



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Sean McManus,
Department of Environmental
Protection

Grievance Appeal

CSC Docket No. 2020-835

ISSUED: APRIL 17, 2020 (HS)

Sean McManus, a Conservation Officer 3 with the Department of Environmental Protection (DEP), represented by David Beckett, Esq., appeals the denial of his grievance concerning the rate of cash overtime compensation for emergency-related work.

By way of background, DEP, on or about May 23, 2019, declared an exceptional emergency for the period June 1, 2019 through August 31, 2019 for the provision of law enforcement support by employees serving in the titles of Conservation Officer 2 (salary range K21) and Conservation Officer 3 (salary range FA19).¹ These are non-exempt, non-limited titles (NE), meaning that they have irregular or variable work hours and are subject to the provisions of the Fair Labor Standards Act. *See N.J.A.C. 4A:3-5.2.* The appellant was one of several employees approved for emergency-related work. Pursuant to *N.J.A.C. 4A:3-5.7(d)*, the employees were deemed to have a 40-hour workweek for purposes of determining the rate of cash overtime compensation for the emergency-related work. The appellant filed a grievance, claiming that the determination of the rate should have been based on a 35-hour workweek as that was his workweek. DEP maintained that it followed this agency’s guidelines. Following a departmental grievance hearing, the Hearing Officer denied the grievance, finding that since DEP was only compelled to compensate NE employees for overtime after 40 hours had been worked, it was appropriate that the rate be based on a 40-hour workweek.

¹ The appellant’s salary has been \$90,390.09 (salary range FA19, step 10) since July 2018.

On appeal to the Civil Service Commission (Commission), the appellant contends that *N.J.A.C.* 4A:3-5.7(d) is void in light of P.L. 2019, c. 32, which increased the minimum wage and amended *N.J.S.A.* 34:11-56a1(g) to include the State as a covered employer under the Wage and Hour laws. The appellant maintains that the amendment requires all employers to pay overtime at a rate that is one and one-half times the employee's regular rate, which, he maintains, must be based upon a 35-hour workweek in this case. He requests that the Commission reverse the Hearing Officer's decision and revise its own regulations to conform to the applicable law.

In response, DEP notes that Conservation Officers are eligible for overtime at their "regular rate" after accruing 40 hours per week. In support, DEP points to *N.J.A.C.* 4A:3-5.2, which defines "[r]egular rate," in pertinent part, as "the hourly proration of the employee's annual base salary" and provides that "[e]mployees in covered non-limited titles (NE) shall be deemed to have a 40-hour workweek for determining the hourly proration." Thus, DEP maintains that it is following Civil Service regulations.

In reply, the appellant reiterates that the rate of cash overtime compensation should have been based upon a 35-hour workweek and notes that *N.J.S.A.* 34:11-56a4 requires that the payment of overtimes rates be based upon the regular hours worked each week.

CONCLUSION

N.J.A.C. 4A:2-3.7(f)1 provides that in grievance matters, the employee shall have the burden of proof. *N.J.A.C.* 4A:2-3.7(b) provides that grievances may be appealed to the Commission. The regulation further provides:

1. The Commission shall review the appeal on a written record or such other proceeding as the Commission directs and render the final administrative decision.
2. Grievance appeals must present issues of general applicability in the interpretation of law, rule, or policy. If such issues or evidence are not fully presented, the appeal may be dismissed without further review of the merits of the appeal and the Commission's decision will be a final administrative decision.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level. Moreover, in considering grievance actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by

statute to the appointing authority. Generally, the Commission will not disturb appointing authority determinations in grievance proceedings unless there is substantial credible evidence that such determinations were motivated by invidious discrimination considerations, such as age, race or gender bias, or were in conflict with Civil Service regulations.

N.J.A.C. 4A:3-5.7(d)1i provides that when an agency head declares an exceptional emergency involving a critical service disruption that poses a danger to health or safety, the agency head may authorize cash overtime compensation for non-limited employees in titles with established salary ranges below range 32 performing emergency-related work. For these circumstances, employees in non-limited titles shall be deemed to have a 40-hour workweek.

In this matter, the issue is actually not whether DEP followed Civil Service regulations, namely *N.J.A.C.* 4A:3-5.7(d)1i. It undoubtedly did. Rather, the issue is the appellant's claim that the regulation itself is void when set against certain statutory provisions outside the Civil Service Act, namely *N.J.S.A.* 34:11-56a1(g) and *N.J.S.A.* 34:11-56a4. The Commission does have the right and duty to interpret and apply statutes, including those outside the Civil Service Act, to resolve the dispute before it. *See Matter of Allen*, 262 *N.J. Super.* 438, 444 (App. Div. 1993); *In the Matter of Edison Cerezo, Police Officer, West New York*, Docket No. A-4533-02T3 (App. Div. October 15, 2004); *John Kowaluk v. Township of Middletown*, Docket No. A-4866-02T1 (App. Div., August 6, 2004); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000). *Compare, In the Matter of Sybil Finney, Judiciary, Vicinage 8, Middlesex County* (MSB, decided March 24, 2004) (It was determined that no jurisdiction existed to review a Judiciary employee's claim that the denial of a reasonable accommodation request violated the ADA, where the appeal was based *exclusively* upon an alleged ADA violation). However, it will only do so where such statutes implicate Civil Service law and regulations.

Upon review, the Commission here does not find the appellant's argument persuasive. While it is true that *N.J.S.A.* 34:11-56a1(g) defines "[e]mployer" to include the State, it must be noted that it is a definition relative to *minimum wages*. *N.J.S.A.* 34:11-56a4 similarly concerns the *minimum wage rate*. As the appellant clearly is not a minimum wage employee, his reliance on these statutory provisions is inapposite. Moreover, from a workweek perspective, titles designated as NE and titles designated as 35-hour fixed are not strictly equivalent, as, it appears, the appellant would have it. For example, NE titles are compensated one salary range higher than 35-hour fixed workweek titles in recognition of the fact that non-limited titles do not have a fixed workweek. *See N.J.A.C.* 4A:3-4.9(g). Thus, the appellant's apparent effort to equate a non-limited workweek designation with a fixed 35-hour workweek is not persuasive. Further, employees in NE titles are only eligible for cash overtime compensation for time worked in excess of 40 hours per week. Thus, it is appropriate that the rate of cash compensation for emergency-related work

performed by such employees on an overtime basis be based on a 40-hour workweek. The appellant has not cited to any specific prohibition on such practice. Accordingly, there is no basis to disturb the Hearing Officer's decision or find that the Commission's regulations are void.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2020



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

c. Sean McManus
David Beckett, Esq.
Robin Liebeskind
Kelly Glenn
Records Center