

Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUE

Whether the Department of Public Health and Human Services, Child and Family Services Division, owes wages for work performed, as alleged in the complaint filed by Tara Starkel, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. The Child and Family Services Division (CFSD) of DPHHS is designated by statute as the agency responsible for the protection of children who have been or are at substantial risk of abuse, neglect, or abandonment and is specifically charged with the duty to respond to reports of child abuse or neglect and to provide protective services when necessary, including the authority to take temporary or permanent custody of a child when ordered to do so by the court.

2. The Central Intake Services unit of CFSD takes all calls of alleged abuse and neglect of children within the State of Montana. It is an around-the-clock operation, with supervisors rotating on-call status outside of their normal shift hours.

3. Starkel is an Intake Specialist Supervisor (supervisor).

4. Part of the requirement of the supervisor position is to rotate on-call duties with the other supervisors.

5. At present staffing levels (with three supervisors), supervisors have to be on call once every three weeks.

6. On average, supervisors have to come into work while on call approximately one or two times per month.

7. Between 2016 and 2017, there were approximately 14 child deaths each year. Handling situations such as these could involve a significant duration of time.

8. Supervisors had to be available to answer a telephone at all times while on call. If supervisors could not answer calls immediately, they had to be able to return them within a reasonably short period of time.

9. DPHHS provided telephones to supervisors.

10. While on call, supervisors had to:

- a. be in an area with cell phone service;
- b. be available to take a confidential telephone call;
- c. be within approximately 20 minutes¹ of the workplace; and
- d. refrain from alcohol use.

11. Within the bounds of the foregoing restrictions, supervisors could do anything they wished while on call. Examples given through testimony were going into town, going to the Farmer's Market, and writing Christmas cards.

12. Supervisors could not, however, do things that were out of cell phone range and/or not within approximately 20 minutes of the workplace while on call, such as:

- a. going hunting, fishing, or hiking out-of-town;
- b. attending sporting events for children and families out-of-town; and
- c. attending family or social gatherings out-of-town.

13. In addition to the foregoing restrictions, Starkel had to make adjustments to her personal life, such as moving to areas where family could not overhear her telephone conversations, particularly at night, in order to be available to answer confidential calls.

14. Supervisors decided among themselves what weeks they were on call.

15. To the extent there was no supervisor who could cover, the Bureau Chief, Laramore, was available to do the work.

16. Starkel submitted an accurate spreadsheet of her on-call hours, compensation history, and a calendar of on-call hours.

17. Starkel was paid for all time spent working while called out, but not while on call.

¹ The terms "20 minutes" and "20 miles" were used interchangeably throughout the hearing, though the implication in either case was that supervisors had to be within an approximate 20-minute driving distance of the workplace while on call.

18. Prior to 2017, supervisors who were called out while on call were paid regular hourly rates up to 40 hours in a week, and 1.5 times their normal rate thereafter. Starting in mid-2017, supervisors who were called out while on call were paid 1.5 times their normal rate, regardless of whether they had worked 40 hours that week.

19. DPHHS has a Nonexempt Employee Compensatory Time policy (the Policy) that may provide benefits above those legally required, but also provides there is no guarantee an employee will receive additional compensation for being in an on-call status.

20. In May, 2017, supervisors were given the option to take six months of back-pay for on-call time in exchange for not making any additional claims for unpaid time. Only six months of back-pay were offered because of budgetary restrictions.

21. Starkel was not paid additional compensation for being on call from June 2015 through June 2017. The Department began paying all Claims Intake Specialist Supervisors on-call compensation as allowed in the Nonexempt Employee Compensatory Time policy prior to this claim being filed in June 2017.

IV. DISCUSSION²

A. Wage and Hour Claim

The sole wage and hour issue in this case is whether Starkel's time spent on call—but not called out—was compensable. 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

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

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); 29 C.F.R. 785.17. 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. *Id.*; 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.*

Going through the foregoing factors as applied to the facts of this case, most all weigh in favor of DPHHS. There was no on-premises living requirement. Starkel was provided a phone by DPHHS, which allowed her to take calls from a variety of locations. Although the Centralized Intake hotline was undoubtedly busy, Fortune-Blair testified that on-call supervisors were only called in one or two times per month, which was confirmed by time sheets. Although the number of supervisors available to be on call was small, Starkel could choose and trade on-call responsibilities with the other supervisors. To the extent there was no supervisor who could cover, Laramore was available to do the work. Being on call was the result of Starkel's employment arrangement with DPHHS. Whenever Starkel was called out while on call, she was paid for her work. Starkel could engage in personal activities while on call, albeit within certain geographical limitations.

With regard to factors weighing in Starkel's favor, she emphasized the number of child death cases received by DPHHS in 2016 and 2017. While these calls may have been long in duration, Starkel did not provide evidence she personally had to handle any of these calls while on call, nor does she claim she was not paid while called out. Thus, the primary factor which weighs in Starkel's favor is also the one which she placed the most emphasis on at hearing—the geographical restriction while on call. Starkel argued that she was unduly restricted because she could not do things such as attend school or family functions out-of-town. It was acknowledged by both parties that, whenever she was on call, Starkel had to be within approximately 20 minutes of the workplace and in an area with cell phone service. As testified to by both Starkel herself and others, however, this restriction did not prevent them from carrying out normal, personal activities while on call. Starkel could engage in any personal activity she wished at home or in the Helena vicinity while on call, albeit she had to refrain from drinking alcohol. The fact that she could not go outside a 20 minute radius of the workplace in a community the size of

Helena was not so severely restrictive that she could not use the time effectively for her own purposes. Furthermore, as stated, Starkel was paid for whenever she was called out while on call, and she has no claim for unpaid work while called out.

Although Starkel has shown she was restricted while on call, it was not to the degree required to make her on-call time compensable. In light of the foregoing, and after weighing the factors discussed above, the time Starkel spent on call was not so severely restricted she could not use the time effectively for her own purposes, and is therefore not compensable. Admin. R. Mont. 24.16.1005(7); 29 C.F.R. 785.17. Furthermore, Starkel acknowledged she is only seeking compensation for the time spent waiting to be engaged while on call, and she is not owed any additional wages for her time spent called out.

B. Contractual, Equitable, and Other Claims

Starkel ably articulated several arguments which could be interpreted as a combination of contractual, equitable, and similar claims that are not cognizable under the wage and hour laws, and are therefore not within the jurisdiction of this tribunal to render judgment upon. *See* Mont. Code Ann. §§ 39-3-201 *et seq.*; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978). For example, Starkel raised arguments with regard to DPHHS's ability to pay, the fairness and equity of supervisor pay, and the application of the Nonexempt Employee Compensatory Time policy to her claim. DPHHS conceded that Starkel presented evidence to support her contention that the Department restrictions placed on her while on call created the need to pay her the on-call compensation set out in the Department's Nonexempt Employee Compensatory Time policy. However, as stated, application of the Policy is not something this tribunal can decide within the context of a wage and hour claim. Similarly, whether the Department had the ability to pay, and the fairness of how other groups within the Department may have handled on-call time relative to Starkel's group are not proper subjects for adjudication under the wage and hour laws.

The Hearing Officer renders no decision with regard to any issues not specifically decided 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 Starkel spent on call was not so severely restricted she could not use the time effectively for her own purposes, and is therefore not compensable. Admin. R. Mont. 24.16.1005(7); 29 C.F.R. 785.17.

3. 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. Starkel's 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:

Starkel's appeal is DISMISSED with prejudice.

DATED this 12th day of February, 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