

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1107-2017
OF REBECCA S. HARVEY,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
THE UNIVERSITY OF MONTANA,)	
RESIDENCE LIFE,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On January 26, 2017, Rebecca S. Harvey (Harvey) filed a claim for unpaid wages with the Department’s Wage & Hour Unit. On May 25, 2017, the Wage & Hour Unit issued a Determination dismissing Harvey’s claim finding there was not an employee-employer relationship under the federal Fair Labor Standards Act (FLSA).

On June 7, 2017, Harvey appealed the Determination to the Office of Administrative Hearings. Hearing Officer David Scrimm was assigned to preside over the matter. Prior to hearing, the University filed a Motion for Summary Judgment arguing that under the resident manager exception found in Mont. Code Ann. § 39-3-406, the University was not required to pay Harvey the minimum wage or for overtime wages. It also argued that under the FLSA, Harvey was not an employee entitled to protections under that Act. The Hearing Officer denied the motion, finding that the resident manager exclusion in 39-3-406, MCA did not apply to Community Assistants at the University; that the University could not include the entire value of the housing it provided to Harvey as overtime wages; and that Harvey’s claim was not governed by the FLSA, but rather the Montana Wage Protection Act § 39-3-101 et seq.

On October 26, 2017, the Hearing Officer held a contested case hearing in this matter (HRG I). Claimant Rebecca S. Harvey (“Harvey”) appeared and represented herself. Vivian Hammill and Helen Thigpen appeared on behalf of the Respondent, the University of Montana, Residence Life (“the University”). The parties stipulated

to the admission of Documents 1-133, as well as “Exhibit A” submitted by the University. At some point after the hearing Harvey moved to Australia.

After the parties submitted proposed findings and briefs, on April 3, 2018, the Hearing Officer issued a Preliminary Agency Decision which decided some matters but found that the evidentiary record was insufficient to accurately determine the precise number of hours worked and the wages that were owed. He therefore required the University to provide certain additional information. On April 16, 2018, the parties held a pre-hearing conference in which they agreed to reopen the hearing on May 17, 2018.

The second hearing was conducted as scheduled on May 17, 2018 (HRG II). Jace Whitaker and Harvey provided sworn testimony. There were difficulties reaching Harvey in Australia. At this hearing, Exhibit B, an updated version of Attachment A, the spreadsheet the Hearing Officer requested the University to create, was added to the evidentiary record. After the hearing, it came to the Hearing Officer’s attention that he had excluded evidence that he had told the parties he would allow during the second hearing. He therefore set a brief third hearing for September 18, 2018 to address the primary versus secondary on call issue. That hearing was later postponed to October 9, 2018 (HRG III). At the third hearing, Jace Whitaker and Harvey provided direct testimony and Curtis provided rebuttal testimony. Exhibits B, C (demonstrative), F (substituted for Docs. 37-64), G (duty logs), H (phone records), I (duty calendar) were admitted into the evidentiary record. Exhibit C illustrated the University’s position on the time worked and wages owed but included some double counting and was not relied upon for any purpose in this decision. Exhibits D and E were not offered or admitted. The hearing was conducted by telephone and once again it proved difficult to reach Harvey and to maintain her telephone contact.

For the reasons that follow, the Hearing Officer finds that Harvey is due additional wages.

II. ISSUE

Whether the University owes Harvey additional wages for time Harvey spent on call as a student serving as a Community Assistant for the University.

III. FINDINGS OF FACT

1. On January 26, 2017, Rebecca Harvey filed a wage claim with the Department of Labor and Industry seeking unpaid wages in the amount of

\$14,494.30, for 1,780 hours of on call work she performed for the University. Docs. 69-70.

2. Harvey worked as a Community Assistant (sometimes referred to as CA or CAs) pursuant to two written Work Agreements (Agreements) while she was a student at the University. Docs. 22, 29. The work agreements are contracts between Harvey and the University and were effective for the periods January 5, 2016 through May 31, 2016 and June 1, 2016 through May 31, 2017. *Id.*

3. Community Assistants are full-time students at the University who are selected to assist residents of the University Villages apartment complex (sometimes referred as UV), which is a university-owned apartment complex located near the University's main campus in Missoula, Montana. The complex contains multi-room apartments with bedrooms, kitchens, and living spaces for residents. *Id.*

4. The Agreements between Harvey and the University specified the duties, eligibility criteria, personal conduct expectations, time commitments, and compensation package for the Community Assistant position. Docs. 22, 36.

5. Community Assistants are required to take at least 12 credit hours per semester as undergraduates, and maintain a minimum grade point average. Docs. 22, 29.

6. Harvey terminated her studies at the University and could therefore no longer serve as a Community Assistant for the University. Harvey resigned from her position as a Community Assistant on January 31, 2017. Doc. 21.

7. In exchange for serving as a Community Assistant, Harvey received a three-bedroom apartment in the Toole Villages area of the University Villages complex. Harvey was also to receive the difference between the value of a three-bedroom and four-bedroom apartment as a stipend, minimum wage for any hours she worked in addition to her required contract hours, and an additional stipend and phone allowance under the second Agreement. Docs. 22, 29; HRG I Rec (03) 11:40 to 11:55.

8. Under the first Agreement, Harvey's apartment was valued at \$4,214.09 and her stipend was valued at \$401.70. Doc. 28. Under the second Agreement, her apartment was valued at \$6,278.00 and her stipend was valued at \$852.00. Doc. 36. The value of Harvey's apartment under both Agreements was prorated since she started mid-semester of the 2015-2016 term and terminated her studies at the University and resigned from her position shortly after the beginning of the second semester of the 2016-2017 term.

9. The Agreements required Harvey to pay for her housing and stipend by working approximately 20 hours per week as “contract hours.” Harvey’s timesheets indicate that she worked significantly more hours than she was contractually bound to perform. Docs. 24, 31. Harvey was also prohibited from working more than 29 hours per week on campus and prohibited from “accepting other employment which negatively affects the ability of the CA to fulfill CA responsibilities.” Docs. 31, 32.

10. The University Residence Life Office considers service as a Community Assistant to be a form of a scholarship. The compensation package for Community Assistants is processed through the University’s financial aid office. HRG I Rec (03) 13:12. The value of the apartment provided to Harvey and other similarly situated students is not taxed by the Internal Revenue Service. HRG I Rec (03) 16:58. In addition, taxes under the Federal Insurance Contributions Act do not apply to students who are enrolled at least half-time and are employed by a college or university. HRG I Rec (03) 18:18.

11. Sandy Curtis is the Director of Residence Life at the University. She supervised the Assistant Directors who would consult with her about major decisions concerning resident and staff policies. The Assistant Directors supervised the Area Coordinators and the Area Coordinators supervised the Community Assistants and others. Curtis had monthly one-on-one meetings with the Area Coordinators. Curtis testified that she could not recall any large events during Curtis’s tenure but that based on a quick review of Harvey’s timesheets it did not appear that Harvey received an excess number of calls from residents nor did she respond to an unusual number of serious or more time-consuming situations, such as a suicide or fire. HRG I Rec (03) 25:10. Jace Whitaker was hired as an Area Coordinator in May 2017, after Harvey had left the University. Whitaker had a lot of experience at other colleges and universities but this was his first position at the University. HRG III Rec (01) 18:49.

12. As a Community Assistant Harvey felt she was responsible for the residents and families that lived in the University Villages complex.

13. The Community Assistant Agreement includes an overarching principle regarding Harvey’s mandatory time commitments:

time as needed to build respectful, inclusive, positive communities and to preserve the welfare of the University Villages community including resident drop-in discussions, emergencies and other items that may arise. General

availability to residents is critical to meet the student needs, develop a positive community, and to effectively contribute to the building staff team.

Docs. 24, 31.

14. Harvey's specific duties included: acting as a liaison; assisting with building community; providing educational, wellness, and social programming; referring and assisting in resolving neighborhood disputes; delivering the Cornerstone Newsletter and other fliers; encouraging resident responsibility; reporting vandalism; responding to violations of campus policies and submitting reports; assisting with lock outs; checking in new residents; locking up the UV office; and performing minor maintenance. *Id.* Harvey also worked closely with the UV Office Manager, the UV Assignments Coordinator, and the Maintenance Supervisor. *Id.*

15. The words "manager" or "manage" are not found in either of the Agreements.

16. The lodging provided to Community Assistants allows the students in these positions more effectively to carry out their work, to gain experience in the areas of building inclusive, positive communities, and more easily to provide assistance to the student residents.

17. The Community Assistant apartments are located in the middle of each area of the University Villages complex. On the outside of each Community Assistant's apartment is a permanently attached sign, that says, "Community Assistant." HRG I Rec (01) 56:01. There are also street signs that point to the location of each Community Assistant apartment. When tenants move in to University Villages, they receive a map showing where the Community Assistant apartment is located. The signage and the central location of the Community Assistant's apartments provides more opportunities to assist student residents.

18. Harvey was required to be on call at various times under the Agreements. Docs. 22, 29. Her timesheets and calendars show that she generally worked one or two eleven-hour on call shifts during the week, each scheduled from 9:00 p.m. to 8:00 a.m. the next day. *See* Exs. 37-64. She also worked at least two weekend on call shifts during the month. Doc. 32. Shifts would generally start on Friday at 9:00 p.m. and end on Sunday at 8:00 a.m. *See* Exs. 37-64. Harvey commonly worked two or three shifts totaling more than 25 hours over a weekend and in one

instance worked 81 hours in a row.¹ *Id.* Most of these longer shifts Harvey served as the primary on call, but in some instances she might alternate primary and secondary duties. The University employed a primary on call person (primary) and a secondary or backup on call person (secondary) during the time Harvey served as a CA.

The role of a Community Assistant was to be present for, and act on the behalf of, University administrative and maintenance staff when they are absent. Prior to beginning her primary time during the week, Harvey would report to the office at about 4:45 p.m. to check on any matters that she needed to be aware of, close the office, and report to the UV Community Center (UVCC) for three hours. Doc. 90; HRG I Rec (01) 24:48. This time was considered part of her 20 hours per week of contract time. She would leave the UVCC at 9:00 p.m. to go to her apartment where she would be on call from 9:00 p.m. to 8:00 a.m. *Id.* During her weekly on call shift, she was expected to make two rounds of the Toole Village grounds, which consisted of 93 apartment units, one at 5:00 p.m. and one at 9:00 p.m. Doc. 90. When conducting rounds, Harvey was expected to look for violations of the University policies such as smoking, pets, material being inappropriately stored. HRG I Rec (03) 1:11:12. Harvey was expected to eat dinner before she went to the office or to bring it with her. Doc. 90.

19. Curtis testified that the secondary CA “only goes out on a duty call in the event that there’s a big issue going on, and the primary needs that person.” HRG I Rec (03) 25:04. Curtis further testified that it was up to the primary to determine if they wanted the secondary to go out on a call with them especially if safety was a concern. HRG I Rec (03) 56:24. Curtis was not aware of whether the Area Coordinator for University Villages and Harvey’s supervisor told the CAs that secondary CAs must go on all night calls, because she was “not in those meetings.” HRG I Rec (03) 56:24.

20. There was no set standard requiring the Community Assistants to perform on call duties in one particular way. HRG I Rec (03) 22:50. It was up to the Area Coordinator to discuss how they really wanted to do duties. HRG I Rec (03) 23:00. It was up to the primary to decide if the secondary would accompany the primary on duty calls or rounds. HRG I Rec (03) 56:00. The University has this policy to ensure the safety of its staff. HRG I Rec (03) 55:58. In addition to calling the

¹ See 2016 timesheets and calendars for March 3-5; April 2-4; April 23-24; May 21-22; June 4-6; June 17-19; July 16-18, July 22-24; August 13-14; September 3-5; October 7-9; November 4-6; November 11-13; November 24-27 and in 2017 - January 7-8, 2017. The timesheets are a bit opaque when the shift covered more than one day - Harvey would report the shift as 9:00 p.m. to 8:00 a.m. for one particular day and not split it over the two actual days she worked.

secondary, the primary could also call the University police department for assistance if they felt it necessary. HRG I Rec (03) 56:24.

21. Because safety was a concern for the University, the Community Assistants, including Harvey, were instructed to never go out on a call alone at night. HRG I Rec (03) 25:10, HRG III Rec (01) 45:27. For the same reason, the primary and secondary conducted rounds together. HRG III Rec (02) 02:18. Because Harvey was the only witness to testify that had first-hand knowledge of what policies and procedures were in place during her employment, her testimony with respect to the primary and secondary going together on rounds or calls at night was more credible than Curtis's testimony.

22. Harvey was on call over a weekend at least 15 times. Docs. 37-64. Harvey would work from 8:00 a.m. Saturday morning to Sunday at 9:00 p.m., a total of 32 hours. Docs. 32, 37-64. At the end of Harvey's duty shift, she was required to send an electronic duty log to her supervisor. It was to include everything that she confronted/handled while on duty. Doc. 90. Those logs indicate a significant amount of fairly quiet shifts but a higher number of busy shifts where Harvey had to file Maxient reports which denoted infractions of University policies and work orders for repairs.

23. While on call, Harvey was required to remain available to all tenants and their families residing at the University Villages. Doc. 32. This included answering all incoming telephone calls, responding to maintenance issues, resident emergencies and neighbor complaints, addressing dangerous or inappropriate behavior, responding to lock outs, checking in new tenants (signing their lease, etc.), completing rounds at least twice per night to ensure tenant safety, and calling appropriate emergency services when necessary. Doc. 33.

24. Harvey initially used her own cell phone to respond to resident phone calls. In July 2016, the University began providing a cell phone and a cell phone allowance for Harvey and the other Community Assistants. Harvey was expected to answer, and respond to all incoming calls—not only the 93 apartments in Toole Village, but the entire 564 units comprising University Villages. HRG I Rec (03) 01:23:18. She was expected to use her own vehicle when responding to calls, and, when acting as the "secondary," she was also required to use her own cell phone.

25. When on call, Harvey was required to remain on the University Villages property at all times. HRG I Rec (03) 23:50 to 24:40. She could socialize with friends, study, sleep, take care of her children, do laundry, visit the Community Center at the University Villages complex, and eat at the Iron Griz restaurant. *Id.*

Harvey could trade on call days with other Community Assistants, but was required to take on call days so that the time evened out.

26. While on call, Harvey was restricted from going to the grocery store, the main U of M campus, the gas station, or to her children's activities. HRG III Rec (01) 24:45. No breaks were provided. HRG III Rec (01) 41:00. Harvey could not drink alcohol while she was on call. HRG I Rec (03) 24:45. Even though Harvey spent on call time in her own apartment, most of the time, Harvey was unable to use the time to the benefit of herself or her family due to ongoing phone calls and knocks at the door. HRG I Rec (01) 40:32. In most instances when Harvey was called, she had to leave her apartment for an indefinite period of time. Harvey recorded events occurring during her on call shifts into a "duty log." Doc. 90. If there was a violation of policy recorded, it was entered into the "Maxient System." *Id.* No records from the Maxient system were offered into the evidentiary record.

27. Harvey served as the "primary" 54 times during her employment and served as the "secondary" 57 times. Exhibit I. The calendars comprising Exhibit I were found in the University's computer system and apparently created by one of Harvey's Area Coordinators. The Area Coordinator would send out a draft calendar and the Community Assistants would comment or trade shifts until the calendar was finalized. HRG III Rec. (01) 14:16. It is unknown if Exhibit I reflects the actual dates a particular CA worked a particular shift and whether they were primary or secondary during the week and on the weekends. Exhibit I is a fair estimate of how many days a CA would work in the two on call positions.

There was also a period of time from March to July 2016 when the Community Assistants did not have direct supervision. HRG II Rec (02) 2:45. During that time, Sara Agnostelli served as supervisor but there was no testimony regarding what she actually did. During the 4-5 month period, the Community Assistants put together their schedules, figured out what needed to be done, and did it without any direct supervision. *Id.*

28. Harvey's duty logs indicate that 43% (20/46) of the times Harvey was identified as the primary she identified the shift as "busy" or the log indicates similar activities as those that she identified as busy. Ex. G. The logs also indicate that while serving as the primary, Harvey submitted 20 Maxient reports for violations of conduct and other University policies; submitted five work orders; and called the UMPD 5 times. *Id.* Harvey indicated that 26% (12/46) of her primary shifts were "quiet." *Id.* The remaining shifts fell somewhere in between quiet and busy, such as the log entry from July 15, 2016:

On call tonight 4 visitors to the UVCC tonight. Two Check ins tonight 216 A and 2016T. CA Rebecca Harvey responded to one call for a lock out and one call for missing keys. This CA also followed up on a work order from UV Office staff for 321A regarding a broken stove. When CA arrived tenant advised he had fixed the issue himself.

Id.

29. When Harvey was the primary when it was dark and she was called out of her apartment, she would contact the secondary to assist. When Harvey was on call, it was frequently from 5:00 p.m. to 8:00 a.m. when it would be dark. HRG I Rec (03) 23:50. Safety was an issue for the Community Assistants as they did rounds at night looking for violations of University policies or when they were called they had to address domestic issues, complaints about noise, smoke and dogs, etc. See Exs. F and I.

The Agreements describe the Secondary on call duties as follows:

Secondary Weekend duty entails being on duty from Saturday at 5:00 p.m. - Sunday at 8:00 a.m and assisting the Primary Weekend duty person with rounds, lock-outs, maintenance and other calls. Doc. 33.

The Agreements make clear that the on call staff is filling in for regular staff of the University Villages Center when regular staff is off duty. Docs. 22, 29. The shifts for the on call staff indicate that regular staff work an 8:00 a.m. to 5:00 p.m. Monday through Friday schedule. Docs. 24, 30.

30. When serving as the secondary, Harvey had all the same restrictions as when she was the primary except that she did not have to be the CA who received the first call about some problem. HRG III Rec (02) 4:40. If the call could be handled over the phone by the primary, the secondary was not called. As a CA secondary, Harvey would accompany the primary CA on rounds when it was dark or when a call required Harvey to accompany the primary. The secondary was freer than the primary, particularly during daylight hours when it was unlikely the primary would need accompaniment. Phone records indicate that Harvey never called the secondary on the University cell phone nor that she was ever called by the primary while the secondary. Ex. H; HRG III (01) 11:38. Harvey and other Community Assistants used their personal phones to contact one another as needed, frequently by text. HRG III Rec (01) 6:35.

31. During the hearing on her wage claim, Harvey testified that she was “waiting to be engaged” while she was on call. She also testified that she was “engaged to be waiting.” The terms are easily confused.

32. One of every four hours Harvey worked on call went to satisfy her contractual obligation of 20 hours per week. Docs. 25-32. The Agreements provided that if more than 11 hours are spent on call, Harvey would be paid for those additional hours worked at minimum wage. *Id.* However, as noted on paystubs and timecards reflecting weekend shifts, this was not done with absolute exactitude.

33. Harvey’s claim seeks only unpaid wages for her time spent working on call. Respondent’s Exhibit B provides the basis from which the Hearing Officer was able to determine Harvey’s hours of work and amounts owed. Column B of Exhibit B shows the total hours Harvey worked in every week of her employment. Column E shows the contract hours Harvey worked in exchange for her housing and stipend and includes the 1:4 hours (If Harvey worked 8 hours, she was credited for 2). Column F shows any extra hours paid pursuant to her contract.

34. The total number of unpaid on call hours can be determined by subtracting the hours in Columns E & F from Column B. In many instances, those unpaid hours included overtime hours. The table below illustrates the calculation described above from Exhibit B, page 6, Row 403. The total hours worked is 42.75 (Column B). Column D and E show 6.5 contract hours and 17.5 paid hours for a total of 24.0 hours. Subtracting 24 hours from 42.75 hours leaves a difference of 18.75 unpaid hours, 16 of which should be paid at the regular rate (40 hours in a regular work week - 24 hours paid = 16 hours owed) and the remaining difference of 2.75 hours of unpaid hours worked which should be paid at the overtime rate.

Ex. B	Column B	Column E	Column F				
Row	Total Hours	Contract Hours	Paid Hours	Total Paid Hours	Total Unpaid Hours	Unpaid Regular Rate	Unpaid Overtime Rate
403	42.75	6.5	17.5	24	18.75	16	2.75
Total	2707	1125.5	238	1363.50	1343.50	683.75	659.75

35. Harvey was fully paid for 1363.50 contract hours that she worked, either in the form of housing and stipend (1125.50 hours) or directly (238 hours). Exhibit B. Harvey is owed for 1343.50 hours that she worked on call and for which she was not paid (2707.00 total hours - 1363.50 hours paid = 1343.50).

36. Harvey was not paid 683.75 on call hours at her regular hourly rate of pay. The 683.75 hours amount to \$5,561.60 in unpaid regular wages [(301 x 8.05) + (382.75 x \$8.20)]. The penalty on unpaid regular wages is 55 percent which in this case amounts to \$3,058.88 (\$5,561.60 x 0.55).

37. During her employment, Harvey worked a total of 659.75 hours of overtime. Exhibit A Column B. She worked 203.5 hours when she was earning \$8.05 per hour and 456.25 hours when she was earning \$8.20 per hour. Overtime is earned at 1.5 times the hourly rate. The total amount of unpaid overtime is \$8,069.14 [(203.5 x \$8.05 x 1.5) + (456.25 x \$8.20 x 1.5)].

38. The penalty on unpaid overtime wages is 110%. Admin. R. Mont. 24.15.7566. The penalty on \$8,069.14 is \$8,876.05.

39. On three occasions the University paid Harvey at her regular rate for 34 overtime hours worked.² Those 34 hours amount to \$139.40 in unpaid wages (34 x \$4.10 = \$139.40) for those 34 hours. The 110% penalty on these unpaid wages amounts to \$153.34.

IV. DISCUSSION³

Harvey only seeks to recover unpaid wages for time she spent while on call. Her claim did not expressly assert that she was owed wages for minimum wage or overtime hours. However, as a result of finding that Harvey is owed wages for all her on call time, the overtime laws are implicated.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to “show the extent and amount of work as a matter of just and reasonable inference.” *Id.* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; see also, *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that the lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

² On or about June 6, 2016, July 18, 2016, and November 14, 2016.

³ Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation’ . . .” *Garsjo*, 172 Mont. at 189, 562 P.2d at 477, quoting *Purcell v. Keegan*, supra, 359 Mich. at 576, 103 N.W. 2d at 497.

The University argues that although Harvey was on call for the hours she claims, there are exclusions under the Wage Payment Act that eliminate her right to be compensated for those hours in part, or at all. It also argues that Harvey’s on call time was primarily for her benefit so it need not compensate her any further.

Through testimony and the exhibits admitted into the evidentiary record, Harvey proved she is owed unpaid wages. The University does not dispute the number of hours Harvey worked, but asserts that the on call time was properly compensated at the 1:4 rate and that no further compensation is due.

A. Resident Manager Exclusion

Montana law provides, “. . . [E]very employer of labor in the state of Montana shall pay to each employee the wages earned by the employee in lawful money of the United States or checks on banks convertible into cash on demand at the full face value of the checks, and a person for whom labor has been performed may not withhold from any employee any wages earned or unpaid for a longer period than 10 business days after the wages are due and payable, except as provided in 39-3-205.”

The University argues that any claim for unpaid wages resulting from a failure to pay minimum wage or overtime should be denied because under Mont. Code Ann. § 39-3-406, resident managers of lodging establishments are excluded from the requirement to pay minimum wages or overtime.

The requirement to pay overtime does not apply to “resident managers employed in lodging establishments or assisted living facilities who, under the terms of their employment, live in the establishment or facility.” Mont. Code Ann. § 39-3-406(1). The burden of proving that an employee is excluded from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer must present evidence to show that the employee falls “plainly and unmistakably within the exemption’s terms.” *Id.* at ¶16, citing *Public Employees Ass’n v.*

Dept. of Transportation, 1998 MT 17, 287 Mont. 229, 954 P.2d 21. If Harvey was a resident manager of a lodging establishment, such status would not relieve the University from paying regular wages.

Neither “resident manager” nor “lodging establishment” are defined in the Wage Payment Act. The judicial function in construing statutes is to give effect to the intention of the legislature. Legislative intent is determined by first looking to the plain meaning of the statute. *Thiel v. Taurus Drilling Ltd.* (1985), 218 Mont. 201, 205, 710 P.2d 33, 35; *Stewart v. Region II Child & Family Servs.*, 242 Mont. 88, 99, 788 P.2d 913, 920 (1990). The statutes do, however, provide instruction for determining the meaning of a statutory provision:

1-2-101. Role of the judge — preference to construction giving each provision meaning. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

1-2-106. Construction of words and phrases. Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

1-2-107. Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

The University suggests that the Hearing Officer should interpret the individual words of the statute using the plain meaning approach. While this is the preferred method, defining individual words in the statute as opposed to the terms in the statutes does not conform with the idea of placing the words in context as required by section 106. “Resident manager” is, in plain language, a manager who lives at the place of employment. Based on this fact alone, Harvey cannot be considered a manager. “Manager” is defined as: one who handles, controls, or directs; one who controls a business or other enterprise; one who controls resources and expenditures. *American Heritage College Dictionary*, 822 (3d ed., 1997). The designation of “manager” implies general power and permits reasonable inferences

that the employee so designated is invested with the general conduct and control of his employer's business. *Black's Law Dictionary* 960 (6th ed., West 1990).

Harvey's duties as a Community Assistant were not those of a manager. Harvey executed no control over the University Villages residences. She did have duties with respect to the residents. Her job title in this case says it all: "Community Assistant." Her overall job duty was to "build respective, inclusive, positive communities and to preserve the welfare of the University Villages community." Docs. 24, 31. Her specific duties included acting as a liaison; assisting with building community; providing educational, wellness, and social programming; referring and assisting in resolving neighborhood disputes; delivering the Cornerstone Newsletter and other fliers; encouraging resident responsibility and reporting vandalism; responding to violations of campus policies and submitting reports; assisting with students who are locked out of their apartments; checking in new residents; locking up the UV office; and performing minor maintenance. There is insufficient evidence that Harvey had control or general power over the University Villages. She did not supervise anyone or hire or fire anyone. While Harvey was clearly a "resident" of University Villages, she was not a "resident manager."

Notwithstanding the fact that Harvey was not a "resident manager," the University must also prove that University Villages is a lodging establishment. "Lodging" is defined as: "a place to live" or "sleeping accommodations." "Establishment" is defined as: "an institution or place of business with fixtures and organized staff." Clearly, the University of Montana is an "educational establishment," but whether University Villages is a lodging establishment is unclear (Interestingly, the term "motel" is defined as: "an establishment that provides lodging for motorists in rooms usually having direct access to a parking area"). There was no testimony as to whether University Villages is a separate institution from the University of Montana. Arguably, University Villages is just part of an educational institution that provides housing for its students, but not a separate lodging establishment.

Under the plain meaning analysis, the University's defense to Harvey's claim based on the resident manager exclusions fails. In addition, a review of the Legislative history of the bill that created the resident manager exclusion makes it clear that it was not intended to apply in this context. In 1986, Ernie Dutton, an owner of two small motels in Billings, asked for his attorney, Doris Poppler, to provide him an opinion of whether he had to pay overtime to his motel managers who lived on the premises 24 hours a day. Her opinion included the recommendation that motel owners, especially small motel owners, obtain a legislative exemption from the Legislature. Ex. 13 to House Business & Labor Comm. Hrg. Feb. 16, 1987.

Mont. Code Ann. § 39-3-406(1)(l) was enacted by the Montana Legislature in 1987 as House Bill 727. Its sponsor, Cal Winslow, a legislator from Billings, testified that the intent of the bill was to provide relief of problems for small motel and hotel owners whose managers lived on the premises. Test. House Business & Labor Committee Hearing on HB 727 February 16, 1987. The bill initially included “persons employed in lodging establishments or personal care facilities . . . who live in the establishment or facility” but was amended to replace “persons” with “resident managers.” Committee Action February 16, 1987.

The intent of HB 727 was to exclude owners of small motels and hotels and not university residences. Contrary to its assertions, the University is not clearly and unmistakably exempt from paying overtime or minimum wages based on this provision.

B. On Call Time

The United States Supreme Court has 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). “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).

In *Skidmore*, supra, the Supreme Court found the following factors relevant in determining whether on-call time is compensable:

(1) the extent to which there was an on-premises living requirement;

This factor clearly weighs in Harvey’s favor, as she was required as a Community Assistant to reside in the University Villages and was prohibited from leaving the premises regardless of whether she was the primary or secondary.

(2) the extent to which there were excessive geographical restrictions on employee movements;

This factor also weighs in Harvey’s favor, as she was required to remain in the University Villages area while she was either the primary or secondary person. Other than eating at the one on-campus restaurant with her children, Harvey could not go off-campus to eat, shop, get gas, go to medical appointments or to

the grocery store. Harvey's timesheets frequently show she worked 24 hours or more in a row and would follow that with a nine hour on call shift. Such a schedule would make the geographical restriction severe.

(3) the extent to which the frequency of calls was unduly restrictive;

Harvey testified that she would sometimes get called out 4-5 times during an eleven hour on call shift and that residents would knock on her door at all hours of the night. The duty logs indicate that when Harvey was on call, she noted that she was busy 43% of the time and had a quiet night 26% of the time. Given the unpredictability of whether it would be a quiet night or a busy night, Harvey was unable to effectively use her on call hours for her own purposes.

If Harvey was the secondary, she was expected to go on rounds with the primary and to accompany the secondary if that person was called out at night.

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

The University expected Harvey to immediately answer the duty phone or a knock on the door. She was further expected to address the issue raised by the resident at that time. Such interruptions would make it difficult to cook dinner or to put her children to bed. If Harvey was the secondary, she was expected to respond to the primary immediately.

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

Harvey could trade on call responsibilities, if approved by her supervisor.
Doc. 90.

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

When Harvey was the primary, she had to carry the University's cell phone with her at all times. She was expected to answer immediately and there was no evidence offered that she could just let the call go to voice mail. The phone did not ease any restrictions on Harvey's time.

(7) the duration and danger of calls;

Harvey and Curtis testified that the calls could take considerable time especially if it was a "large event" such as a suicide, fire, explosion, or domestic

dispute. A significant part of Harvey's duties was related to a security-type function, such as doing rounds and checking for and confronting violations of "campus policies and procedures or community standards." Doc. 33. Harvey's residence was well identified to all the residents of University Villages, as such, she is unlike other employees who may be called out to a dangerous situation but are free from the danger associated with having the whole community know where you live. While Curtis testified that Harvey did not receive an excess of calls while on duty or that she did not respond to an unusual number of serious situations, the vagueness of her testimony on this issue resulted in less weight being given to her testimony.

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

The on-call policy only paid Harvey for one of every four hours she worked while in that status. While Harvey benefitted from the housing and small stipend to aid in her studies at the University, that benefit inures to her position as a Community Assistant and not to the on call requirement. As busy as Harvey was and could be while she was on call, being paid only for one of every four hours did not benefit her financially.

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

Harvey worked under two Agreements that required her to be on call and clearly stated she would be paid for only one of every four hours she was on call.

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

The University's witness could only testify to what her "understanding" of what Community Assistants could do for their own benefit while being on call and offered no first-hand knowledge. However, it is logical that Harvey could cook, clean, study, or sleep, with the caveat that those activities most likely would be disrupted by some issue during the course of her prolonged on call shifts. The fact that the greatest numbers of Harvey's on call hours were late at night or early in the morning also restricted her ability to use the time as her own. During these hours she could not entertain guests or do things like cooking or cleaning that might disrupt her children's sleep. All she could really do was attempt to sleep or study while waiting for the cell phone to ring or for someone to knock on her door.

The Montana Supreme Court has endorsed the use of these same factors when making determinations of whether on call time should be compensable. *See Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, P17, 369 Mont. 322, 328, 298 P.3d 419, 424. The court held that no one factor was dispositive. *Id.*

The University could not effectively rebut Harvey's testimony that during her time as a CA the secondary person went with the primary at night on rounds, when called out or any other time they were concerned for their safety. Whitaker testified that safety was a key factor with respect to calling the secondary to accompany the primary. He was also new to the position of Area Coordinator and offered no credible testimony about what the previous Area Coordinators expected from Harvey and the other Community Assistants. The biggest issue raised by the University was the absence of any calls to Harvey's phone from the primary phone during her tenure. While this tends to support the idea that Harvey was not called out once while she was a secondary, that is unlikely given the high probability that at least one event occurred that would have prompted the primary to call Harvey. The complete absence of any call to Harvey also supports her testimony that the primary would text the secondary when needed. No other Community Assistants were called to rebut Harvey's testimony with regard to expectations for the time she spent on call or on secondary.

The University's phone records don't prove very much, the calendars are only suggestions of what might have happened and reveal more of what was planned than what actually happened. No one testified as to what the real schedule was with respect to primary and secondary. Whitaker's deductions from the calendars, the phone records, the duty logs, and the timesheets likely provide a close approximation of when Harvey was the primary person versus being the secondary. The work schedules for the Community Assistants, including Harvey, indicate that they worked when the UV office was closed and its staff were unavailable. No testimony was offered as to whether those staff were full-time paid employees or not. Regardless, having Harvey and the other Community Assistants available when regular staff was not, was a benefit to the University.

More weight is given to Harvey's testimony because she was directly involved in the on call policies in place during her tenure. Curtis was in the unenviable position of having to testify to details about the day-to-day operation of the University Villages and the Community Assistants that were most likely left to subordinates several layers below her in the chain of command. Curtis's testimony leads the Hearing Officer to conclude that her knowledge was either filtered through other sources who did not testify or gathered in response to Harvey's claim. Curtis's "understanding" of what policies were in place with respect to on call duties indicates to the Hearing Officer that she had perhaps heard something from someone else but

could not be sure.⁴ Her testimony as a rebuttal witness regarding when a secondary would assist the primary was not persuasive. Whitaker's testimony regarding what policies may have been in place prior to his arrival in May 2017 and to what instructions the previous Area Coordinators might have given Harvey and other Community Assistants must also be given less weight because he simply wasn't there to gain the necessary first-hand knowledge.

When considering the totality of the circumstances, the factors weigh in Harvey's favor regardless of whether she was serving as the primary or secondary. Harvey was engaged to be waiting.⁵

C. The University Cannot Include Any Of The Value Of Harvey's Residence As Toward Her Unpaid On Call Wages

The Minimum Wage and Overtime Act defines "wages" to include:

the reasonable cost to the employer of furnishing the employee with lodging or any other facility if the lodging or other facility is customarily furnished by the employer to employees. However, the inclusion may not exceed an amount equal to 40% of the total wage paid by the employer to the employee.

Mont. Code Ann. § 39-3-402(7).

Although not at issue in this matter, Harvey was fully paid for 1363.50 contract hours that she worked, either in the form of housing and stipend (1125.50 hours) or directly (238 hours). The University credited 100% of the value of the housing toward Harvey's contract hours. Admin. R. Mont. 24.16.1501 limits the reasonable cost that may be attributed to housing to the actual cost. Accordingly, the University cannot use any portion of the value of her housing to offset any on call overtime wages owed, because all the reasonable cost of that housing was already used to satisfy Harvey's contract hours.

⁴ Curtis's uncertainty was also reflected in her testimony that she "took a quick look" at Harvey's timecards and opined that Harvey was claiming "about double the amount of hours that would have been on those timecards." HRG I Rec (03) 23:50. The University's own Exhibit B shows that Harvey actually claimed 24 hours less than what it determined she worked (1780 vs. 1804).

⁵ While Harvey testified she was waiting to be engaged, she also said she was engaged to be waiting. Ultimately, it is the Hearing Officer's decision based on an analysis of the factors identified above, which lead to the conclusion that Harvey was engaged to be waiting.

D. The University Owes Penalties On The Unpaid Wages

Harvey is owed unpaid wages as described in Findings of Fact 31 to 34. Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. For claims involving compensation other than minimum wage and overtime compensation, a penalty of 55% must be imposed in the absence of certain circumstances, none of which apply to this case. Admin R. Mont. 24.16.7566. Applying this regulation, the employer owes Harvey \$3,058.88 (\$5,561.60 x 0.55) as a penalty on the unpaid regular wages.

For claims involving failure to pay overtime wages, the penalty is 110%. Admin R. Mont. 24.16.7561. Applying this regulation, the University owes Harvey \$9,029.39 as a penalty on the total unpaid overtime wages.

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* (1978), 176 Mont. 31, 575 P.2d 925.

2. This claim is governed by the Montana Wage Protection Act and the Montana Minimum Wage and Overtime Act. Mont. Code Ann. §§ 39-3-404 and 39-3-405. *Babinecz v. Mont. Highway Patrol (In re Wage Claims)*, 2003 MT 107, ¶¶ 24-25, 315 Mont. 325, 68 P.3d 715.

3. Harvey was not a resident manager of a lodging establishment. The University of Montana has failed to clearly and unmistakably prove that it was excluded from paying Harvey minimum wage or overtime wages. Mont. Code Ann. § 39-3-406(1)(l).

4. Harvey's time spent on call was primarily for the benefit of the University of Montana. *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944).

5. Harvey was engaged to be waiting. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-39 (1944).

6. Harvey proved that all her on call hours are compensable. *Id.*

7. Harvey is owed \$5,561.60 in unpaid regular wages. She is also owed \$3,058.88 in penalties on the unpaid regular wages. Finding of Fact No. 36.

8. Harvey is owed \$8,069.14 in unpaid overtime wages. She is also owed \$8,876.05 in penalties on the unpaid overtime wages. Finding of Fact Nos. 37 and 38.

9. Harvey is owed \$139.40 in overtime wages paid at the regular rate of \$8.20 instead of the overtime rate of \$12.30 per hour. She is also owed \$153.34 in penalties on the unpaid overtime wages. Finding of Fact No. 39.

VI. ORDER

Based upon the foregoing, the University of Montana is hereby ORDERED to tender a cashier's check or money order in the amount of \$25,858.41, representing \$13,770.14 in unpaid wages and \$12,088.27 in penalties made payable to Rebecca Harvey and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. The University of Montana may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 28th day of January, 2019.⁶

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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 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 59620-1503

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

⁶ The Hearing Officer apologizes to the parties for the time it took to issue this decision. The Hearing Officer had several significant medical issues in 2018 that hampered his ability to issue this decision in a more timely fashion.