appointing authorities may establish different work shifts for work units, divisions or departments based on the business needs of the department or agency." § 9-61 A. Here, the Agency has established a ten-hour plan for the work units to which Appellants belong. It has also assigned different reporting times to Appellants based on their duties and the needs of the Agency. See CSR. Rule 1, Staggered work schedule.

In his capacity as CSA staff, Mr. Garritt has been involved in the rule-making process on shift differential since 2004. He testified that the rule was passed to compensate employees who work certain hours of the day. Both 2006 amendments were intended to correct perceived abuses that avoided payment of differential by manipulation of work schedules. The April amendment defined an eligible shift as that with certain start times. The May amendment refined that definition: an evening or night shift was stated to be one that has half its hours between certain times. He testified that defining an eligible work shift was particularly important given the wide variety of work schedules used by city agencies to perform their work.

The evidence is clear that the word "shift" in the context of differential pay is not the same as an individual employee's work schedule. The Personnel Director must be notified in writing of the start times of an agency's evening, night and snow emergency shifts. § 9-61 F. Of the 170 work schedules in use at the Agency, few if any are identical to the hours defined by the Agency as the day, evening, and night shifts under § 9-61. [Testimony of Thomas; Adams.] Since subsection C defines the phrase "eligible shift", that definition must be applied in determining the meaning of the same phrase when used in subsections D and F of the rule. Id.

The Career Service Board's recent amendment of the rule further supports this interpretation. The rule now states that differential "shall be paid for all hours worked by an eligible employee *in a work day*". § 9-61, effective Sept. 14, 2008. Clearly, when the rule is intended to require differential for an employee's work day or schedule, it does not use the word "shift" in describing the hours for which differential must be paid. Where a rule-making body amends a rule by using familiar words and phrases with a different meaning than the original, there is a presumption that the amendment was intended to change the meaning of the rule. AmJur Statutes § 132 (Sept. 2008); Bugajewitz v. Adams, 228 U.S. 585 (1913).

Contrary to Appellant's argument, the Agency's initial misinterpretation of the rule does not require reversal of its March action correcting that error. Likewise, the evidence does not support Appellant's argument that the denial of pay was caused by the Agency's purchase of a new computer program, rather than

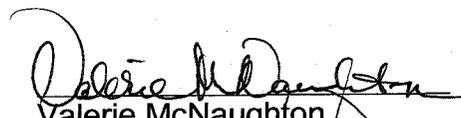
While the Kronos 5.2 electronic pay program served as the impetus to seek consistency with the city on shift differential pay, it did not control the Agency's interpretation of the rule. The March memo merely implemented the shift differential rule, in keeping with the intent of that rule.

I therefore find that the Agency did not violate CSR § 9-61 by implementing the March 2008 change in its interpretation of that rule, or by its non-payment of evening and night differential pay to the Appellants for the hours specified above.

Order

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that the Agency's denials of Appellants' grievances are AFFIRMED.

Entered this 22nd day of September, 2008.


Valerie McNaughton
Career Service Hearing Officer