STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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| IN THE MATTER OF THE WAGE CLAIMS OF SHAWN M. COATES, MARK J. POWERS, JOSHUA N. BOLTON, FRANCIS A. BOLTON, ROBERT W. KENT, KEVIN S. LANE, DANIEL J. POWERS, KEVIN J. SEYMOUR, TIM J. BYRNES, DAVID B. STARCEVICH, JACOB S. PETERSEN, DANIEL F. EMETT, RYAN P. ZEMLJAK, CLARK R. WARD, MICHAEL L. GIACOMINO, JESSE E. TRACY, | ) | Case Nos. 1785-2017, 1786-2017, 1788-2017, 1789-2017, 1790-2017, 1792-2017, 1793-2017, 1794-2017, 1795-2017, 1796-2017, 1798-2017, 1799-2017, 1800-2017, 1801-2017, 1802-2017, 1803-2017 |
| Claimants, | ) | **FINAL AGENCY DECISION** |
| vs. | ) | |
| BUTTE SILVER BOW PUBLIC WORKS, WATER UTILITY DIVISION, | ) | |
| Respondent. | ) | |

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## I. INTRODUCTION

Claimants are and/or were all members of LIUNA Laborer's Local No. 1686 (the Union). In May, 2015, the Union filed an untimely grievance concerning Claimants' 30 minute lunch break under the grievance procedure of the Collective Bargaining Agreement (CBA). The Union alleged that Butte-Silver Bow Public Works, Water Utility Division (BSB) had violated provisions of the collective bargaining agreement by requiring the Claimants to take a 30-minute, unpaid lunch break. BSB denied the grievance in June, 2015, and the Union did not further pursue the grievance.

In May, 2017, Claimants filed wage claims seeking one hour of overtime for each fully completed shift from November 1, 2014, to May 2017, alleging that BSB was a 24/7 operation and the CBA provided for a 30-minute, paid lunch break. The Wage and Hour Unit dismissed the claims on the basis of lack of jurisdiction over the CBA.

On January 23, 2018, Claimants requested that the claims be reopened for review, alleging that they had worked through their lunch breaks and were owed overtime. Claimants have asserted they were not completely relieved of duty during lunch breaks because they could be called back to duty. The Wage and Hour Unit determined that the wage claims sought overtime compensation for lunch breaks during which Claimants were completely relieved of duty, concluded that it did not have the authority to enforce the CBA, and dismissed the wage claims. Claimants requested a redetermination, claiming they were not completely relieved of duty because they could be called back to duty during their unpaid lunch break. Based on Claimants' failure to provide any new or additional evidence establishing that they performed work during the lunch break for which they were not compensated, the Wage and Hour Unit again dismissed the wage claims.

In the present matter, Claimants' cases have not been consolidated, but the parties mutually agreed that all claims were sufficiently similar that all claims could be resolved at the same hearing, with testimony on individualized damages given as necessary.

BSB moved both for summary judgment and to exclude Claimants' expert witness, Gene Vukovich (Vukovich). Following oral argument, an order was issued on November 9, 2018, denying BSB's motion for summary judgment but granting its motion to exclude Vukovich on the grounds that the proffered opinion testimony concerned only an alleged contractual violation of the CBA and an unfair labor practice, with no bearing on wage and hour issues.

The hearing was held in front of Hearing Officer Chad Vanisko on November 14, 2018, with Claimants represented by Wade Dahood and Jeffrey Dahood, and Respondent represented by Cynthia Walker. Claimants moved for reconsideration of the decision excluding Vukovich's testimony and made an offer of proof which included Vukovich's affidavit. The affidavit was entered into the record, but Claimants' motion was denied. Claimants' Exhibit 3 and Respondent's Exhibits G and H, all of which contain several parts, were admitted into the record. Joshua Bolton, Mark Powers, Tony Bonney, David Schultz, Brian Wilkins, and Leslie Clark all testified under oath.

The parties requested the opportunity for post-hearing briefing. Upon receipt of the final brief on February 1, 2019, the record was closed and the case was deemed submitted. Based upon the evidence and argument adduced at hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

## II. ISSUE

Whether Respondent owes wages for work performed, as alleged in the complaints filed by Claimants, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. Claimants are and/or were employed as laborers in BSB's Water Utility Division at the time the wage claims were submitted.

2. Claimants are and/or were all members of the Union.

3. BSB and the Union are parties to a collective bargaining agreement (CBA).

4. In 2014, BSB learned that Claimants were claiming 8 hours of actual work on their timecards, but had been leaving their shifts 45 minutes early each day, asserting they were entitled to a 30-minute, paid lunch break and a 15 minute paid break.

5. Effective November 12, 2014, BSB Public Works Director Dave Schultz (Schultz) instructed Claimants to cease this practice and take their 15 minute paid break and a 30 minute unpaid lunch break. This change was made without negotiations with the Union or Claimants' consent. From that point forward, Claimants' hours of work have generally been 7:00 a.m. to 3:30 p.m., which consists of 8 hours of actual work plus a 30-minute, unpaid lunch break.

6. Claimants assert they should be compensated for five hours per week since November, 2014, because they were on call and engaged to wait during their lunch breaks. Claimants reason they are owed a full hour (as opposed to 30 minutes) because they both lost the 30 minute lunch break and their work day has been extended from 8 hours to 8½ hours (i.e., 30 minute unpaid lunch + 30 minute extended workday). In fact, Claimants' reasoning that the loss of a 30 minute paid lunch break amounts to one hour each day is a logical fallacy. Claimants are double-counting their lunch break.

7. Claimants' wage loss statements each reference November 12, 2014, as the date when the 30-minute, paid lunch break was discontinued. According to these wage loss statements, the majority of Claimants are owed 1,040 hours (260 hours per year) for the four-year period running from November, 2014, to

November, 2018, at double their higher operator rate of pay. (Claimants are normally only paid the higher operator rate of pay when operating heavy equipment.)

8. The wage loss statements only reflect on-call time, and do not show that Claimants are owed compensation for hours actually worked during their lunch break that were not paid.

9. Claimants were not required to stay at a job site during their 30-minute, unpaid lunch break. They could return to the Water Shop, go home for lunch, go out for lunch, run personal errands, or use the time however they chose. BSB did not place any restrictions on how Claimants spent their lunch break.

10. Claimants drove BSB-owned vehicles to job sites. Time spent traveling to and from the Water Shop for lunch was recorded as time worked and is paid by BSB.

11. When Claimants were called out during a lunch break, the time spent working was reflected on their timecards and was paid by BSB as overtime.

12. As a standard practice, Claimants completed and signed daily timecards, which were turned into biweekly timesheets. Claimants reviewed and signed the timesheets, which were then turned in to payroll to be processed for payment of their paychecks.

13. Claimants recorded all the hours worked on their daily timecards, and they have been paid for all hours recorded on their timecards, including regular hours, overtime hours, and hours while called out.

14. Although Schultz testified that he would have preferred Claimants bring a box lunch and eat at the job site instead of going elsewhere, he confirmed that BSB did not require Claimants to eat lunch at a particular location, and that the 30-minute, unpaid lunch break was Claimants' time to spend as they chose.

15. Except for foremen, BSB did not provide cell phones to Claimants. BSB had no ability to require that Claimants keep their personal cell phones on during their lunch break, and Claimants could choose to not carry cell phones, not answer them, or leave them off during their lunch breaks.

16. All employees were allowed to use cell phones, but only supervisory employees such as foremen with BSB-provided phones (who did not constitute the majority of the Claimants) were required to make themselves available for calls. There was no testimony regarding danger of the work, but no one testified that calls

were of excessive duration. Furthermore, Claimants were always compensated for the hours they worked, including overtime pay.

17. It was rare that Claimants were required to work during their lunch break. To the extent they did so, the time spent working was recorded on their timecards and paid by BSB. No Claimants presented any testimony or evidence of any date on which they were called out and required to work during a lunch break but not compensated.

18. There was no fixed time limit for responses when Claimants were called out.

19. There was no evidence any Claimants had refused work when they were called out, but they likely could have refused work absent an extreme emergency. Had a Claimant needed to do swap work with someone else when called out, the ability to do so likely would have depended on seniority status.

20. Claimants' timecards, timesheets, and paystubs establish that all hours recorded by Claimants have been fully paid by BSB, including regular hours, overtime hours, and hours while called out.

## IV. DISCUSSION

### A. Wage and Hour Claims

The sole wage and hour issue in this case is whether Claimants' 30-minute, unpaid lunch breaks were compensable. As an initial matter, the wage and hour laws entitle a successful claimant to recover past wages for the two years before their filing of a wage claim, or two years before their last day of employment. Mont. Code Ann. § 39-3-207(2). If the employer has committed "repeated violations," however, a successful claimant may recover past wages for the three years before the filing of the claim. Mont. Code Ann. § 39-3-207(3). To the extent any of Claimants' claims concern time periods outside of these time periods, they are not recoverable. Application of these rules are rendered moot, however, by the following discussion and decision.

Under both the Montana Wage Protection Act (WPA) and the federal Fair Labor Standards Act (FLSA), the regulations regarding on-call time are identical in their wording and application, and state as follows:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

Admin. R. Mont. 24.16.1005(7); *see also* 29 C.F.R. 785.17. Bona fide meal periods during which an employee is completely relieved from duty are not work time, and are not compensable. Admin. R. Mont. 24.16.1006(2)(a). Even if an employee opts to eat lunch at the employer's premises or on a job site, it is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. Admin. R. Mont. 24.16.1006(2)(b). In order for on-call time to be considered work time, the employee must be so severely restricted they cannot use the time effectively for their own purposes. Admin. R. Mont. 24.16.1005(7); *see also, e.g., Aiken v. City of Memphis, Tenn.*, 190 F.3d 753, 760 (6th Cir. 1999) (citations omitted) (referencing the "severely restricted" language).

The United States Supreme Court has likewise held that time spent waiting on call is compensable if the waiting time is spent "'. . . primarily for the benefit of the employer and his business.'" *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local*, 321 U.S. 590, 597-98). "Whether time is spent predominately for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Armour & Co.*, 323 U.S. at 133. The key is whether the employee was engaged to wait, which is compensable, or whether the employee waited to be engaged, which is not compensable. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-39 (1944); *see also Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 17, 369 Mont. 322, 298 P.3d 419 (citing *Armour*, 323 U.S. at 132; *Skidmore*, 323 U.S. at 137-39) (applying *Skidmore*).

The Montana Supreme Court, in applying *Skidmore*, has discussed the following non-exclusive factors as having relevance to whether time spent on call is predominately for the benefit of the employer or for the employee:

> (1) the extent to which there was an on-premises living requirement;
>
> (2) the extent to which there were excessive geographical restrictions on employee movements;
>
> (3) the extent to which the frequency of calls was unduly restrictive;

(4) the extent to which a fixed time limit for on-call response was unduly restrictive;

(5) the extent to which employees could easily trade on-call responsibilities;

(6) the extent to which the use of cell phone could ease restrictions;

(7) the duration and danger of calls;

(8) the extent to which employees benefitted financially from the on-call policy;

(9) the extent to which the policy was based upon an agreement between the parties; and

(10) the extent to which on-call employees engaged in personal activities during on-call time.

*Stubblefield*, ¶ 17. No single factor is dispositive. *Id.*

Almost all of the foregoing factors weigh in favor of time spent during lunch breaks being predominantly for the benefit of the employees. The key evidence and testimony in this case showed that Claimants could go anywhere and do anything during their lunch break without restriction. As Claimant Joshua Bolton testified, the Claimants all could go home, run errands, and do anything else they wished during the lunch break. The fact that employees may have chosen not to do so does not change the fact that they were free to do so.

With regard to the other factors, Claimants had no on-premises requirement of any kind and no geographical restrictions on where they could go during their lunch breaks except insofar as they had a limited amount of time for lunch. Many Claimants chose to return to the Water Shop during lunch, but they did not have to return. Because Claimants were usually in BSB-provided vehicles, they were required to return to their personal vehicles to conduct personal outings during lunch, but they were paid for travel between the worksite and the Water Shop. Claimants were also only rarely called out to work during their lunch breaks. There was no fixed time limit for responses. Schultz opined that employees could probably refuse to work even if called out, but there was no evidence that anyone had refused work when they were called out. Had someone needed to do swap work with someone else, the ability to do so likely would have depended on seniority status. All employees were

allowed to use cell phones, but only supervisory employees such as foremen with BSB-provided phones (who did not constitute the majority of the Claimants) were required to make themselves available for calls. There was no testimony regarding danger of the work, but no one testified or presented evidence that calls were of excessive duration. Furthermore, Claimants were always compensated for the hours they worked, including overtime pay. Indeed, as Claimant Mark Powers testified, he would receive four hours of pay if called out, regardless of the amount of time. This was the policy for all Claimants.

In terms of factors weighing in favor of time spent during lunch breaks being predominantly for the benefit of the employer, the fact that the present policy is not the result of an agreement of the parties weighs in Claimants' favor. Paid lunch breaks were a historical practice prior to being changed at Schultz's direction. In making this change, Schultz did not communicate with the Union, which would have been Claimants' exclusive representative for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment. *See* Mont. Code Ann. § 39-31-205. Paid lunch breaks were not and are not, however, an explicit contractual agreement of the parties through the terms of the CBA. It should also be noted that Claimants' historical practice was not to be paid during the traditional midday lunch break. Instead, Claimants would typically skip midday lunch and leave work early each day, with the end of the day being their paid lunch break. Claimants did not raise the argument that they were previously allowed to leave early because they remained on call and were engaged to be waiting. Claimants' previous practice of leaving work early for the day to go home or engage in other, personal activities without restriction actually suggests they were completely off-the-clock at that point.

Some of Claimants' testimony focused on the fact that the public water system never shuts down. While this may be true, it does not mean that all Claimants are on call and engaged to be waiting during their lunch break. By extension of that logic, Claimants should be paid around the clock simply because BSB Public Works continues to provide water, which is an unreasonable result.

The amount of Claimants' claims also undercuts their argument that they were engaged to be waiting. Claimants assert they are owed for one hour every day since their 30 minute paid lunch break was discontinued. Their logic is that they not only lost the 30 minute paid lunch break, but also have to work an extra 30 minutes each day, resulting in an extra hour total. Ignoring for purposes of this argument the application of the 15 minute paid break which is not at issue, prior to November, 2014, Claimants would have typically worked "straight" hours until leaving for the day. Thus, a Claimant may have stayed on the job from 7:00 a.m. to 2:30 p.m., then

left for the day. This period would amount to only 7½ hours, but with a paid lunch break, Claimants were still considered on the clock until 3:00 p.m., for a total of 8 hours. Claimants now typically work from 7:00 a.m. to 3:30 p.m., excluding their 30 minute unpaid lunch break. The only way to get a full additional hour out of the day now as compared to before is if Claimants are asserting they were only, in fact, working 7½ hours a day prior to November, 2014, and not engaged to be waiting for the remaining 30 minutes that was their paid lunch break. The Hearing Officer does not understand this to be Claimants' argument and assumes the total hours claimed to be the result of an unintentional error in reasoning. To the extent the Hearing Officer's assumption is incorrect, however, then the claim for a full additional hour of pay every day does not comport with workers who were engaged to be waiting during their lunch breaks.

In light of the foregoing, time spent during lunch breaks was predominantly for the benefit of the employees. Claimants were therefore waiting to be engaged during their lunch breaks, and the time spent during those breaks is not compensable under the wage and hour laws. Admin. R. Mont. 24.16.1005(7), 24.16.1006(2); *see also Stubblefield*, ¶ 17.

**B. Other Claims**

Throughout this case, Claimants have focused heavily on the argument that past practices dictate the outcome of their present claims. In particular, Claimants point to the unilateral action of Schultz in terminating paid lunch breaks, and argue in relevant part as follows:

> As was established in Billings Firefighter Local 521 [, Int'l Ass'n of Firefighters v. City of Billings, 1999 MT 6, 293 Mont. 41, 973 P.2d 222] the actions of Butte-Silver Bow are clearly a failure to bargain collectively in good faith with regard to wages, hours, fringe benefits, and other conditions of employment and therefore constitute a violation of labor practices. The past practices of Butte Silver Bow establish that the Claimants herein are entitled to overtime pay. They were paid for the half hour prior to November 2014 and should be paid for it today.

(Brief in Support of Claimant's Request for Judgment at 6.) Unlike the present claims, the *Billings Firefighter* case was not brought under the wage and hour laws. As the Hearing Officer already stated at length both prior to and at the hearing, Claimants' entire argument here goes to what appears to be an unfair labor practice claim, just as did the *Billings Firefighter* case. Administrative proceedings are limited

in jurisdiction by both statute and rule. Unfair labor practice claims are not cognizable in administrative cases brought under the wage and hour laws, and are therefore not within the jurisdiction of this tribunal to render judgment. *See* Mont. Code Ann. §§ 39-3-201 *et seq*.; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

Regardless of the merit of any arguments Claimants may have under laws other than wage and hour, this decision will only apply the wage and hour laws to the claims. The Hearing Officer renders no decision with regard to any issues not specifically addressed in section IV(A) above.

## 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 Mont. Code Ann. §§ 39-3-201 *et seq*. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. The time Claimants spent on call was not so severely restricted they could not use the time effectively for their own purposes, and is therefore not compensable. Admin. R. Mont. 24.16.1005(7), 24.16.1006(2).

3. Claimants have been fully paid by BSB for all hours they worked and recorded, including regular hours, overtime hours, and hours while called out.

4. The jurisdiction of the Department of Labor and Industry is limited to determinations of compensation for actual hours worked under the wage and hour laws. Claimants' claims not falling under the guise of the wage and hour laws are not properly before this tribunal. Mont. Code Ann. §§ 39-3-201 *et seq*.

## VI. ORDER

IT IS THEREFORE ORDERED THAT:

Claimants' appeals, and each of them, are DISMISSED with prejudice.

DATED this 11th day of April, 2019.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO
CHAD R. VANISKO
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 the date of mailing of the hearing officer's decision. See also Mont. Code Ann. § 2-4-702. Please send a copy of your filing with the district court to:

Department of Labor & Industry
Wage & Hour Unit
P.O. Box 201503
Helena, MT 59624-1503