

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

Appeal No. 161-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GENETTE A. TONJES, Appellant,

v.

Agency: Department of Public Works, Parking Management Division, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Genette A. Tonjes, shall be referred to as "Appellant." The Department of Public Works, Parking Management Division, shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". Together they will be referred to as the "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held December 5, 2000, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Paul A. Baca, Esq. The Department and City were represented by Robert D. Nesor, Esq., with Jennifer Vars as the advisory witness

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Appellant:

Appellant

The following witnesses were called by and testified on behalf of the Agency:

Nola Owens, Jennifer Vars

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

Exhibits A – K,

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 1-6.

The following exhibits were admitted into evidence by stipulation:

Exhibits A – K, 1 - 6

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

The Hearing Officer ordered the supplementation of the record with the following documents:

Enforcement Unit, Voluntary Overtime Record 2000; Voluntary Overtime Sheets posted during the period March 9, 2000 through November 29, 2000 (other than those previously submitted as Exhibits F – K).

NATURE OF APPEAL

Appellant is appealing the denial of her grievance wherein she contested the March 2000 change in voluntary overtime policy contrary to Parking Management Operations Policies and Procedures 89-100-04 and 91-200-05 which required voluntary overtime be awarded by seniority. Appellant is requesting compensatory time, to the maximum amount permitted, and then monetary relief for the remainder, for all overtime she has requested since the change in the Division's overtime policy in March 2000.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this matter?

Whether the Hearing Officer has the power to grant the relief requested?

Whether the Agency had a formal overtime policy that was violated or improperly modified in March/April 2000?

What is the proper interpretation of CSR §10-36 a) and Public Works Rule

10-P002 b) and whether the new overtime policy violates either or both of those Rules?

Does the Hearing Officer have subject matter jurisdiction to consider Appellant's overtime requests that were made and denied after the filing of this appeal as a continuing matter or did Appellant have to grieve and appeal each and every one of her overtime requests that were denied as they were denied?

What is the appropriate relief to be granted, if any?

PRELIMINARY JURISDICTIONAL MATTERS

The Agency filed a Motion to Dismiss the appeal because Appellant did not allege retaliation or harassment in her initial grievance, that Appellant included the rights of other co-workers in her appeal, that Appellant did not timely raise her allegations of a violation of CSR §10-36, and because Appellant requested relief which is not within the Hearing Officer's power to grant (i.e., money damages). The Hearing Officer, being fully advised on the matter, granted the motion in part and dismissed the retaliation and harassment claims and the claim filed on behalf of her co-workers, denied the motion in part as it related to the alleged violation of CSR §10-36, and reserved ruling in part on the issue of monetary compensation for the lost overtime.

FINDINGS OF FACT

1. Appellant is employed by the Department as a Vehicle Control Agent in the Parking Management Division. She has been with the Department for twenty-four years.
2. Appellant's supervisors in April 2000 were Darrell Delmont, Damian Padilla and Pat De Leon. Nola Owens was the Program Administrator. Jennifer Vars was the Assistant Director. John Oglesby was the Director.
3. Appellant works the 7:15 a.m. to 4:00 p.m. shift. Her duties include issuing parking violations, marking vehicles, processing abandoned vehicles, and going to court. From April through November, she works a special assignment following the street sweepers. From December through March, Appellant works an assigned "beat" that may change every week.
4. Parking Management Operations Policy and Procedures Number 89-100-94 requires that all policies appropriate to the Parking Management staff be distributed to employees by their supervisors, who are required to sign, date and return a statement to the Director's office that affirms the supervisor has informed the employee(s) of the policy. The Policy also requires that finalized policies be posted on a clipboard on appropriate bulletins boards for staff information. (Exhibit C)

5. On May 10, 1991, Parking Management Operations Policy and Procedure Number 91-200-05 established the procedure for "Special Events/Saturday Detail Scheduling." Specifically, it provides that the work assignments will be based upon job classification, seniority based on total length of continuous Career Service employment, and the needs of the agency. (Exhibit D)

6. On September 23, 1994, the Department issued Policy Number 10-P002, which is entitled "Seniority: Shift, Overtime Assignments, and Granting Vacation Leave." According to the Policy, when overtime assignments need to be filled, supervisors shall ask for volunteers, notify volunteers on a rotating basis with the most senior volunteer being contacted first, and, should there not be enough volunteers, the least senior employees shall be assigned overtime first. (Exhibit 6)

7. Traditionally, the Department gives overtime assignments for special events, such as Rockies and Broncos games, as well as Saturday assignments.

8. Prior to April 2000, voluntary overtime assignments were made on a seniority basis. In April 2000, the assignment of voluntary overtime was changed by Nola Owens and Jennifer Vars to a rotating basis. Seniority was no longer used as a basis.

9. The change in the Department's overtime policy was not formalized by any written policies or procedures.

10. The sign-up sheets for overtime state, "If there are more volunteers than needed assignments will be based on seniority...." (See, e.g., Exhibits F-J, supplemental exhibits) This notation is included on all the overtime sheets, including one dated March 17, 2000, which precedes the "change" in policy. (Supplemental exhibit)

11. Appellant is the third most senior employee in the Enforcement Unit. She is the most senior employee who applies for voluntary overtime on a regular basis (See Exhibit 5 and supplemental exhibits).

12. Appellant volunteered for overtime 15 times and was assigned voluntary overtime 7 times between April 25, 2000 and June 11, 2000. (Exhibits F-J) She volunteered for overtime thirty-four times from June 11, 2000 through December 2, 2000. She was assigned voluntary overtime 20 times. She was cancelled as "ineligible" by Ms. Owens on July 12 and 14, and possible other dates as well.¹ She was assigned to mandatory overtime once. (Supplemental exhibits)

¹ According to the Agency's notation on its voluntary overtime compellation, and as stated in the Agency's closing argument, Appellant was on worker's comp at the time. Appellant denies this assertion in her closing argument and claims that she is entitled to overtime for the entire period from April 25 through December 2, 2000, inclusive. Because there was no testimony as to this issue during the hearing, and the Department did not include the voluntary overtime sign-up

13. Ms. Vars and Ms. Owens were unaware of the written Departmental policy regarding voluntary overtime. They changed the "policy" after consultation with other supervisors and managers. Ms. Owens believed the "E-team" (a group of employees) was notified of the change sometime prior to April 25, 2000. Appellant, who was the secretary for the E-Team at the time, testified that management never notified the E-team of the change.

14. Ms. Vars testified that she had spoken with other employees, including Scott Dykstra, Joe Richardson, and Mr. Mercure about the new system. They liked it. Mr. Mercure has six years seniority while Mr. Richardson and Mr. Dykstra have five years of seniority as compared to Appellant's 25 years.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Regulations

CSR §18-10 A. defines a grievance as:

For purposes of the Career Service personnel rules the term "grievance" shall mean an issue raised by a Career Service employee relating to the interpretation of rights, benefits or conditions of employment as contained in the Career Service personnel rules, the Charter of the City and County of Denver or ordinances relating to the career service.

CSR §18-12 provides, in pertinent part:

2. **Filing with Supervisor:** The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) calendar days give the employee dated, written notice of a decision....
3. **Filing with Agency Head:** If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) days) after receiving the decision of the immediate supervisor....

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in

sheets for mid-July through August, the Hearing Officer cannot make a finding of fact about it at this time.

writing to the head of the agency or designee no later than ten (10) calendar days after the supervisor's response was due....

The head of the agency or designees shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate or mailing or certificate of hand delivery....

4. Filing with Career Service Authority: If the employee still feels aggrieved after receipt of this decision, or the agency has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of RULE 19 APPEALS....

CSR §19-10 d) governs the actions that are subject to appeal before the Hearing Officer. The version in effect when Appellant filed her appeal provides:

- d) Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of Section 18-10 Grievance Procedure.

CSR § 16-36 concerns the administration of overtime work. It provides, in relevant part:

- a) Assignment of overtime work: Except in cases of emergency all overtime work shall be authorized and assigned in advance by the appointing authority, or by any supervisor to whom this responsibility has been delegated. Whenever possible, such overtime shall be offered to **volunteers on a fair and equitable basis** before assignments are made to non-volunteers.... (emphasis added)
- d) Departmental regulations: Departments and agencies may adopt departmental or agency regulations to implement paragraph a)...of Subsection 10-36 Administration of Overtime Work.

Public Works Department Policy 89-100-04 requires the timely distribution of policies to appropriate Parking Management staff.

Parking Management Operations Policy and Procedures Policy 91-200-05, effective May 10, 1991, provides, in relevant part:

- I. Purpose:

The purpose of this Policy is to expand the policies and procedures followed in making regular work detail assignments to include Saturday assignments, and special event assignments. Parking Management Policy # 89-200-03 is hereby abolished and is replaced in its entirety by this policy.

II. Narrative

- a. All work detail assignments will be made by the Director in accordance with the following criteria:
- Volunteers based on job classification.
 - **Seniority based on total length of continuous employment in the Career Service;** and
 - The needs of the agency considering the nature of the assignment. (emphasis added)

Public Works Department Policy 10-P002, Seniority: Shift, Overtime Assignments, and Granting Vacation Leave, effective September 23, 1994, provides, in relevant part:

Policy

This policy is designed to outline how seniority shall affect shift and overtime assignments and bidding on vacation leave. Seniority is used here as city wide seniority. Where a tie results due to employees being hired on the same Career Service continuous service date, the tie breaker will be time-in-grade.

Procedure

2. **OVERTIME ASSIGNMENT:** With regard to overtime assignments, all employees may be required to work overtime as the need arises. Supervisors shall:
- a) initially ask for volunteers.
 - b) **notify volunteers on a rotating basis with the most senior volunteer contacted first,** or
 - c) if there are not enough volunteers and the need for overtime arises, employees shall be contacted based on seniority with the least senior employees contacted and assigned overtime first. (Emphasis added)

Analysis

The first issue is whether the Hearing Officer has jurisdiction to consider this grievance appeal. The Department cites three prior decisions, In the Matter of the Appeal of Patrick Shawn McGinley, Appeal; No. 127-88, In the Matter of the Appeals of Leonard F. Ortiz, Appeal Nos. 165-00 and 182-00, and In the Matter of the Appeals of Donnie D. Dollison, Appeal No. 141-00, in support of its proposition

that this Hearing Officer lacks subject matter jurisdiction to review this case because the Appellant is asking for the interpretation of an Agency policy, not the CSR. The Hearing Officer finds that these three cases are easily distinguishable from the instant case in that in this case involves the creation of a policy that is specifically required by CSR §16-32 d) in order to implement CSR §16-32, whereas the three cases cited by the Agency concern policies or actions that are not mandated by the CSR. They involve polices and procedures with regards to Executive Orders and/or the rights of third party employees, not those of the Appellant herself.

Because CSR §16-32d) requires that departments implement policies and procedures to implement the overtime rules contained in the CSR, the Hearing Officer has the power to review such policies and procedures to ensure that they are in fact in compliance with CSR §16-32. The Hearing Officer has subject matter jurisdiction to decide this matter.

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the *de novo* hearing and resolution of factual disputes. Turner v. Rossmiller, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is the appeal of a grievance, Appellant has the burden of proof in this matter.

By the credible evidence, Appellant has shown that the Department had a written policy concerning voluntary overtime, that such a policy had been in effect since 1991, that policy was changed in April 2000, and that the change was not in writing or done in compliance with Parking Management Operations Policy and Procedures 89-100-04.

The Department countered by producing evidence that the managers who changed the volunteer overtime policy were unaware of the written policy, that they talked to people of five or six years seniority, and they liked the new "policy," that the new policy met the definition of "fair and equitable" better, and that their Departmental needs were better met by rotating overtime, rather than by granting it in order of seniority. The Hearing Officer does not accept these explanations as reasonable and finds that the Department abused its discretion by changing the voluntary overtime policy in a way that violated the written voluntary overtime policy that has been in effect for ten years.

The Colorado Supreme Court has held that the terms and conditions contained in an employee manual are an implied contract if the employer's actions manifest to a reasonable person the intent to be bound to the handbook or manual. Continental Airlines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

The terms and conditions contained in the Department's policies and procedures concerning the terms of employment constitute the implied contract between Appellant and the Department. Included within the terms of this implied contract is Parking Management Operations Policy and Procedures Number 89-100-94. The clear intent of the Department when it issued this policy was that all policies and changes in those policies appropriate to the Parking Management staff must be in writing. Otherwise, there would be no requirement that the finalized policies be posted on a clipboard on appropriate bulletins boards for staff information.

In May 1991, Parking Management issued Operations Policy and Procedure Number 91-200-05 which establishes the procedure for "Special Events/Saturday Detail Scheduling." It provides three factors to be considered in assigning voluntary overtime: job classification, seniority based on total length of continuous Career Service employment, and the needs of the agency.

In April 2000, the Department modified its "policy" concerning assignment of voluntary overtime to omit the seniority component. This modification was not made in writing and was not distributed to employees or clearly posted as required by Policy and Procedure No. 89-100-94. Therefore, the "change" in policy is ineffective. Seniority must remain one of the three components, equally weighted with the other two.

The Department's managers claim that they were unaware of Policy No. 91-200-05. The Hearing Officer finds that this, even if it is to be believed, is not an excuse. The managers are employees of the Department and, as managers, are required to be aware of the Department's policies and procedures.

The Department's witnesses testified that they had provided notice to the employees of the change. There is no credible evidence to support this. In fact, the evidence submitted by the Department contradicts this statement. Even if the Department did not have to follow its own policies and procedures regarding changes in policies and publish them by posting them on a clipboard on bulletin boards and discuss them with individual employees, the Department at least had the obligation to modify the sign-up sheet with the new information. In fact, a review of the sign-up sheets submitted from before the alleged policy change in March and April 2000 recite the same language which continues to be used after April 27: "If there are more volunteers than needed assignments will be based on seniority...." With such a statement on the sign-up sheets, the Hearing Officer can only conclude that Appellant should have been awarded overtime every time she requested it, even when there were more volunteers than needed, because the Department was advising her of her right to overtime as part of her seniority every single time voluntary overtime was available throughout 2000.

The Hearing Officer also does not find the Department's witnesses' statements that the E-Team was aware of the change to be credible. Neither Ms.

Vars nor Ms. Owens could testify to actual knowledge that the E-Team was notified. Appellant, who happened to be the secretary for the E-Team during the relevant period (i.e., when changes to the "policy" were discussed), was in a much better position to know whether or not it was brought to the E-Team. The Hearing Officer finds the Appellant to be credible on this issue, particularly because, had Appellant been aware of the proposed changes to the voluntary overtime policy, in all likelihood, she would have made her disagreement known before it went into effect, thereby obviating the need for her to grieve the denial of overtime as established by the facts of this case.

Additionally, even if certain members of the E-team knew about the proposed change, this information is irrelevant. The Department's witnesses testified that the E-Team was not a party to the decision to modify the policy. Further, the only role for the E-Team, according to Ms. Owens, seems to be to offer an explanation of the change to an employee who does not understand it, not to offer input prior to the modification of the policy.

The Department also argues that the "new policy" better helps it meet the Department's needs. This is an equally faulty position since there is no indication that keeping seniority as a factor hindered the ability of the Department to either have a sufficient number of volunteers for overtime or its ability to assign overtime to the least senior persons when there were an insufficient number of volunteers.

The Department finally argues that using seniority as a factor is somehow not fair or equitable. To support this, its witnesses testified that they spoke with people of considerably less seniority than Appellant and they liked the "new policy." Of course they liked the new policy because, presumably, they no longer had to wait to achieve seniority, as Appellant had, in order to get all the voluntary overtime they wanted.

The Hearing Officer also rejects the argument that the new policy is *per se* fair and equitable. While it may permit short-tenure employees the opportunity to receive more voluntary overtime than under the written policy, the fact that seniority is a factor to be considered indicates that the fairness and equity of the system is viewed in a longer term than weekly. Conversely, the change in policy is not fair and equitable *vis à vis* a long-term employee, like Appellant, who had to wait for years to achieve her right to voluntary overtime as she accumulated her seniority.

Therefore, the Hearing Officer concludes that the Department improperly modified its policies and procedures regarding voluntary overtime. Appellant was not properly notified of the modification in writing. Since the terms of her employment were not properly modified, the policies and procedures in effect prior to April 25, 2000 remained in effect. She is entitled to the overtime she requested but did not receive.

The next issue is whether the Hearing Officer has jurisdiction to consider the

denial of Appellant's overtime requests that occurred after the original grievance had been denied and this appeal filed with the CSA. The Hearing Officer finds that, due to the continuing nature of the Department's enforcement of the modified policy that the Hearing Officer finds to be void *ab initio*, Appellant did not have to grieve and appeal the denials of her overtime each and every week after the denial of her first grievance by the Department. Given the continuing nature of the Department's stand that it was entitled to modify the policy as it had, it would have been pointless for Appellant to grieve the denial of her voluntary overtime once a week for six or more months, and then file appeals each and every time the Department denied the grievance, as it would have done in order to remain consistent in their position. The Hearing Officer has the subject matter jurisdiction to consider the entire period – from April 25 through December 2, 2000.

The final issue is the relief to be ordered for Appellant. The Hearing Officer has the general power to affirm, modify or reverse the Department's actions. CSR §19-27. In other words, the Hearing Officer can do anything that the Department could have done in the first instance had the Department not been acting arbitrarily and capriciously in denying the grievance. Therefore, the Hearing Officer could order that the Department award Appellant overtime every time she volunteers for it and/or Appellant be awarded compensatory time or overtime pay for the overtime wrongfully denied. Since the first option is mooted by the passage of time, only the second option will make Appellant whole.

The relief that is to be fashioned must make Appellant whole for the Department's failure to award her the volunteer overtime she requested. First, there is the issue of the total number of hours involved. Appellant is seeking recovery of the differential of overtime requested minus the overtime awarded for the period of April 25 through December 2, inclusive. The Agency claims that Appellant was not eligible for overtime for the period of July 12 through August 31 because of a worker's compensation claim. Appellant claims that she was eligible for overtime since the worker's comp claim involved an injury in January 1999 and Appellant had received a release to work as much as she desired, as evidenced by the fact that she worked overtime in March through mid-July 2000. No evidence was taken on this at the hearing. Therefore, the parties are instructed to resolve the issue of the amount of overtime involved. The Hearing Officer will retain jurisdiction over this matter and, if the parties cannot resolve the total number of hours involved between themselves, the Hearing Officer will conduct an additional hearing to resolve that matter.

Once the exact number of hours is determined, either by the parties themselves or after an additional hearing, the Appellant will be entitled to both compensatory time and a monetary award for the time that cannot be included as compensatory time.

According to the Agency, Appellant is limited to 48 hours of overtime as compensatory time. It is not clear how much compensatory overtime Appellant can

be awarded as of today since there has been no evidence of how much compensatory time Appellant has presently accumulated. The Hearing Officer, therefore, awards Appellant compensatory overtime up to 48 hours.

The Hearing Officer also awards Appellant overtime pay for the remainder of the differential between the overtime requested and the overtime previously awarded. There is some indication in the attachment to Appellant's closing argument that this amount is in excess of \$6,500.00. The Hearing Officer leaves it to the parties to review the figures and agree to the amount in issue. If they cannot do it, the Hearing Officer will hold a hearing on that issue.

The Agency argues that the Hearing Officer cannot award money to Appellant because she has no jurisdiction to award compensatory damages. However, the Hearing Officer finds that the Agency has confused the use of the term "compensation" for wrongly withheld overtime pay with "compensatory damages."

The Hearing Officer finds that the three cases cited by the Agency for the issue of compensatory damages to be irrelevant. These cases, In the Matter of the Appeal of Charles B. Brown, Appeal No., 147-99, In the Matter of the Appeal of Abbas Mazooji, Appeal No. 219-97, and In the Matter of the Appeal of Donnie D. Dollison, Appeal No. 141-00, all sound in tort. Those appellants were requesting compensatory damages for mental and emotional stress, discrimination, and harassment. Those claims are all based upon the allegedly tortuous conduct of co-workers and supervisors.

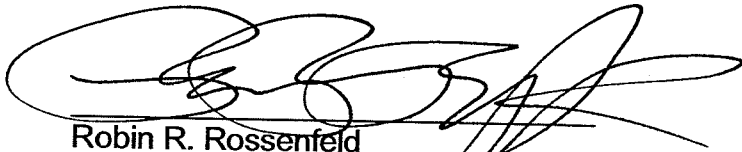
In this case, Appellant's grievance sounds in contract, not in tort. She is seeking to recover time and money she should have earned had the Agency not breached the terms of the employment contract by violating its written policies and procedures for voluntary overtime. Simply put, Appellant complied with the terms of the written policy by putting her name on the voluntary overtime sign-up sheets. The Department breached the employment contract by not awarding overtime by seniority, as required by their own written policy and by the information posted at the bottom of each and every voluntary overtime sign up sheet. Appellant is entitled to be fully compensated for the Department's breach.

ORDER

The denial of the grievance by the Department is REVERSED. Appellant is entitled to the relief sought, i.e., the award of overtime requested and not received, either as compensatory time or as overtime pay for the period between April 25 through December 2, 2000. If and only if the parties are not able to decide between themselves whether the period between July 17 through August 31, 2000, is included or not, or upon the amount of compensatory time versus the monetary amount, a further hearing will be scheduled. The parties are further ORDERED to notify the Hearing Office on or before February 28, 2001, whether or not they have

been able to resolve the remaining issues or whether a further hearing will be required. The Hearing Officer retains jurisdiction over this matter until further notice.

Dated this 31st day of January 2001.



Robin R. Rossenfeld
Hearing Officer for the Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 2nd day of February, 2001, addressed to:

Paul A. Baca, Esq.
1009 Grant Street, Suite 201
Denver, Co 80203

Genette A. Tonjes
2330 S. Kearney Street
Denver, CO 80222

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 2nd day of February, 2001, addressed to:

Robert D. Nespor, Esq.
Assistant City Attorney

Rama Mallett
Human Resources
Department of Public Works

John Oglesby
Parking Management Division

