

Claimant exhibits 1 through 23, and Respondent exhibits A through H were admitted into evidence. The parties stipulated to include the transcript of hearing conducted on June 12, 1998 into the record.

The parties filed post-hearing submissions which were received on November 14, 2000.

II. ISSUES

1. Whether RBC owes Donohue overtime wages for services performed during the period from August 1, 1996, through May 31, 1997.
2. Whether RBC owes Donohue three weeks vacation pay under the terms of employment.

III. FINDINGS OF FACT

1. Donohue was working for Billings radio station KOHZ when RBC purchased the station in August of 1991. Donohue continued working for RBC under a verbal agreement following the purchase.
2. RBC discharged Donohue in November 1994. During the period November 1994 to mid-January 1995, Donohue collected unemployment insurance benefits while he was out of work. RBC re-hired Donohue in January 1995, to work at KOHZ.
3. RBC initially paid Donohue on an hourly rate, but later placed him on a monthly salary of \$2,000.00. While on salary, Donohue's duties included hosting a morning show on FM, computer programming, and commercial and promotional production.
4. Effective August 1, 1996, RBC purchased five additional radio stations located in Bozeman. William Reier (Reier) decided it was necessary to hire an operations manager/program director with the expansion to the business. Reier offered Donohue employment in the new position, which he accepted effective August 1, 1996. With the added responsibilities, RBC gave Donohue a salary increase to \$2,700.00 per month.
5. Reier performed the duties of general manager at the multiple station network. In that capacity, he gave orders and other directions to Donohue and other supervisory employees to carry out management policies and to implement the general operations of the enterprise.
6. As operations/program manager, Donohue's assigned duties and responsibilities regularly required him to work in excess of 40 hours per week. Except for the fourth week of November, 1996, the first week of February, 1997, and the fourth week of May, 1997, Donohue worked more than 40 hours per week.
7. RBC did not require Donohue to turn in time sheets after his appointment to operations/program manager, as was required of non-managerial employees. However, Donohue kept personal, contemporaneous time sheets during the period from August 1, 1996 through May 1997. He did not show or turn in his personal time records to Reier. Donohue's records show that

from August 1, 1996 through May 31, 1997, he worked 533.45 hours of overtime. (Claimant's exhibit 1).

8. Donohue had broad discretion in his supervisory duties. He approved time sheets for employees. He trained employees in the use of digital equipment and board operation. He dealt with networks and suppliers, and reviewed transmission logs on behalf of RBC. He was responsible for ensuring that orders from Reier, the station general manager, were implemented with the staff.

9. Donohue supervised from 15 to 30 full- and part-time board/program employees on a daily basis in his capacity as operations manager/program director. RBC paid him an average of \$700.00 per month more than the on-air employees with no supervisory responsibility. He received inquiries from potential applicants regarding staff vacancies at the stations. Donohue reviewed applications, made recommendations regarding candidates, and discussed the candidates with Reier prior to any hiring.

10. Donohue wrote memos to the employees he supervised regarding what they were to do and how to proceed with their work. He also received memos from subordinates asking about work assignments. He reviewed and approved all of the time cards for employees he supervised.

11. Donohue received requests from subordinates for vacation or other time away from work. Donohue recommended staff changes to Reier and was involved in the termination process.

12. In addition to supervisory duties, Donohue maintained a three hour, Monday through Friday morning on-air shift. Donohue sometimes worked a Friday evening or Saturday morning on-air shift. Each program shift typically required 1½ to 2 hours routine production/preparation. His work on the on-air shifts was the same as the work performed by the announcers/board operators, who were paid on an hourly basis.

13. Donohue worked between 50 and 60 hours per week. His non-supervisory duties ranged from 27.5 hours to 37.5 hours each week.

14. According to Reier, Donohue's management duties required 100% of his time, since he was always subject to the needs of his subordinates.

15. Donohue began asking Reier for additional compensation due to the long hours he was putting in as operations manager/program director. In recognition of the long hours worked, RBC gave Donohue a one-time payment of \$2,200.00 in December 1996.

16. RBC policy requires an employee to have 5 years uninterrupted service to qualify for three weeks vacation. Under the terms of the agreement, Donohue was entitled to three weeks paid vacation upon completing 5 years of continuous employment. Donohue had taken some annual leave prior to his termination in November 1994. Donohue also took paid leave during the period after August 1, 1996.

17. Donohue acknowledged that as supervisor of RBC's five stations, he had a degree of responsibility when things went awry. He acknowledged that in his management capacity he developed new procedures and made decisions even when on the air at the radio stations.

18. On June 9, 1997, Donohue accepted a position with RBC's KOBB station, which involved less responsibility, and offered a salary of \$2,200.00 per month. He was relieved of his operations manager/program director responsibilities.

19. On September 26, 1997, Donohue's employment relationship with RBC ended.

20. Donohue filed a wage claim with the department against RBC on October 9, 1997, for unpaid overtime for the period from August 1, 1996 to May 31, 1997, and for three weeks vacation pay. He calculated his claim using an hourly rate of \$15.58. ($\$2,700.00 \times 12$ months divided by 2080 hours). He calculated his overtime rate at \$23.37 hourly. (15.58×1.5).

21. RBC's broadcasting business earned in excess of \$500,000.00 in advertising sales during the year prior to the filing of Donohue's wage claim.

Bozeman is designated as a first class Montana city having more than 10,000 residents.

IV. DISCUSSION/RATIONALE

A. Overtime Claim

Reier Broadcasting Company, Inc., a Montana corporation (RBC), is engaged in a business that did \$500,000.00 or more in sales during the year Donohue filed his claim. Edward A. Donohue was an employee of RBC during the period he alleges he was owed wages. Therefore, this claim is covered under the federal Fair Labor Standards Act (FLSA). The Department has jurisdiction over Donohue's FLSA claim under the Montana Wage Payment Act, §§ 39-3-201 through 39-3-216, MCA. *State of Montana v. Holman Aviation Co.*, 176 Mont. 31, 575 P.2d 925 (1978).

The FLSA requires that employers pay employees overtime at one and one-half times their hourly rate for hours worked in excess of 40 hours per week. 29 U.S.C. § 207. However, the statute exempts from coverage of overtime pay provisions any person "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Donohue claims that he was not employed in an exempt, executive, or administrative capacity as defined under the FLSA and that, therefore, he should be entitled to overtime pay for all hours he worked in excess of 40 hours per week while employed by RBC during the period of his claim. RBC contends that Donohue was an exempt employee. The regulations of the U.S. Department of Labor define "employee employed in a bona fide executive . . . capacity" in 29 U.S.C. § 213(a)(1) to mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: . . . and

(f) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week, exclusive of board, lodging, or other facilities: provided, that an employee who is compensated on a salary basis at a rate of not less than \$250 per week, exclusive of board, lodging or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 CFR § 541.1.

Applying those factors to Donohue's employment, it is clear that the "short test" contained in 29 CFR § 541.f is the appropriate test in this matter. The "short test" contains three requirements and applies to "high salaried executives" paid more than \$250.00 per week. Since RBC paid Donohue in excess of \$250.00 per week on a salary basis, the short test applies. In order to qualify as exempt, Donohue's primary duty must be management of the enterprise of a customarily recognized department, and he must regularly direct the work of two or more other employees.

The evidence reveals that Donohue's responsibilities included the customary and regular supervision of two or more employees. Therefore, the crux issue is whether Donohue's primary duty consisted of management of a customarily recognized subdivision of RBC.

Section 29 C.F.R. § 541.103 defines the phrase "primary duty" and provides that the following factors determine whether management is the primary duty:

- (1) time spent performing management duties;
- (2) relative importance of management duties;
- (3) frequency of exercise of discretionary powers;
- (4) relative freedom from supervision;
- (5) relationship between employee's and subordinates' wages.

Each of the five factors are applied to Donohue's duties as follows:

Time Spent Performing Management Duties

In general, primary duty means the majority of time, or over 50%. Time alone is not the sole test, however, and an employee who spends less than 50% of his time on management duties may still be considered to have management as his primary duty if other factors support such a conclusion. 29 C.F.R. § 541.103, *Kemp v. State Board of Personnel Appeals*, 296 Mont. 319, 989 P.2d 317 (1989). Donohue spent a significant amount of work time performing non-supervisory on-air and other non-supervisory duties for RBC. However, he was never relieved of his management responsibilities while performing the non-supervisory tasks. When something occurred that required him to act in his managerial role, he was not relieved of addressing the new task.

Relative Importance of Management Duties

Donohue's managerial duties were clearly more important to the overall RBC operation than his on-air and other non-supervisory tasks. While he may have performed non-managerial work more than 50% of the time, other tasks did not diminish his responsibility as manager. He was involved in the process of hiring and firing employees. He assigned work schedules and approved time cards each week before he turned them into the payroll office. He trained and authored on-going instructions for his subordinates. Reier relied on him to be the immediate contact with the disc jockeys he supervised, and to make sure that supplies and equipment were on hand and determine when they were needed.

Frequency of Exercise of Discretionary Powers

As operations manager, Donohue exercised discretionary powers on a daily basis. He supervised the work of the disc jockeys and programmers and instructed staff as to techniques and proper operation of equipment. He assigned work schedules and approved time cards. He used independent judgment when training and making sure that supplies and equipment were available for the broadcasting operation. He had authority to plan his own work day and manage his time. He participated in the hiring process for new employees of RBC. He also communicated with the general manager concerning tasks that involved him as a supervisor.

Relative Freedom From Supervision

Reier, as general manager, played an active role in the overall management of RBC. However, he did not closely supervise Donohue. Reier allowed Donohue to use broad discretion to carry out his supervisory and management duties in the regular operation of the five radio stations. He directed his subordinates in their daily job tasks through memos and verbal instructions without Reier's presence. He used his own discretion in determining what work needed to be done and which workers were to be assigned to each project, without the direct involvement of Reier.

Relationship Between Employee's and Subordinates' Wages

Due to Donohue's increased responsibilities as operations manager/program director, RBC and Donohue re-negotiated his salary, which was significantly higher than he had received previously and significantly higher than that paid to the hourly employees he supervised. He also received a payment of \$2,200.00 over and above his salary in December, 1996, for the additional responsibilities of his position as operations manager/program director.

Applying the five factors to this case, Donohue's primary duty as operations manager/program director with RBC was management and included work requiring exercise of discretion and independent judgment. The services Donohue performed as the operations manager/program director were indicative of someone employed in an "executive" or "administrative" capacity pursuant to the law. Therefore, he is not entitled to overtime wages he claims.

B. Vacation Claim

Donohue failed to demonstrate by convincing evidence that he had an agreement with RBC entitling him to three weeks vacation pay at the time he was terminated on September 16, 1997. Both parties acknowledge that five year's continuous employment qualified employees at RBC to three weeks annual leave. However, Donohue had a break in service between his Billings and Bozeman employment for RBC. His employment terminated in November 1994 and he returned to employment in January 1995. Donohue failed to provide convincing evidence to support a finding that he is entitled to three weeks vacation pay under the terms and conditions of employment. Because vacation pay is not a state or federal obligation of employers, and because of the failure of Donohue's evidence, RBC owes Donohue no additional vacation pay.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under § 39-3-201 et seq., MCA. *State of Montana v. Holman Aviation Co.*, 176 Mont. 31, 575 P.2d 925 (1978).
2. Edward A. Donohue was a bona fide executive or administrative employee and is not, therefore, entitled to overtime wages under the FLSA.
3. This decision is appealable to the Board of Personnel Appeals.

VI. ORDER

The claim of Edward A. Donohue is hereby DISMISSED.

DATED this 9th day of May, 2001.
DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By:
Michael T. Furlong
Hearing Officer

NOTICE: You are entitled to review of this Order pursuant to §§ 39-3-216 and -217, MCA. Review may be obtained by filing a written notice of appeal postmarked no later than . This appeal time includes the 15 days provided for in § 39-3-216(3), MCA, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer. It must set forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to § 39-3-212, MCA. Such an application is not a review of the validity of this Order.