



## II. ISSUES

1. Is Vermillion an exempt administrative employee?
2. If Vermillion is not an exempt administrative employee, is he due additional overtime wages?

## III. FINDINGS OF FACT

1. Among services provided to veterans by the Montana Disabled American Veterans (MDAV) are transportation services. MDAV employs a hospital services coordinator (HSC) who coordinates the operation of vans by volunteer drivers.
2. The United States Department of Veteran's Affairs (VA) owns the vans that MDAV volunteers drive. VA requires MDAV to use volunteer drivers. Because of insurance requirements, VA does not permit MDAV to utilize paid employees to drive the vans.
3. At all times pertinent to this case, Wayne Mooney served as Adjutant and treasurer for the MDAV. MDAV has two HSC positions, one at Fort Harrison in Helena and the other in Billings.
4. In 2005, Vermillion applied for the job of HSC. When he applied, both HSC positions, in Helena and in Billings, were open. Mooney interviewed Vermillion and offered him one of the HSC positions in March, 2005. Vermillion accepted the job and began work on April 1, 2005.
5. Mooney assigned Vermillion to the Billings HSC position. The position job description (Exhibit 5) indicates that the HSC (1) is responsible for setting up the office of transportation at the assigned VA medical facility, (2) must be a certified volunteer driver of the VA, (3) is not allowed to transport veterans or equipment while employed by the MDAV, (4) must assure the transportation needs of the veterans are met through coordination of the DAV transportation network volunteers, (5) must keep certain records, and (6) is responsible for obtaining volunteer drivers. The job description shows that the employer's interest is in ensuring the timely meeting of veterans' transportation needs.
6. Vermillion was hired as a salaried employee, initially making \$23,000.00 per year. Later, that salary was raised to \$23,500.00 per year.
7. When Mooney hired Vermillion, Mooney informed Vermillion that Vermillion could not drive the vans because of the insurance requirements imposed on VA. Mooney specifically told Vermillion, "If we don't have a driver, we just don't have the vans run." In addition, Mooney informed Vermillion that overtime was not permitted. Mooney also told

Vermillion that he could work no more than 8 hours in one day and no more than 40 hours in one week. Vermillion indicated to Mooney that he understood these restrictions.

8. Vermillion prepared and signed off on his own time sheets, which he submitted to Mooney every two weeks in order to get paid. At no time during the entire tenure of his employment did Vermillion ever indicate on his time sheets that he had worked more than 40 hours during any one work week.

9. As HSC in Billings, Vermillion was responsible for coordinating the volunteer drivers in order to ensure that the transportation needs of the veterans were covered. He was also responsible for recruiting volunteer drivers from among the local DAV members. Vermillion had the sole discretion to make decisions about how to recruit drivers, whom to recruit as drivers, how and when to schedule drivers and how to staff and operate the Billings HSC office.

10. The HSC also required that Vermillion have the Billings office staffed during the lunch hour to ensure continuity of service. This meant that Vermillion could not leave the office for lunch unless he found someone to staff the office during lunch hour.

11. Mooney on occasion called himself Vermillion's boss. In reality, however, Mooney exercised little or no direction over Vermillion's job activities. Vermillion was responsible for ensuring that there were drivers to meet the transportation needs of the local veterans and that the driving schedules were met. He exercised his own judgment as to how to best meet those responsibilities.

12. Problems arose for Vermillion in obtaining and scheduling drivers to cover the transportation needs of the veterans. He also had problems in retaining the work study volunteers who undertook some of the record keeping duties of the HSC office. Eventually, this resulted in Vermillion filling the gaps by undertaking some of the work that the work studies volunteers had previously performed and by driving the vans himself. Though aware of Mooney's admonition about not driving the vans, Vermillion nonetheless started driving the vans on occasion in order to ensure that the transportation needs of the veterans were met.

13. Other problems began to surface in the Billings HSC office. Several members of the Billings MDAV Chapter 10 were upset with the way Vermillion was handling his position. The problems even got into the local newspaper.

14. Eventually, MDAV decided to investigate the problems that had arisen during Vermillion's tenure as Billings HSC. In November 2005, Alvy Chapman, then senior vice-commander for the MDAV, began an investigation into the issues facing the Billings HSC position. He interviewed Vermillion about the problems. During the interview, Chapman admonished Vermillion that he could not drive the vans as a paid employee of MDAV.

15. The situation in Billings further deteriorated. On January 17, 2006, Mooney wrote to Vermillion, accusing him of improperly reporting vacation time and of not being in the office during the requisite hours. (Exhibit 254).

16. Vermillion responded to Mooney's letter indicating that he felt that the MDAV had created the problems he faced in the Billings HSC office. Vermillion was upset by and denied Mooney's allegations that he was improperly using vacation time. At this point, Vermillion also indicated (in the context of refuting the allegations of improper use of action time) that he had been working additional hours in order to complete all of the duties his position required. In addition, he for the first time provided to MDAV a second set of time sheets which showed a large number of overtime hours (399.5) which he claimed to have worked as Billings HSC.

17. MDAV decided to discharge Vermillion from his HSC position. Chapman met with Vermillion on February 1, 2006 to advise Vermillion that he would be discharged. At the meeting, Vermillion informed Chapman that he had beaten Chapman to it by resigning in a letter sent to MDAV the day before.

18. While employed as HSC, Vermillion was exempt from the protections of the Montana Wage and Hour Act because he qualified as an exempt administrative employee.

#### IV. DISCUSSION<sup>1</sup>

Vermillion contends he is due over \$5,700.00 in unpaid overtime wages. MDAV disputes this claim, asserting that Vermillion did not work any overtime. In addition, MDAV contends that Vermillion is exempt from the protections of the Montana Wage and Hour Act because he is an administrative employee. Because a finding that Vermillion is administratively exempt would be dispositive of this case, that issue will be considered first.

The burden of proving an exemption rests on the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, the employer must present evidence to show that the employee falls "plainly and unmistakably within the exemption's terms." *Id.* at ¶16, citing *Public Employees Ass'n v. D. of T.*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21. Questions involving exemption from overtime are narrowly construed to carry out the purposes of the FLSA. *Reich v. Wyoming* (10<sup>th</sup> Cir., 1993), 993 F.2d 739, 741.

Montana law specifically exempts bona fide administrative employees from the protections of the minimum wage and overtime act. Mont. Code. Ann. § 39-3-404, Admin R. Mont. 24.16.101. The applicable administrative rule provides a "short test" that establishes,

---

<sup>1</sup>Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

when its criteria are met, that an employee is an exempt administrative employee.<sup>2</sup> Admin R. Mont. 24.16.202(5). Under that short test, an employee is deemed to be exempt if he (1) is compensated at a rate of more than \$200.00 per week and (2) his primary duties consist of office or nonmanual work directly related to management policies or general business operations of his employer. *Id.*

MDAV has conclusively demonstrated each facet of the short test. First, it is not disputed that Vermillion was paid a salary of \$23,500.00 per year. As the claimant concedes (Page 2, claimant's responsive brief), Vermillion's salary equated to just over \$451.00 per week. Second, the sole business operation of the HSC office was to coordinate transportation of veterans for various appointments. Vermillion's only function (and certainly his primary function) was to fulfill the tasks of the HSC position by coordinating transportation, scheduling drivers and recruiting drivers. He recruited and selected volunteer drivers exercising independent and unfettered judgment. He undoubtedly had the power to discharge volunteer drivers. He scheduled drivers and coordinated trips using unfettered judgment. Other than the hours to be worked, Vermillion had virtually sole authority to decide what to do and how to do it. He engaged in office work within the meaning of the exemption. Because MDAV has conclusively demonstrated that Vermillion's job met each of the short test components, MDAV has shown that Vermillion was an exempt administrative employee under the Montana Wage and Hour Act. *See, e.g., Dennis v. Tomahawk Services, Inc.* (1988), 235 Mont. 378, 767 P.2d 346 (dispatcher for towing company who, among other things, gave input to his superiors regarding reprimands, hiring, and firing of drivers, decided whether or not to issue written reports on drivers who violated company policy and monitored drivers' days off and mileage reports was found to be an administrative employee).

Vermillion asserts, without citation to authority, that the Fair Labor Standards Act (FLSA) and its higher administrative exemption salary threshold (\$455 per week, *see generally*, 29 CFR § 541) apply to this case. The Montana Wage and Hour Act does confer power upon this tribunal to adjudicate claims arising under the FLSA, but there must first be evidence adduced showing that the FLSA applies to the employment. Although the employer bears the burden of proving that an employee is exempt from the protections of FLSA, the employee must first show that he is entitled to those protections. *See, e.g., Warren-Bradshaw Drilling v. Hall*, (1942), 317 U.S. 88, 90 ("The burden was . . . upon [the claimants] to prove that, in the course of performing their services for [the employer] and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce").

---

<sup>2</sup>The respondent has not discussed the short test but has instead argued that each of the 5 facets of Admin. R. Mont. 24.16.202, the so-called "long test," has been met in this case. While the hearing officer agrees that the facts establish that all five facets of the exemption have been proven, it is unnecessary to consider all five factors. Admin R. Mont. 24.16.2020(5) makes it clear that where the salary threshold and office or nonmanual work components are fulfilled, the employee is deemed to meet all of the requirements of the regulation and to be exempt from the overtime and minimum wage requirements.

Vermillion has presented no evidence showing his entitlement to the protections of the FLSA. No one presented any evidence at hearing to show that MDAV met the threshold requirements of a business acting in interstate commerce, the requisite to showing that the protections of the FLSA applied to Vermillion. Vermillion has presented no authority (and the hearing officer is unaware of any authority) that would require MDAV, in addition to showing that the claimant is exempt, to go further and to show also that the threshold jurisdictional requirements to invoke the FLSA have not been met. Certainly, there is no authority applying a presumption that the FLSA applies in any given case.

Citing Admin. R. Mont. 24.16.1504, Vermillion further argues that he must be accorded the higher protections of the FLSA. That rule is inapposite as authority in this matter. That rule is plainly designed only to ensure that nothing in Montana law should be taken to lessen the protections of federal law “[w]here such [federal] law is applicable, . . .” Admin. R. Mont. 24.16.1504. Here, there has been no showing that FLSA is applicable. Accordingly, Vermillion has failed to prove that this is an FLSA case.

Because Vermillion is an exempt administrative employee, he is not entitled to the protections of the Montana Wage and Hour Act. His claim must be dismissed.<sup>3</sup>

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 et seq.; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Vermillion was an exempt administrative employee under the Montana Wage and Hour Act awhile working as HSC for MDAV.

3. Because Vermillion was an exempt employee, he is not protected by the overtime provisions of the Montana Wage and Hour Act.

4. Because Vermillion was an exempt employee, the issue over the actual number of overtime hours which Vermillion worked is moot.

---

<sup>3</sup> After completion of testimony, Vermillion objected to MDAV’s argument that he was an exempt administrative employee. The objection was untimely. Throughout the hearing, MDAV often elicited testimony about the administrative exemption, without objection. By failing to object, Vermillion impliedly consented to the litigation of the issue of the administrative exemption. Moreover, when Vermillion finally objected after the hearing, the hearing officer offered his counsel an opportunity to put on rebuttal evidence about the defense. See, e.g., unofficial record transcript, page 317, lines 15-17 wherein the hearing officer stated to Vermillion’s counsel, “And so I’m asking you, is there any additional evidence, if you want to put on any additional evidence about whether or not he’s a, you know, that the administrative exemption doesn’t come in?” Vermillion did not avail himself of this opportunity. Thus, any objection to MDAV interposing the administrative exemption defense was waived.

**VI. ORDER**

Vermillion's claim is hereby dismissed.

DATED this 25th day of May, 2007.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
Gregory L. Hanchett  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.