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

Appeal Nos. 193-02, 48-03 and 94-03

ORDER

IN THE MATTER OF THE APPEAL OF:

KYJA THORSGARD, Appellant,

v.

Agency: Denver Health and Hospital Authority, Denver Medical Center.

Appellant filed three grievance Appeals, one on November 11, 2002, one on April 11, 2003, and one on June 20, 2003, which involve the same legal issue. Denver Health and Hospital Authority ("Authority") filed a Motion to Dismiss the first appeal on February 4, 2003. Appellant responded on February 19, 2003. The Authority filed a reply in support of its Motion to Dismiss on March 3. After reviewing the submissions, the Hearing Officer concluded that the facts are not contested and that the original grievance would be determined by issues of law. The Hearing Officer issued an Order to Show Cause to the parties requesting briefing on the legal issues presented and informed the parties that she would treat this matter as one for summary judgment. The parties responded to the Order to Show Cause with additional argument. In the meantime, Appellant filed her second grievance. The parties, again through their representatives,[1] agreed to consolidate the first two appeals because of the identity of the legal issues. The Hearing Officer is joining the third appeal to this matter in the interest of judicial economy because of the identity of its legal issues with the other two appeals. Specifically, the factual situation of the third appeal, as far as it affects the legal questions presented, is identical to those contained in the second appeal.

Being fully advised of the issues, the Hearing Officer finds, as follows:

FACTS

For the purposes of this decision, the following facts are deemed to be true:

1. Appellant is employed at the Authority as a nurse in the Maternity Ward. She is employed on a part-time basis with a .8 FTE; she is scheduled to work 32 hours per week. (Affidavit of Darlene Datkuliak, attached to Agency's Motion to Dismiss Appeal No.

[1] Cheryl Hutchison, AFSCME, represents Appellant for the first two cases. Appellant is appearing *pro se* in the third case.

48-03) She has Career Service status with the Authority, thereby falling within the protection of the Career Service Authority ("CSA") and its Rules ("CSR").

2. The City and County of Denver and the Authority entered into a personnel services/operating agreement on January 1, 1997, by which the Authority assumed responsibility for the operation of the City's health system, pursuant to CRS §§ 25-29-101, *et seq.* ("the Act"). Under the Act, any employee of the City who was working for the City's Department of Health and Hospitals on the transfer date could elect to remain an employee of the City or to become an employee of the Authority. The agreement indicates that the Authority would enter into a Memorandum of Agreement with the Career Service Board relating to the City employees working for the Authority.

> ...It is the intent of the Career Service, the City and the Authority to cooperate in all respects in order to accomplish a smooth and harmonious administration of both the Career Service rules, policies and procedures ...and the Authority rules, policies and procedures among all individuals working at the Authority Health System.

[Appellant's Response to Agency's Motion to Dismiss ("Appellant's Response"), Exhibit I, p. 5]

3. Covenant 3.4 f. of the agreement provides:

> City Employees shall continue to accumulate Annual Leave Hours and Sick Leave Hours while working at the Authority Health System and may use such Annual Leave Hours and Sick Leave Hours, all in accordance with Career Service Rules.

(*ibid.*, p. 14)

4. Covenant 3.8 covers the supervision of the City employees. It provides, in relevant part:

> a. The City and the Authority acknowledge and agree that each City Employee working for the Authority pursuant to section 3.1 above shall be under the direct supervision and direction of whomever the Authority management designates as the appropriate supervisor, whether a City Employee or an Authority Employee. The Authority shall be responsible for ensuring that all City Employees are supervised in a manner which is fully consistent and in conformance with the Career Service Personnel System.
> ...
>
> b. The City and the Authority shall cooperate and use their best efforts in achieving a consistent application of the Career Service Rules and the Authority Rules by supervisors working for the Authority Health System.

* * *

d. The Authority shall have the right to establish work schedules, including overtime and standby schedules, and the granting of leaves as set forth in Career Service Rule 11, for City Employees in accordance with Career Service Rules.

(*ibid.*, p. 15)

5. Covenant 3.11 permits the City employees to pursue grievances in conformity with Career Service Rule 18 and appeals to the Hearing Officer in conformity with Career Service Rule 19. (*ibid.*, p. 16)

6. CSR Rule 10 governs the hours of work, holidays and overtime for CSA employees. It provides, in relevant part:

Section 10-10 Hours of Work

10-11 Standard Work Week

The five (5) day forty (40) hour week shall be the standard work week for employees of the career service unless otherwise provided by ordinance. The work week shall begin on Monday and end on Sunday. Standard work hours shall be eight (8) hours per day, excluding the lunch period. Appointing authorities shall be responsible for establishing daily work schedules.

Deviation from the standard eight (8) hour-work-day (40) hour-work-week and special work schedules must be in accordance with the provisions of Subsection 10-35 Special Work Schedules.

10-13 Positing of Changes in Work Schedules

If work schedules are changed, such schedules shall be posted sufficiently in advance of rotation so that the employees concerned are fully informed.

10-35 Special Work Schedules[2]

* * *

b) Standby: The Personnel Director shall set criteria for establishing standby schedules.

[2] CSR §10-35 also discusses 10-hour workday plans, compensatory time plans, special weekly work schedules, and staggered work schedules, all of which require pre-approval of the Career Service Personnel Director.

When the Appointing Authority or authorized designee schedules overtime eligible employee(s) to be on standby, such employees shall receive an amount equal to one and one half (1 ½) hours of work for each eight hours the employee is assigned to standby duty.

* * *

d) Special weekly work schedules: When an agency's program is such that, in order to provide necessary services, employees must be scheduled for a forty (40) hour work week in more than five (f) work days per week, the appointing authority shall propose a special weekly work schedule to the Career Service Board. The Career service Board may approve such special weekly work schedule for certain classifications of work, individual employees, or specific units or agencies. Such special weekly work schedule shall be requested in writing and shall be subject to the following provisions.

* * *

3) When approved, such special weekly work schedule shall be reviewed and re-evaluated annually at the written request of the appointing authority.

7. CSR § 11-84 permits budget required furloughs. Under this Rule, furloughs without pay can only occur by Executive Order of the Mayor.

8. During the relevant time (July 2002 though June 2003), the Mayor did not issue an Executive Order permitting furloughs for budgetary reasons.

9. In June 1996, DHHA requested blanket authority to institute a standard work week commencing 7:a.m. each Sunday and ending one hundred sixty-eight hours later at 6:59 a.m. the following Sunday in order to accommodate scheduling for departments that needed extended shifts (i.e.., 10,or 12 hours) for operational flexibility and efficiency. This time of scheduling variance had previously been requested on a case-by-case basis. DHHA assured Fred Timmerman, then Personnel Director, that the extended shift method of scheduling would not be used in a manner that would result in the payment of overtime. Mr. Timmerman approved the request for a special work week, with the caveat that it was still for five days a week, eight hours a day, for a total of 40 hours a week; all requests for longer shifts would still need approval from the Personnel Director. (*See,* Appellant's Response Exhibit M. pp. 8 -11)

10. On April 15. 2002, Jim Yearby, then Personnel Director, approved a request from DHHA to permit health care technicians to change their shifts from ten hour shifts four days a week to twelve and eight hour shifts, four days a week. (Appellant's Response

Exhibit M, p. 3) A similar request for ten-hour days, four days a week for the Engineering Department was requested in August 2002 and approved in September of that year. (Appellant's Response Exhibit M, p. 2)

11. When DHHA promulgates policies concerning all of its employees, those policies are marked as "CSA/DHA" (*see,* Appellant's Response Exhibit R). Policies that pertain only to Authority employees, such as those for overtime, employee retention incentives and other special compensation, are designated by "DHA" only (*see,* Appellant's Response Exhibits P and Q).

12. DHHA issued policies and procedures regarding on-call status that cover Authority employees only as they are designated by the "DHA" notation. (Appellant's Response Exhibit P, pp. 1-2)

13. Based upon the policies designated as "DHA," the Denver Health Labor and Delivery Mandatory Downstaffing Guidelines for Low Census /Acuity ("Guidelines") were promulgated, effective August 1, 2002. (Appellant's Response Exhibit F)

14. DHHA did not seek approval from the Personnel Director for the Guidelines before they went into effect.

15. The Guidelines provide that, if the census acuity needs of the unit are low, staff will be "downstaffed" for that shift. "It will be the charge nurse who will discern if the staff person down staffed is to be placed on call or off for the shift or even a portion of the shift." However, volunteers for downstaffing are to be sought prior to assigning a staff member for on-call status. (Agency's Motion to Dismiss Appeal No 193-02 Exhibit B, Appellant's Response Exhibit F)

16. DHA Policy #3-111, states that employees who are sent home for lack of work will be paid for a minimum of two hours, unless the employee was notified not to report to work. (Appellant's Response Exhibit P, p. 1). The Guidelines do not set out payment information.

17. Appellant was scheduled to work from 7 a.m. to 3:30 p.m. on October 1, 2002. At 5:45 a.m., she received a message from the charge nurse indicating that she was on call from 7:00 to 11:00 and that she was to call back at 10:30 to see whether or not she would be needed at 11:00. At 10:20 a.m., Appellant was called into work for the remainder of her shift. When she got there, another staff member went home because she was ill. This staff member had not been asked, prior to coming into work, if she would volunteer to be downstaffed for the day; no others were asked to volunteer, either. Appellant wound up working until 4:45 that day due to a complication with a birth near the end of her shift. (Appellant's Response Exhibit 1)

18. Appellant grieved her downstaffing on October 1, 2003, to her supervisors at DHHA in a timely manner. She requested that she be fully compensated for her scheduled shift and that any annual leave that was used for her downstaffed shift be

replaced. Her grievance was denied at both level one and level two. (Appellant's Response Exhibit A) She appealed to the Hearing Officer on November 11, 2003, in a timely manner. (Appeal No. 193-02)

19. Appellant was again downstaffed on Saturday, March 8, 2003. She was told not to report to work that day. Since Appellant was scheduled to work on Sunday., she was unable to work on Saturday night. Saturday was the end of the work week. She alleged that as a CSA employee, she was not entitled to work overtime the next week to make up for the twelve hours, including the $1.85/hour weekend shift differential, that she lost that day. DHA employees are not limited by the interdiction against overtime and could make up the time the next week. Appellant was forced to take annual leave or leave without pay for the Saturday. Appellant grieved her loss of pay, including the pay differential, and/or vacation in a timely manner. The grievance was denied by DHHA. Appellant filed her grievance appeal with the Hearing Officer on April 11, 2003. (Appeal No. 48-03).

20. Appellant was scheduled to work twelve-hour shifts on Saturday, May 3 and Sunday May 4. She was contacted at 5:15 a.m. and was told she could have the day off or be on call. She chose "on-call." She received a second call about 6:10 a.m. and was informed that she would need to be on call until 11:00. At 11:00 she was told that she would need to remain on call. At 11:30, she received a call that she could come in to work at that time. She worked from 1:00 p.m. until 7:00 p.m. She was paid straight time for her 6 hours of work, plus 1.125 hours pay for the six hours she was on-call. Appellant was unable to make up her downstaffed hours by floating to an alternate area since she was required to be available to work in Labor and Delivery. She was unable to pick up the extra hours to compensate because Saturday was the end of her week, she was required to work Sunday and she claimed she could not, under the Rules governing CSA employees, receive overtime the next week to offset her lost hours. Appellant filed her grievance with the Authority in a timely manner. After it was denied at levels one and two, Appellant filed her grievance appeal with the Hearing Officer in a timely manner on June 26, 2003. (Appeal No. 94-03)

21. On December 10, 2002, Mr. Yearby sent a memorandum to Steve Addrianese, Chief of Employee Services and Resources at the Authority. The memo provides:

> Your request for the entire organization at Denver Health to have blanket approval for special work schedules, including shifts that are less than eight hours, eight hours, ten and twelve hours and any other shift that may enhance operational effectiveness or meet organizational and/or community needs is granted. All such schedules must conform to the Fair Labor Standards Act and the Career Service Rules regarding overtime provisions.

(Motion to Dismiss Exhibit G)

22. On April 15, 2003, Mr. Yearby submitted an affidavit stating that, in his opinion, the Authority was not required to obtain his approval before implementing the downstaffing guidelines since they pertain only to an employee's workday, not work week. (Agency's Supplemental Response to Show Cause Order).

DISCUSSION

The Hearing Officer is treating this matter as a Motion to Dismiss of Failure to State a Claim/Motion for Summary Judgment. This means that, if viewing the facts in the best light for Appellant, there is no cause of action for which the Hearing Officer can grant the remedy requested, the case(s) must be dismissed. On the other hand, if the facts establish a legally recognizable claim, then Appellant is entitled to her remedy. The Hearing Officer has considered all the information provided by the parties and has concluded that Appellant has stated a claim with regard to the first grievance, but not to the second two.

Appellant's cases are based upon her contention that DHHA has no authority to create a "downstaffing" system to accommodate low census counts and organization efficiency to the extent that it affects the pay, status and tenure of CSA employees, either with or without the approval of the Personnel Director. The Agency contends that it does not need the Personnel Director's approval and that, in any case, it had the Personnel Director's approval and otherwise did not violate the CSR. The Hearing Officer concludes that both parities are partially right and partially wrong.

It must first be pointed out that this case is a matter of first impression. The issues raised here have not been addressed by the Career Service Board or by any courts in Colorado. The case law from other states, as well as federal court decisions, does not provide much assistance, nor does the Fair Labor Standard Act, or any similar federal statutes, or any provisions of the Code of Federal Regulations concerning on-call/standby status.

The most that can be said is that this matter is not a "Belo contract" [3]matter because it does not concern an irregular contract – Appellant's contract is regular and is only modified on an irregular/ocassional basis.

These cases also do not involve "standby" status and "on-call" pay in the traditional sense, even though persons who are downstaffed are entitled to some compensation for the time not worked. "Standby" refers to availability of overtime for persons who must remain "on-call" after the completion of their regular hours. *See, e.g.,* 5 USC §5535; 38 USC §7457 (b)(3); *Huskey v. Trujillo*, 302 F.3d 1307 (C.A. Fed. 2002); *Adames v. Executive Airlines* 258 F.3d 7 (C.A. 1 2001); *Andrews v. Town of Skiatook, Okl.*, 123 F.3d 1327 (C.A. 10 1997); *Gillgian v. City of Emporia, Kan.*, 986 F.2d 410 (C.A. 10 1992), *Armitage v. City of Emporia, Kan.*; 982 F.2d 430 (C.A. 10 1992); *Abreu v. United States*, 948 F.2d 1229 (C.A. Fed. 1991); *Frasher v. Spradling,* 743 S.W.2d 109 (Mo. App. W.D.

[3] A "Belo contract" permits an employer to regularize an employee's wages even though the employment contract requires irregular work patterns, when viewed on a weekly basis.

1988).

Appellant's grievances do not involve "standby compensation " for having to remain on or near the Authority's campus or otherwise available for emergency duty after the completion of her regular shift. While Appellant had to wait by her phone and check on the occasions she was "downstaffed," she was doing so during her regular shift, not as part of an additional shift or assignment. The Authority did not violate CSR §10-35 b), the provision requiring the Personnel Director to set criteria for standby schedules because it is not one of the limited types of situations that require "standby compensation."

During the relevant period, there was no Executive Order in effect permitting furlough of CSA employees for budgetary reasons. However, CSR §11-84 is not violated because downstaffing is not a "furlough." *Black's Law Dictionary, 7th Ed.*, (1999) defines "furlough" as "a leave of absence from military or other employment duty." This case does not involve Appellant being placed on a leave of absence; she was merely told not to report for a few hours on each of the three days at issue. Therefore, there is no violation of CSR §11-84.

The next area of concern involves procedural due process. If the dwonstaffing policy was required to be adopted in accordance with the CSR in order to apply to CSA employees, and it was not, then it would be invalid and Appellant would be entitled to compensation for her lost wages. On the other hand, if the policy either was adopted in compliance with the CSR or did not even require compliance with the CSR, then Appellant would not be entitled to compensation.

Covenant 3.8 of the Agreement between the City and Authority requires that the Authority be responsible to ensure all CSA employees are supervised in conformity with the CSR. To this end, they are required to cooperate to achieve consistent application of the CSR and Authority Rules. The Authority is given the right to establish work schedules as long as it is done in accordance with the CSR. (Appellant's Response Exhibit I, p.15) It is not as the Authority argues, an unlimited right to set schedules however the Authority sees fit.

CSR §10-11 recognizes the five-day, forty-hour work week, as the standard work week for (non-exempt) CSR employees unless otherwise provided by City Ordinance. Deviations from the standard work week require approval from the Personnel Director.

In the Agency's Supplemental Response to Show Cause Order, it argues that the downstaffing plan is not an alteration to the standard forty-hour work week. The Hearing officer disagrees.

The downstaffing plan affects the weekly assignments of CSA employees insofar as, should a full-time CSA employee be downstaffed on the last day of the work week, the CSA employee must forfeit annual leave or take leave without pay and does not have the option of working more than forty hours the next week, when staffing needs are greater, to recuperate the lost earnings. This is because the CSR clearly disfavors overtime for non-

exempt CSA employees. CSR §10-31 states "overtime work shall, wherever possible, be eliminated by rescheduling work, by utilizing part-time or on call positions, or by setting up overlapping shifts of work." CSR §10-32 sets out the limited emergency type of criteria for the authorization of overtime. These criteria do no include "to offset/make up for hours lost the preceding week due to a downstaffing." Given the potential inability of the CSA employee to recover the lost earnings, the Hearing Officer concludes that the downstaffing plan does affect the work week and requires permission of the Personnel Director.

The Authority recognized the fact that it had to go to the Personnel Director for modifications to the standard work week, as evidenced by the requests made to Mr. Timmerman during the summer of 1996[4] and to Mr. Yearby in the summer of 2002. (Appellant's Response Exhibit M, pp. 2-3, 8-11) Yet the Authority did not ask the Personnel Director's permission for creating the downstaffing/standby plan.

The Authority altered the standard forty-hour work week by instituting the downstaffing plan. The Authority had the right to develop the policies and procedures regarding downstaffing for its own employees, which they did, as evidenced by the policies contained at Appellant's Response Exhibit P. But the imposition of the plan upon CSA employees required prior approval by the Personnel Director.

The Authority did not get approval for the downstaffing plan until mid-December 2002, more than two months after Appellant filed her first grievance. There is no excuse to their failure to get approval earlier, especially as Appellant has submitted copies of e-mails to CSA staff that show she was making her concerns about the process known to her supervisors as early as July 2002. (Appellant's Response, Exhibit G) The after-acquired "stamp of approval" from the Personnel Director does not cure this defect. The Hearing Officer concludes that Appellant is entitled to recover her lost wages and other benefits for the time she did not work for her shift on October 1, 2002.

Appellant also challenges the policy because, she claims, it violates CSR §10-13, which requires posting changes in schedule "sufficiently in advance of rotation so that the employees concerned are fully informed." She argues that being called only an hour or so before she is to start a shift necessarily violates this Rule. The Hearing Officer disagrees. The Authority has now been given permission of the Personnel Director to post a plan that permits it to maximize efficiencies as long as the plan sets out the guidelines that do not violate the overtime rules and, consistent with the analysis below, give CSA employees the opportunity to offset their lost hours and recuperate the reduction in their pay and other benefits without having to use their annual leave or be charged with leave without pay. As long as staff knows the parameters of the guidelines and can see where they are on the downstaffing list so that they can approximate when they might be downstaffed, the plan conforms to the requirements of CSR §10-13.

The second and third grievances arose after the Personnel Director approved the downstaffing plan. Therefore, the question that arises for these is whether Appellant's

[4] As the Authority points out in its Response to the Order to Show Cause, Mr. Timmerman's approvals actually predate the Agreement that now controls the relationship between the Authority and the CSA.

rights were violated by the application of the plan to her.

As stated above, the downstaffing plan has the potential of affecting a full-time CSA employee's guarantee of a forty-hour work week. If Appellant were a full-time employee, the Hearing Officer would have concluded that she was entitled to the full amount of her lost pay since she could not earn back the lost wages in the week subsequent to being downstaffed on a Saturday, the last day of her work week.

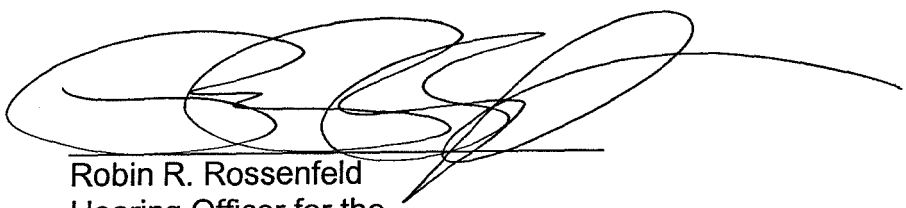
Appellant is not a full-time employee. She works a .8 FTE or thirty-two hours a week. Appellant had a duty to mitigate her damages. She could have made up eight of the twelve the "lost" hours from March 8, 2003, during the next week without violating the overtime restriction in Mr. Yearby's approval of the downstaffing plan. She is not entitled to compensation for those eight hours. However, the Hearing Officer concludes that Appellant is entitled to be compensated for the four hours, including the $1.85/hr weekend shift differential, she could not have made up even if she had worked eight extra hours (to total the permissible forty hours) the next week.

Appellant worked six hours on May 3, 2003. She was paid for that work plus 1.125 hours pay for the time she was on standby at home. Therefore, she was paid for 7.125 hours for that day. Since Appellant works a thirty-two-hour work week, she could have made up the remaining 4.875 hours (or a little over one more hour a day) during the next week without violating the overtime restriction. Appellant chose not to do so. She is not entitled to recover the wages for the hours she did not work on May 3, as she did not fulfill her obligation to mitigate her damages.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer DENIES the Motion to Dismiss in part and GRANTS it in part. Appellant is entitled to lost wages from October 1, 2002, and for four hours, including the weekend pay differential, on March 8, 2003, and all benefits attached thereto. Appellant is not entitled to lost wages or benefits for the hours not worked or otherwise compensated on May 3, 2003.

Dated this 9th day of October 2003.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board