

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1131-2005
OF JAY D. OLD MOUSE,)	
)	
Claimant,)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND FINAL AGENCY DECISION
)	
LAME DEER PUBLIC SCHOOL)	
DISTRICT #6,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

Jay Old Mouse appeals from a decision of the Wage and Hour Unit that found he was an exempt executive employee and not entitled to wages which he claimed were due him for overtime work he performed during the 2002-2003 and 2003-2004 school years. Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter in Lame Deer, Montana on October 11, 2005. Old Mouse represented himself and testified on his own behalf. Mike Dahlem, attorney at law, represented the respondent Lame Deer School District. Charles Mitchell, Michael Williams, Gary Scott and Roger Old Mouse also testified. With the agreement of the parties, Mitchell and Williams, who both reside outside of Montana, testified by telephone. Wage and Hour Unit Documents 1 through 185, Claimants Exhibits 1 through 5, Respondent's Exhibits A, C, D, E, F and its exhibit denominated as "Transportation Supervisor," dated December 2001, were admitted into evidence. Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final agency decision are made.

II. ISSUE

Is Old Mouse due additional overtime pay as alleged in his complaint?

III. FINDINGS OF FACT

1. Lame Deer School District is an employer subject to the Fair Labor Standards Act (FLSA).

2. In 2000, the school district advertised to fill the vacant position of transportation supervisor. Old Mouse applied for the position having had several years experience in driving commercial vehicles including passenger buses. He was hired for the position and began immediately prior to the start of the school year during the fall of 2000. The district had a transportation division that operated in a semi-autonomous mode, with no direct daily supervision by any of the district's administrators. Old Mouse was hired to supervise the transportation division, as he conceded at hearing. Old Mouse remained in this position until his resignation on June 30, 2004.

3. Old Mouse was initially hired at an hourly wage. He later asked that he be paid overtime because of the hours he was putting in at the job. At some point, the school administration approved his request to be paid overtime. He was paid hourly and overtime wages through the end of the contract year of 2001-2002.

4. The school district rehired Old Mouse in his position as transportation supervisor for the school year of 2002-2003. Instead of being renewed as an hourly employee, he was rehired as a salaried employee. From July through December 2002, he was paid on an annual salary basis of \$29,000.00. In January 2003, his annual salary was increased to \$32,000.00. During the 2003-2004 school year, Old Mouse entered into an employment contract with the school that paid him \$34,176.00 in annual salary plus a \$2,500.00 stipend in lieu of health insurance. In contrast, as demonstrated by Documents 69 and 70, other bus drivers were paid an hourly wage, the highest pay being \$11.73 per hour.

5. The nature of Old Mouse's duties did not change over the entire tenure of his employment. His position required him to supervise, evaluate and discipline other drivers. He reported to the district superintendent, but was not closely supervised in his position.

6. Old Mouse supervised 13 bus drivers in his position as transportation supervisor. This included planning and scheduling bus routes, finding replacement drivers in the event of a regular driver's absence and approving repairs to buses and purchases (without preapproval of the district administration up to \$500.00 dollars).

7. The record is full of examples of Old Mouse recommending and carrying out disciplinary action against subordinate bus drivers. These disciplinary actions ultimately had to be approved by the district administration. Nonetheless, in several instances this discipline was initiated at the request of Old Mouse and in many instances carried out by Old Mouse. Some examples include:

(A) On December 12, 2002, Old Mouse recommended the suspension of a driver for two days without pay.

(B) On February 10, 2003, Old Mouse suspended another driver for two days without pay.

(C) On March 14, 2003, Old Mouse suspended a driver for three days without pay.

(D) On March 20, 2003, Old Mouse suspended a driver for five days without pay.

In addition, Old Mouse spoke with drivers frequently on an informal basis in order to correct improper or unsafe conduct that he observed.

8. Old Mouse regularly and customarily exercised discretion in his position, deciding how or whether to utilize substitute drivers, approaching people about becoming bus drivers, initiating and recommending informal discipline and formal discipline and carrying out discipline after approval by the school district. It is apparent that in almost every instance, the school district “rubber stamped” Old Mouse’s personnel recommendations.

9. Old Mouse also reviewed his subordinate drivers’ time sheets and checked those time sheets against trip records to ensure their accuracy. When the payroll staff of the district had a question about a particular driver’s time sheet, one of the staff would contact Old Mouse to check records of route assignments to verify the accuracy of the employee’s time sheet.

10. Soon after assuming the duties of transportation supervisor, Old Mouse organized and initiated weekly (or at least regularly scheduled) transportation meetings with school district administrators to ensure that all the transportation needs of the school district were being met. In addition, toward the end of his tenure with the school district, Old Mouse participated in Rosebud County transportation

meetings with various county school district representatives where Old Mouse presented the Lame Deer school district's annual transportation plans.

IV. DISCUSSION¹

Old Mouse claims that he was a non-exempt employee and is entitled to overtime for hours that he worked in excess of 40 hours per week. The Lame Deer School District argues that Old Mouse was plainly an exempt executive employee, having many supervisory duties that made him an executive. Having carefully considered the evidence presented by both sides as well as the arguments presented in all prehearing materials and at the hearing, the hearing Officer is convinced that Old Mouse was an exempt executive employee throughout the period of his claim (2002 through 2004) while employed by the Lame Deer School District.

The parties agree that this case is subject to the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay non-exempt employees at a rate of one and one half the employees' regular rate of pay for all hours worked in excess of 40 hours per week. 29 U.S.C. §207 (a)(1). Bona fide executive employees are exempt from the overtime requirements imposed under the FLSA. 29 U.S.C. §213(a)(1).

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. The employer must do so by presenting 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* (10th Cir., 1993), 993 F.2d 739, 741.

29 CFR § 541.1² defines an exempt executive employee as a person:

(A) whose primary duty consists of the management of the enterprise in which he is employed; and

¹Statements 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.

² Effective August 23, 2004, the U.S. Department of Labor adopted new regulations to define and delimit the term "bona fide executive employee." 69 Fed. Reg. 22122 (April 23, 2004). Because the effective dates of the Old Mouse's claim precede the implementation of the new regulations, the hearing officer must apply the old regulations to this case.

(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 or 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 of his hours of work in the workweek to activities which are not directly or closely related to the performance of the work described in A through E; and

(F) who is compensated for his services on a salary basis at a rate of not less than \$155 per week.

An employee who makes at least \$250.00 per week and who meets the criteria set out in 29 CFR § 541.1 subpart (a) (primary duty is management) and subpart (b) (supervises at least two full time employees or their equivalent on a regular basis) is deemed to be an exempt executive without considering subparts (c), (d), (e), and (f).³ 29 CFR § 541.1(f).

Old Mouse plainly and unmistakably falls within the executive exempt provision of the FLSA. His salary exceeded the \$250.00 per week threshold needed to bring the short test into play. Old Mouse conceded prior to the hearing that he exercised supervisory power over several employees in the transportation unit of the school district. The evidence adduced at hearing bore this out. His primary importance to the school district was his supervision of the transportation unit. He made several decisions to initiate discipline against subordinates, kept track of the accuracy of their time cards, and even solicited employees for the transportation unit. He supervised 13 employees in the transportation unit. While the school district had the ultimate say over hiring, it is nonetheless clear that Old Mouse had the discretion to initiate hiring of any individual that he felt would be fit for driving. In addition, he did scheduling and laid out some bus routes. Under all the evidence adduced at the hearing, it is evident that Old Mouse was an exempt executive for purposes of the FLSA. *Kemp, op cit.* (assistant chef who scheduled subordinate employees, directed the work of those other employees, and whose managerial duties were her primary importance to the employer was exempt executive even though she spent 80% of her time engaged in non-exempt duties.)

³ This test is commonly referred to as the “short test” to determine exempt executive status.

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. The Lame Deer School District was at all times material to this claim an enterprise engaged in interstate commerce and subject to FLSA requirements.

3. Old Mouse was an exempt executive employee in his position as transportation supervisor for the school district and was not entitled to the overtime protections accorded by the Act.

4. Because Old Mouse was an exempt employee, the Lame Deer School District does not owe him additional wages for overtime.

VI. ORDER

Old Mouse's claim is hereby dismissed.

DATED this 25th day of November, 2005.

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.