

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 325-2010
OF TRACEE L. RAYMOND,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
OPERATING ENGINEERS LOCAL 400,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On August 17, 2009, Tracee L. Raymond filed a claim with the Department of Labor and Industry contending that International Union of Operating Engineers, Local 400 (Local 400) owed her \$52,885.77 in overtime premium pay and \$929.20 in vacation wages. On August 26, 2009, Local 400 filed a response to the charge, contending that Raymond was an exempt employee for overtime purposes, and denying that it owed Raymond additional compensation.

On November 3, 2009, the Department's Wage and Hour Unit issued a determination finding that Raymond was an exempt employee for whom the employer was not required to pay overtime premium, and that she was not entitled to other wages. On November 24, 2009, Raymond filed a request for redetermination.

On November 30, 2009, the Wage and Hour Unit issued a redetermination upholding the original determination.

On December 18, 2009, Raymond appealed the redetermination. Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on March 8, 2010. On March 10, 2010, the Hearings Bureau issued a notice of hearing. Following a scheduling conference on March 24, 2010, the matter was set for hearing on November 16, 2010. The hearing date was later continued to February 15, 2011, at the request of counsel for Raymond. Local 400 did not oppose the requested continuance.

On November 20, 2010, Local 400 filed a motion for summary judgment, contending there were no issues of material fact and that it was entitled to judgment as a matter of law. On February 4, 2011, the hearing officer granted partial summary judgment on some of the issues raised in Local 400's motion.

On February 8, 2011, the hearing officer conducted a pre-hearing conference with counsel for the parties. Counsel stipulated to certain facts, and those facts are incorporated into the findings of fact set forth below as findings 1 - 5 and 7 - 16.

Hearing Officer David A. Scrimm conducted a hearing in the case on February 15, 2011. The claimant, Tracee L. Raymond, was present and represented by Daniel G. Gillispie, Attorney at Law. Karl J. Englund, Attorney at Law, represented the respondent, International Union of Operating Engineers, Local 400. Raymond, Dave Johnson, Chuck Cashell, Earl Salley, Colleen Cartwright, Terry Sprenger, and Randy Sobeck testified. The administrative record compiled at the Wage and Hour Unit and Exhibits A - L were admitted into evidence.

The parties filed post-hearing proposed findings of fact and conclusions of law on March 21 and 22, 2011. They filed simultaneous responses to the proposed findings and conclusions on April 4, 2011, and the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether Operating Engineers Local 400 owes wages for work performed, as alleged in the complaint filed by Tracee L. Raymond, and owes penalties or liquidated damages, as provided by law. Specifically, the issue is whether Raymond's employment was exempt from the requirement to pay overtime premium because she was employed in a bona fide administrative capacity.

III. SUMMARY JUDGMENT

In its motion for summary judgment, Local 400 contended that Raymond was exempt from the requirement for overtime premium on the grounds that she was employed in a bona fide administrative capacity.

Hearings on wage claims are governed by the Montana Administrative Procedure Act (MAPA). Mont. Code Ann. § 39-3-216(3). Under MAPA, administrative agencies may grant summary judgment when there is no material fact issue in dispute:

Procedural due process requires that parties be given reasonable notice and a reasonable opportunity to be heard; these due process requirements are reflected in MAPA in §§ 2-4-601, and 2-4-612(1), MCA. Section 2-4-612(1), MCA, provides that “[o]ppportunity shall be afforded all parties to present evidence and argument on all issues involved.” . . . However, due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute.

In re Peila, 249 Mont. 272, 280-81, 815 P.2d 139, 144 (1991) (citations omitted).

The legal standard for granting summary judgment is set out in *Andrews v. Plum Creek Manufacturing, L.P.*, 2001 MT 94, 305 Mont. 194, 27 P.3d 426:

The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law.

Andrews, ¶ 5 (citing *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

To establish that an employee is exempt as a bona fide administrative employee, an employer must prove: 1) the employee is compensated on a salary or fee basis at a rate of not less than \$455.00 per week; 2) the employee’s primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and 3) the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 CFR § 541.200.

In contesting the motion, Raymond conceded that some of her duties included negotiating and enforcing collective bargaining agreements. Raymond did not dispute that she was compensated on a salary basis of not less than \$455.00 per week. However, she contended that her duties were primarily clerical or janitorial, and that she had limited discretion and exercised limited independent judgment in performing duties involving matters of significance.

With respect to the question of her primary duty, the evidence available when the hearing officer decided the motion did not establish that negotiating and enforcing collective bargaining agreements and processing grievances was Raymond's primary duty. Raymond's affidavit described a number of other tasks she performed and asserted that she spent the majority of her time on these other tasks. Her affidavit was sufficient to require an evidentiary hearing on that fact question.

With respect to the issue of discretion and independent judgment, the affidavit of Randy Sobeck described a number of specific duties performed independently by Raymond that required the exercise of judgment and discretion. Raymond denied that she had "a significant amount of discretion" but provided no specific evidence to contradict the specific assertions of Sobeck. Thus, when Raymond was engaged in the negotiation and enforcement of collective bargaining agreements, she exercised discretion and independent judgment with respect to matters of significance.

Consequently, in ruling on the motion for summary judgment, the hearing officer determined that there were no genuine issues of material fact as to certain issues. The findings on those issues are as follows:

1. Raymond was paid on a salary basis at a rate in excess of \$455.00 per week. The affidavit of Colleen Cartwright established that Local 400 paid Raymond between \$869.20 and \$929.20 per week over the course of her employment, regardless of the number of hours she worked.

2. Raymond's job duties included negotiating and enforcing collective bargaining agreements.

3. Raymond's job duties included processing members' grievances.

4. Raymond's duties in negotiating and enforcing collective bargaining agreements and processing members' grievances involved the performance of office or non-manual work.

5. Raymond's duties in negotiating and enforcing collective bargaining agreements and processing members' grievances directly related to the management or general business operations of the employer or the employer's customers. *Webster v. Public School Employees of Washington, Inc.*, 247 F.3d 910 (9th Cir. 2001).

6. Raymond's duties in negotiating and enforcing collective bargaining agreements and processing members' grievances included the exercise of discretion and independence with respect to matters of significance.

The only material fact not established for purposes of the administrative employee exemption, and the key issue for hearing, therefore, was whether Raymond's duties negotiating and enforcing collective bargaining agreements and processing grievances were her "primary duty."

IV. FINDINGS OF FACT

1. Local 400 is a labor union representing heavy equipment operators, surface mine employees, and stationary (building) operating engineers throughout Montana. Local 400 has approximately 1,500 members in both public and private employment, a little under 1/3 of whom are involved in heavy and highway construction, a little under 1/3 of whom are stationary, and a little under 1/3 of whom are miners. The remaining members are owner/operators and apprentices.

2. Local 400 is a chartered local union of the International Union of Operating Engineers (the International).

3. Local 400 is governed by its written by-laws and by the International's constitution.

4. Local 400's leadership consists of elected officers and an elected business manager. The elected officers make up an executive board which is the policy-making body of Local 400.

5. Local 400's elected business manager is the chief executive officer of Local 400. The business manager is elected by the members of Local 400 for a three-year term. The business manager is charged with the responsibility to direct and conduct the affairs of Local 400 for the benefit of all of its members. Under Local 400's by-laws and the International's constitution, the business manager's responsibilities include (but are not limited to) directing the negotiation and enforcement of all collective bargaining agreements with employers, and the hiring, firing, and supervision of Local 400's staff.

6. Local 400 and the International are covered by and must comply with the federal Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* The LMRDA requires both Local 400 and the International to adopt governing

documents through democratic processes. Accordingly, the International has adopted a constitution and Local 400 has adopted by-laws. Local 400 is governed by and operated in accordance with those two documents.

7. Collective bargaining agreements with employers are of the utmost importance to Local 400 because without collective bargaining contracts, Local 400 would not exist. Enforcing those agreements is vital to Local 400 and, if not done effectively, subjects Local 400 to claims by its members that it breached the duty of fair representation. The processing of grievances is also a matter of significance to Local 400 because: 1) the grievance process is the manner in which Local 400 represents its members; 2) the grievance process is the manner in which Local 400 resolves disputes with employers. Resolving disputes with employers contributes to maintaining a professional working relationship with union employers which furthers Local 400's goal of maintaining good-paying union jobs; and, 3) if a grievance is not resolved, the process ends with final and binding arbitration, which is necessary at times, but which is also expensive and can detract from maintaining a professional working relationship with union employers.

8. Beginning in September 2008, Local 400's elected business manager was Randy Sobeck.

9. Local 400 has its headquarters in Helena, Montana. Local 400 has five field offices in Missoula/Kalispell, Butte, Great Falls, Billings and Colstrip. When fully staffed, Local 400 has a total of 10 employees – the elected business manager, a dispatcher, an assistant business manager/business agent, two office administrative staff, and five business agents, one assigned to each of the field offices. Business agents work directly for the business manager.

10. As a union governed by the federal Labor-Management Reporting and Disclosure Act, Local 400 must file a report with the U.S. Department of Labor once each year detailing Local 400's expenditures and income. The report, called the LM-2, requires Local 400 to provide a very detailed breakdown of expenditures by category including such categories as the amount of money spent on representational activities, political activities and lobbying, general overhead and union administration. In order to complete the LM-2 accurately, Local 400 must know how much time its employees spend doing work that falls into the various categories listed on the report. In order to do that, Local 400 requires its business agents to accurately keep track of their time and to report how much time they spend doing tasks in the various categories.

11. Local 400's former business manager, Jim Keane, hired Raymond on October 30, 2006. He assigned her to Local 400's Colstrip office, where she was the sole employee and in charge of the Colstrip office. She held this position until Local 400 terminated her employment on August 3, 2009.

12. The Colstrip office serviced bargaining units comprised of employees of the coal mines at Colstrip, Sarpy Creek, and Savage, and at Oftedal Construction Company. The two largest employers were Westmoreland Resources' Absaroka Mine located on Sarpy Creek near Hardin and Western Energy Company's Rosebud Mine located near Colstrip.

13. Raymond's duties involved negotiating and enforcing collective bargaining agreements for the collective bargaining units serviced by the Colstrip office. She spent time on the job doing other matters, such as answering the phone, maintaining files and records, and office and vehicle maintenance.

14. Raymond was involved directly in the negotiation of collective bargaining contracts. She was also in charge of processing grievances and enforcing the collective bargaining agreements between Local 400 and employers within her service area. In at least one of the bargaining units, she appointed a grievance committee to assist her in processing grievances. Sobeck retained the authority to approve taking a grievance to arbitration.

15. Local 400 paid Raymond a weekly salary, plus benefits and reimbursement for her expenses. Her benefits included health insurance and two pensions. Health insurance was provided by the Montana Operating Engineers Health and Security Trust Fund. Pensions were provided by the Operating Engineers Central Pension Fund and by the Operating Engineers General Pension Fund. In addition, she received another benefit, payment by Local 400 into the Montana Operating Engineers – Associated General Contractors Vacation Savings Plan. The health insurance, pension, and vacation benefits were provided by joint management and labor administered trust funds designed for the benefit of union members who are hourly employees. The contribution rates were set by the various fund trustees on a per hour basis – a certain amount of money per hour of work. Accordingly, Raymond's pay was commonly expressed as a certain dollar amount per hour in order to determine the amount of the health insurance, pension, and vacation contributions into the various trust funds.

16. Raymond's pay and benefits were always calculated based on a 40-hour work week, whether she worked 40 hours per week or not.

17. Raymond's weekly salary was initially \$869.20 and increased to \$929.20 over the course of her employment.

18. Raymond's work in negotiating collective bargaining agreements was of the utmost importance to Local 400 and its bargaining units because without collective bargaining contracts, Local 400 and its bargaining units would not exist.

19. To perform her job as Local 400's negotiator successfully, the skills and abilities required of Raymond included: understanding the background and issues in each bargaining unit, informing bargaining unit employees of their rights and duties under the existing contract, being available to employees to discuss what they wanted in a new or successor contract, devising bargaining strategy and drafting bargaining proposals, reviewing and critiquing proposals made by the employer, preparing and presenting arguments for Local 400's proposals and against the employer's proposals, amending or changing proposals made by the parties, and deciding whether to agree to, amend, or reject employer proposals and whether to amend or abandon union proposals which were rejected by the employer. She presented tentative agreements to the members of the bargaining unit for ratification vote.

20. Raymond was the lead negotiator for the Local 400 in contract negotiations at the Sarpy Creek mine which began in February and ended in April 2008. She was the lead negotiator in contract negotiations with Oftedal Construction in June and July 2008. She was the lead negotiator for Local 400 in contract negotiations with Western Energy between January and April 2009.

21. In the negotiations involving the Sarpy Creek mine, a bargaining team consisting of unit employees or other Local 400 employees assisted Raymond. Raymond advised the bargaining team and led them through the process of bargaining. At the Sarpy Creek and Western Energy mine negotiations, Richard Spencer, an employee of the International, Colleen Cartwright, Local 400's office manager, and the business manager, assisted Raymond. At the Oftedal negotiations, Cartwright assisted Raymond. Cartwright took notes and performed other secretarial duties. When there was no bargaining team, Raymond did the work of bargaining on her own.

22. Raymond was ultimately responsible for insuring that grievances from employees within her service area were filed and processed properly. Her duties processing grievances required that she educate members about their rights and duties under the contract, listen to members' complaints, determine if those complaints constituted grievances under the applicable collective bargaining agreements,

investigate those complaints, draft grievances, and represent Local 400 at the various stages of the grievance process, including at meetings with the employers, at meetings of joint management/labor committees, and at binding arbitration. Raymond performed all of these tasks. In addition, she supervised the work of job stewards who also performed some of these tasks under her supervision and with her advice and counsel.

23. Local 400 appointed job stewards to assist the business agent in processing grievances. Job stewards were bargaining unit members, appointed to the steward position by the business manager upon a recommendation of the business agent. Job stewards assisted the business agent in processing grievances. In that capacity, job stewards worked for the business agent.

24. When a member of Local 400 had a complaint, he or she was supposed to start the grievance process by discussing that complaint with his or her immediate supervisor in an attempt to resolve the matter. If the complaint was not resolved, the employee was supposed to seek assistance from a job steward who was to attempt to resolve the complaint between the employee and the employee's supervisor and, if that was not successful, to resolve the matter between the employee and the employee's supervisor's supervisor. In fulfilling these duties, stewards kept Raymond informed and sought Raymond's advice and counsel. At times, members brought their complaints to Raymond before they approached a steward. In these instances, Raymond listened to the complaint and either informed the member he or she did not have a valid grievance or referred the member to a steward. If the complaint was not resolved by the steward (with Raymond's advice and counsel), the next step was for the complaint to be reduced to writing in the form of a formal grievance. Raymond sometimes drafted formal grievances but generally had the stewards draft grievances.

25. After a formal grievance was filed, it was presented to a "standing board," a committee of six members (three appointed by management and three appointed by Local 400) who heard the grievance and, by majority vote, had the authority to resolve them. Raymond presented grievances (and the arguments for them and against the employer's position) to standing boards. Raymond signed standing board minutes on behalf of Local 400. If the grievance was not resolved by the standing board, the next step was binding arbitration. The sole authority to take a grievance to arbitration resided with the business manager, but Sobeck did so only after receiving the advice and recommendation of the business agents.

26. Grievances concerning the Western Energy mine were common. There were 25 formal written grievances filed at Western Energy in 2008, the last full year

Raymond worked. Raymond was responsible for handling more grievances than any of the other business agents employed by Local 400. Even when she had the stewards do the investigation or draft the grievance, Raymond was responsible to insure that the investigation was complete and that the grievance was drafted properly. Written grievances at the Western Energy mine could be filed only with Raymond's knowledge and consent. She had the sole authority to compromise or settle a grievance on Local 400's behalf and she in fact did so on multiple occasions. She had the sole authority to drop a grievance if she decided it should not be pursued. She presented all grievances to standing boards. She presented one grievance to an arbitrator. She assisted Local 400's attorney with other arbitrations. She wrote one arbitration brief.

27. Raymond also represented Local 400 in monthly joint management/labor "problem solving" meetings, which served as a less formal means of enforcing collective bargaining agreements than the grievance process. In addition, on an even less formal basis at the Western Energy mine, Raymond and human resource manager Terry Sprenger regularly discussed issues and resolved matters that could otherwise have been elevated to formal grievances.

28. The collective bargaining agreements in Raymond's service area contained union-security clauses – clauses requiring bargaining unit members to become members of Local 400 or pay to Local 400 an appropriate representational fee as a condition of continued employment. Certain legal principles required Local 400 to inform employees covered by the agreement that they have the right to be or remain nonmembers and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employees intelligently to decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If employees objected, the union had to advise them of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

29. Local 400 advised prospective members of these rules when it enlisted new members. As part of her duties, Raymond attended employee orientation sessions at which she advised new employees of their rights and duties under the collective bargaining agreement, including their obligation under the union-security clause to become a member of Local 400 or pay the appropriate dues and fees. The membership form for Local 400 which Raymond used in enlisting new members advised prospective members of their rights not to be a member of Local 400 and advised too "that the only thing which can be enforced under a union security clause

is the payment of the union dues and/or fees germane to the collective bargaining process.” Raymond understood these principles.

30. Business agents of Local 400 completed “daily reports” or “daily activity reports” or “dailies,” for LM-2 reporting purposes. These reports were not used in any manner to determine employee compensation.

31. Raymond tracked the time she spent on representational activity in her daily reports, consistently reporting that she spent 100% of her time on matters related to representational activities, or activities related to representing her members in negotiations and enforcement of collective bargaining agreements.

V. DISCUSSION AND ANALYSIS¹

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt certain employees from the requirement for overtime premium pay. Mont. Code Ann. § 39-3-406(1)(j) and 29 U.S.C. § 213(a)(1) and (17). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Raymond contends that Local 400 owes her overtime premium pay for 1,668.25 hours worked in excess of 40 per week. Local 400 contends that Raymond is an exempt employee because she was employed in a bona fide administrative capacity.

Under the FLSA, employers are not required to pay overtime premium pay to “any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . .).” 29 U.S.C. § 213(a)(1). Montana law has a parallel exemption at Mont. Code Ann. § 39-3-406(1)(j).

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

The U.S. Department of Labor has adopted regulations to “define and delimit” the term “employed in a bona fide administrative capacity” as follows:

The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . exclusive of board, lodging or other facilities; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 CFR § 541.200. The Montana Department of Labor and Industry has adopted this regulation by reference. Admin. R. Mont. 24.16.211.

As noted in the discussion of the motion for summary judgment, *supra*, all of the elements of the administrative employee exemption were established in the summary judgment process except the question of whether Raymond’s duties negotiating and enforcing collective bargaining agreements were her “primary duty.”

The regulations of the U.S. Department of Labor provide:

The term “primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. **Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50**

percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

29 CFR § 541.200 (emphasis added).

Local 400 employed Raymond for the purpose of negotiating and enforcing collective bargaining agreements and processing grievances. She worked independently and with limited supervision as the sole employee in Local 400's Colstrip office. Although Raymond contends she spent more than 50% of her time on activities that are not within the scope of negotiating and enforcing collective bargaining agreements and processing grievances, it is abundantly clear that without those responsibilities, Raymond's position would not have existed at all. Local 400 had no need for an employee to perform the duties she claims makes her non-exempt, absent her presence in the Colstrip office to negotiate and enforce collective bargaining agreements and process grievances. Clearly, she is an exempt employee on this basis.

VI. CONCLUSIONS OF LAW

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

2. Tracee L. Raymond's primary duty, in her work for Operating Engineers Local 400, between October 3, 2006 and August 3, 2009, was the negotiation and enforcement of collective bargaining agreements and processing of member grievances. She was therefore employed in a bona fide administrative capacity, as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(1) and (17), and Montana law. As such, she was an exempt employee not entitled to overtime premium pay when she worked more than 40 hours per week.

3. Because Tracee L. Raymond was exempt, Operating Engineers Local 400 does not owe her overtime premium pay, liquidated damages, or penalties for the hours she worked over 40 per week during the period October 3, 2006 through August 3, 2009.

VII. ORDER

The wage claim of Tracee L. Raymond for overtime premium pay is hereby **DISMISSED**.

DATED this 10th day of May, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.