

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

Appeal No. 13-17A

In the Matter of the Appeal of:

SUEZANN BOHNER,

Petitioner-Appellant,

v.

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

Respondent-Agency.

DECISION AND ORDER

Suzanne Bohner (Appellant) is a Safety and Industrial Hygiene Professional II employed by the Department of Public Works (Agency). The City and County of Denver considers this position as FLSA-Exempt, that is, a position exempt from the minimum wage and overtime requirements of the federal Fair Labor Standards Act. Her job requires that for several one-week periods over the course of the year, Appellant assume the responsibilities of an after-hours duty officer.¹ This additional responsibility means that Appellant when she is the after-hours duty officer, is tasked with responding to emergency calls that may come in before or after the start or end of the normal work day.

Appellant, as an Exempt employee, does not receive overtime or any other type of stand-by pay for being the after-hours duty officer of the week. Appellant believed she was entitled to additional pay and filed a grievance over the fact that she was not receiving any additional compensation. The Agency denied the grievance.

Appellant appealed the denial of her grievance to a Hearing Officer. The Hearing Officer rejected Appellant's appeal. In her decision, the Hearing Officer first determined that she could not order the Agency to change Appellant's Exempt status. As a result, the Hearing Officer could not find Appellant eligible for overtime under the Fair Labor Standards Act or under any

¹ This task is rotated on a weekly basis among Appellant and other similarly situated employees.

Career Service Rule which rendered Exempt employees ineligible for overtime². The Hearing Officer next considered other Career Service Rules which permitted the payment of overtime or stand-by pay to exempt employees under certain conditions, and held that these rules did not entitle Appellant to overtime or any additional pay for her assuming the duties of after-hours duty officer.³ Finally, the Hearing Officer rejected Appellant's claim that the after-hours duty officer assignment violated CSR 9-71 which sets the standard work week at 40 hours and also rejected the claim that the failure to pay over her salary for the after-hours duty officer assignment violated Section 9.1.1 of the City Charter which requires like pay for like work.

Appellant has appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer's decision as it pertains to the denial of her grievance.

Appellant first argues that the Hearing Officer's decision sets improper precedent in that it allows "unfettered and unreasonable abuse" of FLSA exempt City workers. We disagree. FLSA exempt employees are constantly called on to work additional time without additional compensation – as that is the very nature of their work. Exempt employees work until their tasks are completed and they are made aware of this and should have knowledge of this the moment they learn that their positions are consider FLSA exempt. We do not see it as abusive that certain exempt employees are required to respond to emergency situations. In addition, we do not believe the record supports a claim that the after-hours duty officer requirements are onerous or that they result or have resulted in abusive work conditions.

Appellant next argues that the failure to pay stand-by pay "establishes a precedent for an erroneous interpretation of the Rules."⁴ Appellant does not explain the precedent she fears is being created, and further does not explain how the Hearing Officer might have misinterpreted certain rules. The rules she does reference in her brief do not convince us that she should be entitled to additional pay for her rotating additional assignment.

For example, at the top of page 2 of her brief, Appellant references CSR Rules 5-23, 9-70 and 9-71. CSR 5-23 defines a "full-time position" as one where an employee is scheduled to work 40 hours per week. The purpose of this Rule is to define and differentiate between full time positions and positions which are not considered full time positions. The fact that Appellant might be required to work more than forty hours in a week does not violate this Rule and certainly does not entitle Appellant to overtime or stand-by pay.

Similarly, the fact that Rule 9-71 might set the standard work week at forty hours means only that for calculating rates of pay, a forty-hour work week shall be used. It does not mean that an Exempt employee working more than forty hours in a week is entitled to stand-by pay

² Career Service Rule 9-55B(1) makes FLSA overtime entitlement a condition of receiving stand-by pay.

³ For example, CSR 9-93

⁴ Appellant's Brief, p.1.

or overtime and it does not mean that an Agency assigning duties which might require more than forty hours in a week to complete has violated this Rule.

Appellant, at page 2 of her brief, points to CRS 9-72 which deals with changes in work schedules and notice for employees of those charges. The record of this case, however, reflects that Appellant, at all times relevant, was aware of the requirement to assume the responsibilities of after-hours duty officers on a rotating basis with other employees.⁵

Appellant next argues than Executive Order No. 3 permits responses to emergencies to be coordinated by phone. Regardless of whether Appellant has correctly stated the text of the Executive Order (and she has not), that EO does not prohibit an agency from sending out an employee to respond to an emergency in person. And regardless, that Executive Order, and specifically, Section 8.2 of the Executive Order (from which Appellant has cherry-picked her language) deals only with the City's response to a motor vehicle accident where the vehicle was driven by a City employee. This provision of the Executive Order, and the Executive Order itself, has no applicability to Appellant's job.

We have reviewed all of the other Career Service Rules cited by Appellant in her brief and conclude that none of them entitle Appellant to stand-by or overtime pay for time served while performing the duties of after-hours duty officer.

On page 7 of her brief, Appellant objects to the Hearing officer's failure to admit a proposed exhibit into the record. We have reviewed that exhibit as presented by the Appellant and we do not perceive any error in the Hearing Officer's refusal to admit the exhibit as evidence in the record. We do not see its relevancy. We do not see how admission of the exhibit would have changed the outcome of the Hearing Officer's decision or even affect it in the slightest. The question of the admission of exhibits is one left to the discretion of the Hearing Officer. She did not abuse her discretion by refusing to admit this piece of evidence.

At page 8 of her brief, Appellant claims that the Hearing Officer made errors of fact. But our review of the record reveals that all of the Hearing Officer's findings are supported by substantial evidence in the record.

In addition, we believe the Hearing Officer correctly interpreted the City Charter when she concluded that the like pay for like work requirement found in Section 9.1.1 of the Charter was not violated by Appellant's rotating assignment and that said provision did not entitle Appellant to any additional pay for that work. The fact that there might be some similarities between positions which are entitled to stand-by pay and those that are not does not mean that the like pay for like work requirement has been violated. The Charter does not require identical pay for like work and, in any event, based on the record of this case, Appellant has

⁵ Per the Hearing Officer's decision, Appellant was hired in 2015 and the requirement for the after-hours duty officer was in place by 2014.

failed to prove that any position which does receive stand-by pay is sufficiently “like” hers to invoke Section 9.1.1 of the Charter.

In her reply Brief, Appellant argues that the Agency did not even have the right to assign her stand-by duty per CSR 9-55. First, to the extent that Appellant is not eligible for compensation for stand-by pay under any portion of this Rule, we conclude that it does not apply to her situation. Nevertheless, we note that CSR 9-55 states that an Agency may assign stand-by duty only when there is a reasonable anticipation that the employee will have to respond and perform work immediately. The Hearing Officer’s decision notes that Appellant’s Agency could respond to any number of emergency calls per year, ranging from 300 to 600.⁶ Appellant, who bore the burden of proof in this matter, failed to prove that the Agency was unreasonable in its assessment that Appellant could be reasonably anticipated to perform work in the weeks she was assigned after-hours duty officer, regardless of whether she was actually required to respond to an emergency during that period. We have no doubt that the Agency’s assignment of an after-hours duty officer, even where that duty officer is an FLSA-Exempt employee, was well within the rights of Agency management.

Finally, Appellant argues that she is being treated unfairly. If we are to judge this allegation based on the Agency’s compliance with the law and Career Service Rules, we must conclude that Appellant has no basis for her claims.⁷

For all of these reasons, the Hearing Officer’s decision to reject Appellant’s appeal of her grievance is AFFIRMED.⁸

⁶ Statistics for the years 2010 and 2011.

⁷ To be clear, while this Board does not have the authority to issue remedies based on equities alone, if it did, it would not issue any award to Appellant under the circumstances presented by this record.

⁸ We believe it important to note that we find the Number 1 of Section IV of the Hearing Officer’s Order problematic. In that portion of the Order, she states that the issue of Appellant’s proper job classification status under the FLSA “is deferred for resolution by the DOL Wage and Hour Division....” We are not certain what this means. We are certain, however, that the Hearing Officer does not have the authority to refer any matter to the Department of Labor on behalf of the City and County of Denver and that she further lacks the authority to require the City to seek guidance from the DOL on this classification issue. Finally, based on this record, we see no reason to doubt the correctness of the determination that Appellant is serving in an FLSA-Exempt position. Consequently, we MODIFY the Hearing Officer’s Order by striking this item No. 1 from the Order.

SO ORDERED by the Board on November 2, 2017, and documented this 18th day of January, 2018.

BY THE BOARD:



Co-Chair

Board Members Concurring:

Neil Peck

Karen DuWaldt

Patricia Barela Rivera

Tracy Winchester