STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF Shellie R. Babinecz, Jerome D. Belstad, Jr., Henry C. Devereaux, Kevin R. Fifield, Lori S. Gasvoda, Paul L. Hazelton, Lawrence E. Henke, Terry D. Magone, Daniel D. Martin, Daralee A. Murphy, Mary P. Murphy, Frank J. Nowakowski, Michael D. Reddick, Michael T. Staton, Dean V. Walston, and **Scott M. Zarske,**	)	**Case Nos. 8949-97, 8888-97, 8876-97, 8906-97, 8874-97, 8877-97, 8922-97, 8830-97, 8849-97, 8898-97, 8875-97, 8864-97, 8886-97, 8981-97, 8850-97, 8851-97**
Claimants,	)	
	)	***FINDINGS OF FACT;***
vs.	)	***CONCLUSIONS OF LAW;***
	)	***AND ORDER ON LIABILITY***
Montana Highway Patrol,	)	
Respondent.	)	

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I. Introduction

The sixteen claimants filed wage claims against the Montana Highway Patrol (the patrol), their employer, with the Department of Labor and Industry. The department dismissed all sixteen claims on October 20, 1997. The claimants all appealed the determinations, through a single letter written by the attorney representing all of them, on November 6, 1997.

The parties agreed to consolidate and bifurcate the sixteen appeals, first addressing liability. On October 29, 1998, the hearing examiner convened the telephonic contested case hearing on the patrol's liability. Claimants Officer Henry Devereaux, Officer Kevin Fifield, Mary Pat Murphy, Officer Michael Reddick and Officer Scott Zarske (as a rebuttal witness for claimants) appeared and testified. Their attorney, Dean D. Chisholm, Kaplan Law Office, appeared and represented all claimants. The patrol appeared through its designated representative, Colonel Craig Reap, who appeared and testified, and its attorney, Melanie A. Symons, Assistant Attorney General. Other witnesses testifying were Officer Roger Dundas for claimants, and Robert J. Griffith, Stephen Barry, Elaine Peterson, Captain John Michael Frellick, Lieutenant Robert Hammel and Captain Shawn Driscoll for the patrol.

The hearing examiner admitted exhibits A through T, 1-6 and 500-581 into evidence without objection. The hearing examiner admitted exhibits 7-8 over the patrol's objection that the exhibits were outside of the two years for which it contended wages would be recoverable. The hearing examiner's docket of filings accompanies this decision.

The facts and procedures before and after the hearing are aptly summarized by the opinion in the Montana Supreme Court's decision. *Babinecz v. Mt. Highway Patrol* (2003), 2003 MT 107,

¶¶ 3-9, 315 Mont. 325, 68 P.3d 715. The case returned to the department in 2003, on remand from the Board of Personnel Appeals after the Montana Supreme Court's decision and remand. The parties agreed no additional evidence was necessary to address the issue of the employer's liability for the claimants' Montana wage and hour claims, and filed briefs arguing the merits of their positions. The claimants filed the last brief on October 24, 2003, and the case was submitted for decision. The law of the case appears in the Montana Supreme Court decision, *Babinecz*, ¶ 29:

We conclude that the United States Supreme Court decision creates a *de facto* exclusion of the Officers from the full protection of the FLSA and that, therefore, the Officers are not covered by the FLSA as contemplated by the Montana legislature in § 39-3-408, MCA (1995). This result is consistent with the legislature's intent as expressed by its 2001 amendment of § 39-3-408, MCA, to expressly cover state employees. Consequently, the WPA [Montana Wage Payment Act] applies to the facts of this case pursuant to § 39-3-408, MCA (1995).

II. Issues

1. Does the "current" weekly schedule for claimants (i.e., for the applicable period of time preceding the claims) result in overtime hours worked by claimants?

2. Does the labor contract between respondent and claimants' authorized representative apply to determine any of these claims?

3. Are claimants entitled to wages for lunch-hours while "on call?" If so, on what basis, and under what circumstances?

III. Findings of Fact

1. The claimants are sixteen individuals who are or were employed by Respondent Montana Highway Patrol (the patrol) as patrol officers.

2. The claimants filed wage claims with the Montana Department of Labor and Industry in early 1997, demanding compensation for meal periods and overtime (including any overtime resulting from compensation for meal periods). Their claims extended over their prior employment up to the claim dates.

3. In determining overtime pay entitlements for its patrol officers, including the claimants, the patrol recognized three separate methods of determining overtime. It considered these methods to be mutually exclusive. The three methods provided overtime premium pay for hours worked in excess of (1) 8 per day or 160 in a 28-day work period, pursuant to the applicable collective bargaining agreement between the patrol and the officers; (2) 40 per week, pursuant to Montana's Wage Payment Act; or (3) 171 in a 28-day work period, pursuant to the federal Fair Labor Standards Act, 29 U.S.C. § 207(k). The patrol selected which of the three methods it would follow depending upon the availability of payroll funds, and purported to follow the 28-day method.

4. Although the patrol had nominally adopted the 28-day rotating work period, it continued, during all times pertinent to these claims, to assign duties according to a 49-day work schedule it had used for many years. It actually used the 49-day schedule for all purposes.

5. The patrol assigned 9 hour duty shifts to its patrol officers, including a meal break for which the patrol did not pay wages. As a result, the patrol paid the officers for 8 hours of work.[(1)] The rotating work schedule resulted in the officers working (exclusive of the meal breaks) 40 hours in some weeks, 48 hours in other weeks and 32 hours in yet other weeks. The patrol paid the officers for 40 hours per week (80 hours per two-week pay period) without regard to the hours actually worked, again (72, 80 or 88 hours per two-week pay period), again excluding meal periods, paying no overtime as a result of the differing hours per week.

6. The patrol's practice of deploying and assigning its officers based upon 9 hours per officer per shift (while paying wages for 8 hours) allowed it to provide complete coverage within its budget. Had it planned only 8 hours of coverage for each officer's shift, it could not have maintained complete coverage. Its personnel needs and plans were based upon the 9 hour per shift coverage, while its budget was based upon paying wages for 8 hours on each such shift.

7. To maintain 9 hours per shift per officer for coverage, the patrol paid officers the costs of their meals and required them, by direct and indirect means, to remain equipped, available and ready during their meal periods. The methods utilized to maintain the 9 hour per shift coverage included placing the following constraints on officers during meal periods:

Requiring them to inform dispatch of their whereabouts;

Requiring officers to monitor their radios or provide a telephone number where they could be reached by dispatch and requiring that they respond if summoned;

Limiting their locations, to keep them within or near their patrol areas;

Requiring them, in fact if not in policy, to remain in or near their patrol cars and in uniform, unless they obtained special permission;

Barring them from running personal errands with their patrol cars or while in uniform;

Limiting meal periods to within the middle three hours of shifts, not during the first or last three hours;

Further restricting timing of meal periods (within the middle three hours) based upon the extent of "coverage" in their areas;

Restricting the timing of their meal periods within the middle three hours based upon the "coverage" in the area;

In one instance, refusing to allow a female officer to go home during her meal periods to breast feed her newborn;

In one instance, reprimanding an officer for returning home to mow his lawn during a meal period;

By the restrictions, preventing officers from running errands or doing personal business and effectively forcing them to remain, in most instances, in public restaurants within their coverage areas, as uniformed patrol officers;

Requiring that officers respond to inquiries or requests for assistance from the public, and requiring a sufficiently complicated method of claiming work time for such responses so as effectively to prevent officers from claiming the time;

Requiring that officers, while in uniform in public, maintain high standards of personal behavior, so that two officers who argued during a meal period at a restaurant received reprimands from their supervisor;

Requiring that officers remain vigilant for the occurrence of crimes around them and respond if they observed the occurrence of a crime or dangerous situation; and

In at least once instance, advising officers, while reiterating the restrictions upon meal periods, that officers "owe" the patrol 9 hours per duty shift.

8. The presence of a uniformed officer in public, during a meal period, was a crime deterrent of genuine coverage value to the patrol, while keeping officers at risk because of their conspicuous public presence.

9. Officers performed their duties as assigned or as directed by law, departmental policy, procedure, regulation or any lawful order of a superior, including any order relayed from a superior by an officer of the same or lesser rank. The officers followed the directives regarding meal periods, thereby providing law enforcement coverage during meal periods.

10. The patrol neither authored nor authorized any memorandum or directive advising officers that their meal periods were free of restrictions. If officers had known that they were not required to perform any work functions during their meal periods, and chose not to, the patrol's coverage would have been compromised.

11. Many officers either were located in either one-officer stations, or served as the sole officer on duty in small detachments. The patrol in such instances had no coverage without the duty officer being available to dispatch during meal periods. In larger detachments, the patrol only rarely permitted officers to leave their duty areas or otherwise depart from the requirement of being equipped, available and ready during their meal periods.

12. On patrol, officers had three primary functionsto observe, to be observed, and to respond to calls. The constraints the patrol placed on officers' meal periods essentially, for the benefit of the patrol, that they continued to observe, be observed, and respond to calls while on meal periods.

IV. Opinion

Introduction

During the pendency of this case the United States Supreme Court decided that Congress could not subject the states to liability for employees' wage claims under the Fair Labor Standards Act (FLSA) unless and until the state employing the particular claimants expressly waived sovereign immunity under the 11th Amendment with regard to the FLSA. *Alden v. Maine* (1999), 527 U.S. 706.

The United States Supreme Court had long ago acknowledged that Congress applied FLSA coverage to the states. ***E.g.***, *Garcia v. San Antonio Metro. Trans. Auth.* (1985), 469 U.S. 528. Like many of its sister states, Montana had affirmatively excluded from state wage and hour laws those employees "covered by the Fair Labor Standards Act of 1938." Mont. Code Ann. § 39-3-408(1). Montana and the federal government each adopted and retained its statutes and regulations addressing meal breaks and overtime under the assumption that states and state employees were subject to the FLSA.

During the prehearing proceedings in 1998, the parties agreed that the FLSA applied to the claims and defenses involved, and upon their agreement the hearing examiner dismissed the claimants' state law claims. The parties put on their evidence at hearing and wrote their post-hearing arguments on the premise that the FLSA governed these disputes. Now, however, the parties have argued and submitted the case, based upon the evidence adduced at the hearing, arguing both Montana and FLSA cases and statutory provisions, even though the law of the case is specific that "the Officers are not covered by the FLSA as contemplated by the Montana legislature in § 39-3-408, MCA (1995)." *Babinecz*, ***op. cit.***, ¶ 29.

Montana law applies. Montana decisions which applied FLSA case law, statutes and federal regulations are, in light of *Alden* and *Babinecz*, inapplicable.

The Applicable Overtime Standard

Montana law requires that employers pay their employees wages due in accord with the employment agreement and the law. Mont. Code Ann. § 39-3-204. By statute, employers must pay overtime wages of not less than 1½ times the regular hourly wage rate for hours worked in excess of 40 hours during a week, with exceptions irrelevant to this case. Mont. Code Ann. § 39-3-405(1).

Effective March 20, 2001, Mont. Code Ann § 39-3-405(4) mandated that the overtime law of Montana applied to firefighters and law enforcement officers "consistent with" the current requirements of the FLSA and its extant regulations. Laws of Montana, 2001, Ch. 71, Sec. 1.[(2)]

That amendment was not expressly retroactive. Applying the amendment retroactively to wage claims for work performed prior to that effective date would change the rights of the claimants. Therefore the law in effect during the time at issue, before the claim filings in 1997, applies. ***E.g.***, *Porter v. Galarneau* (1995), 275 Mont. 174; 911 P.2d 1143, 1148-50; ***applying*** Mont. Code Ann. § 1-2-109.[(3)] There were no exclusions from the general Montana overtime law for highway patrol officers that were applicable to the times pertinent to this case, either under Mont. Code Ann. § 39-3-406 or other Montana overtime laws addressing specific occupations.[(4)]

The claimants also sought overtime for time worked in excess of 8 hours in a day. Article XII, section 2 of the 1972 Montana Constitution states that "a maximum period of eight hours is a regular day's work in all industries and employment except agriculture and stock raising. The legislature may change this maximum period to promote the general welfare."[(5)] Mont. Code Ann. § 39-4-107(1), originally enacted in 1905, states that "a period of eight hours constitutes a day's work in all works and undertakings carried on . . . by . . . the state government." None of the exemptions in subsections 39-4-107(2) through 39-4-107(4) apply to law enforcement officers working for the state. However, the existing interpretations of the constitutional provision and the statute do not support the claim for overtime whenever these claimants worked more than 8 hours in a day.

The Montana Attorney General concluded that neither the constitutional nor the statutory definition of a regular day's work mandated a 5-day, 40 hour workweek for patrol officers. 27 Attorney Gen. Opinions 28 (1957). The Montana Supreme Court referenced the constitution and the statute, but approved payment of overtime only for hours worked in excess of 40 per week. *Glick v. Montana Dept. of Institutions* (1973), 162 Mont. 82, 509 P.2d 1.

In a later opinion, the Attorney General concluded that the state need only pay employees overtime for hours they worked in excess of the statutory 40 hour week. 37 Attorney Gen. Opinions 16 (1973). However, that opinion also concluded that "The forty-hour basis set forth in the act is only the minimum requirement. Since an eight-hour basis exceeds this standard and is more beneficial to the employee, it is a proper method of figuring overtime. Although the state has the option of using the eight-hour basis, it is only required to pay overtime on hours worked in excess of forty per week" [emphasis added]. More recently, the Montana Supreme Court concluded (in dicta) that the constitutional provision was not self-executing and the 8 hour regular work day statute, as it then existed, was not an overtime provision since it contained a penalty provision (since repealed) for its violation. *Weston v. Mont. Highway Comm'n* (1980), 186 Mont. 46, 606 P.2d 150, 152-53. Although the penalty provision no longer exists, there is no more recent authority altering the decisions and opinions of record.

As a matter of statutory construction, the department must follow the existing law and the Attorney General's opinions. There is no current statutory entitlement to overtime pay for working more than 8 hours in a day, only for working more than 40 hours a week.

There is, however, a collective bargaining agreement between the claimants and the patrol, which provides overtime pay for working more than 8 hours a day:

Employees shall be paid at the rate of one and one half (1 ½) times their regular rate of pay for all authorized time they work over eight (8) hours per shift or over 160 hours per 28 day work period. Authorized holiday leave, sick leave, annual leave or compensatory time off shall constitute time worked when computing overtime or compensatory time credits under this article.

Thus, the State, acting through the patrol, agreed with the claimants to pay overtime based on an 8 hour day as well as 160 hours over a 28 day period. The patrol effectively conceded that it agreed to pay overtime whenever either condition applied. It also noted that its management viewed the 160 hour provision as a "fall back" for tight fiscal times,[(6)] but that reservation is not part of the collective bargaining agreement.

There is no basis in this record to relieve the patrol of the obligations it undertook pursuant to the collective bargaining agreement. The state clearly can agree to more generous overtime provisions than minimum statutory requirements pursuant to Mont. Code Ann. § 39-3-405(1), as the Attorney General specifically noted in 1973. The patrol did agree to more generous overtime provisions. The collective bargaining agreement does not limit the remedy for overtime claimed (based upon the 8-hour day agreement) to the agreement's grievance provisions. There is no authority to limit that remedy to the grievance procedure. The claimants can seek their overtime in this proceeding, under their contract of employment.

The patrol argued that it had paid overtime based upon the agreement, and that none of the claimants filed grievances under the collective bargaining agreement. Whether it has paid overtime in accord with the agreement is a fact question for the damages phase of this proceeding. For the liability phase, the patrol has not cited authority precluding the claimants from electing to pursue their wage claim remedies through the department instead of or prior to filing grievances under their collective bargaining agreement. The patrol has only cited to dicta in *Weston* noting that Weston failed to pursue a grievance under the applicable collective bargaining agreement, after the opinion first held that Weston entered into an employment contract that classified him as a supervisor and expressly exempted him from recovering any overtime compensation. *Weston*, 606 P.2d ***at*** 152 (followed by the further dicta discussing the meaning of the 8 hour regular work day statute and constitutional provision).

As already noted, employers must pay their employees wages due in accord with the employment agreement as well as the law. Mont. Code Ann. § 39-3-204. When the patrol agreed to overtime for work in excess of 8 hours a day, wages, including overtime, for such work became part of any potential wage claim under Mont. Code Ann. §§ 39-3-204 and 405, because it was part of the employment agreement between the parties. Pursuant to Montana law and the collective bargaining agreement, claimants are entitled to overtime pay for hours worked in excess of 8 hours a day as well as in excess of 40 hours a week. The patrol is liable for overtime for such hours.[(7)]

Meal Periods

All parties have extensively briefed the meal periods question with FLSA cases, both federal and state. None of those cases are at all useful with regard to whether meal periods are work time which would count toward overtime and regular pay entitlements.

Montana law entitles employees to wages for hours worked. Time that the employer requires the employee to be on duty generally constitutes hours worked. Admin. R. Mont. 24.16.1002(3). When the employer knows or has reason to believe that work is being performed away from its premises, the employer must count the time as hours worked. Admin. R. Mont. 24.16.1005(2).

Montana law directly addresses meal periods. The regulation appears most applicable to circumstances in which meal periods occur on the employer's premises, but the reasoning of the regulation is clear: time under the employer's direction is work time. A meal period of 30 minutes or more counts as working to earn a wage unless the employee is relieved from all duties. If the employee must perform any duties, including being ready to serve any customers that appear, the break is work time rather than a bona fide meal period:

> (a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods [that must be counted as hours worked]. *The employee must be completely relieved from duty for the purposes of eating regular meals.* Ordinarily 30 minutes or more is long enough for a bona fide meal period. . . . . *The employee is not relieved if he is required to perform any duties, whether active or inactive while eating.*

24.16.1006(2)(a) ARM (*emphasis added*).

In state law cases the Board has followed the plain meaning of the regulation. *Ovik (Ross) vs. Clark, dba Juice'N Java Junction*, Case No. 9038-97 (April 20, 1998); *Wray vs. Clark, dba Juice 'N Java Junction*, Case No. 9271-97 (April 8, 1998).

In addition, the further language of Admin. R. Mont. 24.16.1005(6)(a), addressing when an employee is "suffered or permitted to work" even though "off duty" is also useful to analyze the situation of these claimants. If an "off duty" employee is "completely relieved from duty" for a long enough period "to enable him to use the time effectively for his own purposes," he is not working; however, he is "not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived." Clearly, the claimants were not "off duty" in this sense.

Admin. R. Mont. 29.16.1005(7) also defines working hours to include "on call" time if the employee must await a call either on the employer's premises or "so close thereto that he cannot use the time effectively for his own purposes." While the claimants were not remaining on patrol "premises," they were generally required to remain in or sufficiently near their duty areas to respond to calls. They were further limited in behavior, attire and readiness, as already discussed at length in the findings.

The Montana Supreme Court has approved the Board's approach of looking at whether the employee is completely freed from any duties during the meal period. *Lewis v. B & B Pawnbrokers, Inc.*, 1998 MT 302, ¶ 8, 292 Mont. 82, 968 P.2d 1145. *Lewis* involved on-site lunch breaks, and did not involve a law enforcement officer. However, since the claimants are state employees pursuing claims arising prior to the effective date of the amendment in Mont. Code Ann § 39-3-405(4) applying FLSA standards to law enforcement, their status as law enforcement officers is irrelevant. The degree to which the officers were still under the employer's direction during their meal periods, in the sense of being in uniform, on call, responsive to situations and citizens, and so on, fits the present case to the *Lewis* holding, even though the claimants had no "work site" *per se*.

All these Montana authorities, viewed for their rationale and purpose, support a conclusion that the claimants' meal periods were working hours. Despite the patrol's evidence that the actual policies were not as rigid as the employee manual, the claimants have proved, on this record, that they were not free from the direction and control of the patrol during their meal periods. Because they were not at liberty to ignore calls or questions from the public, because they were restricted in location and dress during the meal periods (in accord with the written policies as well as the actual practices of the patrol) they were not free from the employer's direction, even when they spent a meal period without interruption.

The patrol policy requiring that a claim be made and documented for an interrupted meal period did not alter the status of officers as on duty during meal periods. Clearly, the patrol counted on the availability of officers during meal periods. Its scheduling relied upon the availability of officers during meal periods in order to provide coverage to the public during all hours of the day and night.[(8)]

Therefore, for purposes of determining wages due the claimants, their meal periods were time at work, and the patrol is liable for wages for the claimants' meal periods.

Penalty Applicable

Montana law provides for a penalty of up to 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206. The penalty provision applies to overtime claims not subject to the FLSA. Mont. Code Ann. § 39-3-408(1). Unless the parties agree to a lesser penalty for overtime wages due and unpaid, the penalty is 110% of the unpaid wages. Admin. R. Mont. 24.16.7561(1)(a) and (2). The applicable penalty for regular wages due and unpaid is 55% of the unpaid wages, or 110% of the unpaid wages, if the claimants prove that any of the limited special circumstances in Admin. R. Mont. 24.16.7556 are present. ***Id.***

It is unclear whether the inclusion of the meal periods in work time will result in any wages due, aside from overtime premium pay. If regular wages are ultimately due, the only possible application of the maximum penalty to those wages would occur if the patrol had violated similar wage and hour statutes within three years prior to the filing dates of these claims. Admin. R. Mont. 24.16.7556(1)(c). The current record does not address that fact question. The penalty assessment, as well as the amount of wages due the claimants, the amount of any offset or credit

for overpayments of wages and the applicable time period for any recovery of unpaid wages, remain as issues for the second portion of these bifurcated proceedings.

V. Conclusions of Law

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over the claims.

2. The respondent employed all sixteen claimants and owes wages due and unpaid to the claimants for hours worked in excess of 8 in a day or 40 in a week, for a period to be determined prior to the claim filing dates for each of the claims. The amount per hour may be ½ of the hourly wages for the overtime worked, or may in some instances be 1½ times the hourly wages for the overtime worked, depending upon whether the time was previously credited and paid at the hourly rate.

3. Depending upon the determinations of wages due and unpaid for each claimant, the respondent may owe statutory penalties on those wages.

4. Depending upon the evidence adduced in the second hearing, the respondent may be entitled to an offset for wages overpaid to each claimant.

VI. Order

This bifurcated proceeding is not completed. The conclusions of law are not yet a final order, because the damages portion of the proceeding is next. The conclusions of law herein govern proceedings in the damages hearing.

This is not a final order, but rather is analogous to a partial summary judgment, addressing liability. The hearing examiner is not inclined to certify it as final for appeal purposes, believing that the parties might be better served to complete the damages hearing, and obtain a complete final order. However, the parties will now have an opportunity to address whether they prefer to seek certification in order to pursue an appeal from this order.

In addition, this case, because of its convoluted development, has ranged far from the issues as the parties originally framed them. The parties should also now have an opportunity to make a record of any new or additional authority they believe should be considered regarding liability.

Finally, the parties need to advise the hearing examiner of the need for prehearing proceedings and the timing of any such proceedings. The hearing examiner, with the concurrence of the parties, also needs to set an appropriate date for the damages hearing.

THEREFORE, the hearing examiner now adopts the conclusions of law as the order deciding the issues presented at the liability hearing. THIS IS NOT A FINAL AGENCY DECISION. By January 6, 2004, the parties must file any motions regarding modification of this decision, together with any requests for issuance of certification of this decision as final for appeal purposes, limiting the bases of such motions to new or additional authority, NOT reiterating

arguments or authority already presented. Supporting briefs and other matter addressing requests for modification or certification are due the same date. By the same date, the parties must also file their prehearing statements identifying contentions, issues, proposed uncontested facts, witnesses and exhibits they plan to use for the hearing on damages, including in that prehearing statement any requests for time to engage in discovery or other formal prehearing procedures. By January 20, 2004, the parties must file responses opposing any modification or certification requests. There will be no written replies. On February 3, 2004, at 9:00 a.m., the hearing examiner will convene a telephone conference with counsel, to hear argument on any requests for modification and certification and decide upon a schedule for further proceedings.

Dated: December 1, 2003.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

1. [1] In 1997, the patrol and its union employees (including the claimants) agreed that officers could elect to take meal periods ranging from ½ hour to 1 and ½ hours, with 8 working hours around the elected meal period. The record in this liability phase of the case does not contain detailed information on the length of the meal periods for these claimants. This decision will use the 9 hour schedule with a 1 hour meal period as the model for the findings. The parties can provide evidence of the precise schedules of the claimants during the damages proceeding that will follow.

2. [2] The immediately effective amendment manifests the legislature's recognition, even before the *Babinecz* decision, that after *Alden* the FLSA did not cover state employees.

3. [3] *Porter* clearly explains the difference between the normal retroactive effect of judicial decisions and the normal lack of retroactive effect for statutes when the rights of the parties would be changed by such retroactivity. Thus, *Alden* and *Babinecz* determine the law for this case, while the subsequent statutory enactment does not apply.

4. [4] There were such exclusions for local government's law enforcement officers. Under those exclusions, the Montana Supreme Court had previously held that FLSA overtime provisions applied, like the 171 hours in 28 days provision used by the patrol, instead of the lower of FLSA or Montana requirements for paying overtime. *Phillips v. Lake County* (1986), 222 Mont. 42, 721 P2d 326. This prior holding may be consistent with the patrol's position regarding the threshold for overtime entitlement, but cannot apply to this case, under *Alden* and *Babinecz*.

5. [5] Article XVIII, section 4 of the 1889 Montana Constitution contained substantially the same definition of the work day.

6. [6] It is not entirely clear, but apparently the patrol thought that if it had insufficient funds to pay overtime for work in excess of 8 hours a day, it could reduce hours on other days so that the total worked during a 28 day cycle (which it was not really using) would remain at or under 160 hours, and then it could pay no overtime. No legal basis for such an interpretation of the

collective bargaining agreement is in the current record. The collective bargaining agreement, as applicable to this case, did provide for substitution of compensatory time for paid overtime should the patrol have insufficient funds to pay the overtime.

7. [7] The patrol referenced in passing its argument that it would be entitled to a credit against any wages due for overpayments of wages made to claimants in weeks in which they actually worked fewer than 40 hours. In the damages phase of this proceeding, the patrol can interpose a defense of offset against any overtime recovery for such overpayments.

8. [8] Even if the FLSA standards applied, the coverage officers provided during their meal breaks was a predominant benefit for the employer, which might still render the meal periods work time.