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

IN THE MATTER OF THE WAGE CLAIM OF ASHLEY E. WESTPHAL, Claimant, vs. GRANITE COUNTY HOSPITAL DISTRICT, Respondent.	)	Case No. 1874-2022 **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT and FINAL AGENCY DECISION**

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I. INTRODUCTION

Respondent Granite County Hospital District (Granite County or the Hospital) made a Motion for Summary Judgment. Claimant Ashley E. Westphal (Westphal) countered, and Granite replied. No party requested oral argument. As such, the matter is ripe for disposition. Because Granite County's Summary Judgment Motion is dispositive of the entire claim, this Order constitutes the Final Agency Decision.

II. FINDINGS OF FACT

1. Westphal worked for Granite County from March 24, 2013, to August 31, 2021, as a Nurse Practitioner. Westphal holds an Associate of Science degree, Bachelor of Science degree in Nursing, Master of Nursing, Family Nurse Practitioner degree, and a Post Master's Psychiatric Mental Health Nurse Practitioner certificate. She also holds licenses as a Registered Nurse (RN) and an Advanced Practice Registered Nurse (APRN). She has attended numerous continuing education courses to maintain these licenses.

2. Westphal filed a wage claim with the Montana Department of Labor and Industry, Employment Relations Division. She alleged in her wage claim that she was entitled to $62,052 in unpaid wages; $3,562 in unpaid expenses; $5,760 in unpaid mileage reimbursement.

3. In particular, Westphal alleged overtime wages from September 1, 2019, to August 31, 2021, totaling $62,052, were due having been calculated based on hours worked over 40 hours per week. She asserted she was expected to be at the Hospital within 20 minutes of being called.

4. Westphal further alleged in her wage claim that she was due mileage reimbursement totaling $5,760 based on having traveled a number of miles at $0.56 per mile between September 1, 2019, to August 31, 2021. For that same timeframe and same traveling to Drummond, she alleged she was due $3,562 in unpaid drive time, which she calculated based on a total number of 54.8 hours at $65 per hour.

5. Westphal's most recent Employment Agreement with Granite County was effective on July 1, 2019, continuing for three years and expiring on midnight of July 1, 2022.

6. Regarding compensation, the Employment Agreement provides: "Employer shall pay Employee a **base annual salary of $137,640**. The biweekly salary amount paid will be $5,735. This includes two clinic days per week (8hr worked and 1 hour on call lunch), one weekday per week on call (15 hours), 13 weekends on call per year (63 hours), no more than 3 GCHD [Granite County Hospital District] recognized holidays (24 hours) on call per year and 250 hours of PTO per year. Additional weekdays worked in the clinic will be paid at the per diem rate of **$65 per hour**. Additional on call hours, including nights, weekends and Holidays will be paid at an additional **$45 per hour** above the base salary. Attendance at required meetings/training sessions by GCHD CEO [Chief Executive Officer] or Medical Director will be included as a professional obligation of the base annual salary. It is the expectation that all work will be completed during the scheduled shift. Any hours beyond scheduled hours must be pre-approved." (Emphasis in original).

7. Regarding duties, the Employment Agreement delineated a list of duties Westphal agreed to perform, including being "scheduled for shift(s) that include days, evenings, nights and weekends." Westphal also agreed to be subject to the "terms and conditions of the employees schedule . . . defined in addendum A, attached to this agreement and . . . incorporated herein." That addendum states: "Granite County Hospital District and Employee agree that Employee shall typically be scheduled to work (1) Two (2) weekdays per week in one of the Granite County Hospital District clinics; (2) Clinic day is defined as 8am-5pm, with one hour on call lunch; (3) Employee agrees to be on-call at least one weekend per month in the Employer's emergency department. The Employer agrees to pay the Employee for the period of time beginning at five (5) pm on Friday until eight (8) am on Monday morning (63 hours). This compensation is for providing both availability on call and patient care time. Emergency Room utilization during clinic hours is minimal therefore compensation for being on call during clinic hours is included as part of the base compensation paid for staffing clinic hours; (4) Additional hours may be scheduled from time to time to provide coverage for other contracted providers on Paid Time Off (vacation) or pursuing Continuing Medical Education (CME)."

8. Regarding termination, the Employment Agreement provides for "Termination by Agreement," "Immediate Termination," and "Termination with Notification." Regarding termination with notification, the Employment Agreement provides: "Either party may terminate the Agreement at any time

without cause upon sixty (60) calendar day's written notice to the other. Such termination shall be effective sixty (60) days after such notice is deemed given under [another paragraph in the Employment Agreement]."

9. Regarding the entirety of the agreement, the Employment Agreement provides: "This Agreement supersedes all previous contracts and constitutes the entire Agreement between the parties. Employer and Employee shall be entitled to no benefit other than those specified herein. No oral statements or prior written material not specifically incorporated herein shall be of any force and effect and no changes in or additions to this Agreement shall be recognized unless incorporated hereby amendment as provided herein, such amendment(s) to become effective on the day stipulated in such amendment(s). Both parties specifically acknowledge that in entering into and executing this Agreement, they rely solely upon the representations and agreements contained in the Agreement and no others. This Agreement shall be separate and independent of any credentialing/privileges relationship between the parties."

10. The CEO of Granite County indicated in email correspondence with Westphal on April 6, 2018, for Westphal to "go ahead and begin reimbursing miles," indicating she would "amend the contract." This email response was the result of Westphal's inquiry for Granite County to "reconsider reimbursing [her] mileage for travel to Drummond." She indicated she was the only provider to travel to the Drummond clinic and the total mileage was 62 miles each week. Westphal wanted Granite County to "reconsider [its] stance on mileage reimbursement."

11. Granite County's gross annual sales for 2022 exceeded $500,000.

III. STANDARD

Summary judgment may be granted only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact. *LaTray v. City of Havre*, 2000 MT 119, ¶ 14, 299 Mont. 449, 999 P.2d 1010. To satisfy this burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is." *Toombs v. Getter Trucking*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993).

All evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment. *Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, ¶ 14, 343 Mont. 279, ¶ 14, 184 P.3d 1021.

Once the moving party meets its burden of demonstrating a complete absence of genuine issues of material fact, the burden then shifts to the non-moving party to set forth specific facts, not merely denials, speculation, or conclusory statements, to establish that a genuine issue of material fact does indeed exist. Mont. R. Civ. P. 56(e); *LaTray*, ¶ 14. Finally, if no genuine issues of material fact exist, it must then be determined whether the facts entitle the moving party to judgment as a matter of law. Mont. R. Civ. P. 56(c).

IV. DISCUSSION

A. Parties' Arguments

Granite County alleges in its Summary Judgment Motion that no material facts exist indicating Westphal was eligible to receive overtime payments, "drive time" compensation, or "mileage reimbursement." In particular, Granite County asserts Westphal does not dispute any of the factual findings made in the Montana Department of Labor and Industry (Department) Investigator's Wage Claim Investigation & Determination (Report). According to Granite County, she also admits that each document attached to the Report is authentic. In that regard, Granite County argues Westphal is ineligible for overtime payments because she was an exempt employee under Montana and federal law. Granite County asserts it is undisputed Westphal was employed at the Hospital as a "learned professional," and she was paid an annual salary of more than $137,000 per year. These facts alone, Granite County asserts, are sufficient to exempt Westphal from overtime eligibility under Montana and federal law. In addition, it is undisputed that Westphal has received academic instruction and continuing education that meets the definition of "learned professionals" for overtime under federal law. Granite County continues that Westphal is not entitled to additional compensation for her time spent driving to the Hospital's clinic in Drummond, Montana, pursuant to settled Montana law. That follows because it is undisputed that the Hospital made all payments to Westphal due under her employment contract. This included any drive time because such time was included in her employment contract as part of the services she agreed to provide for the compensation she received. Moreover, Granite County contends that even if the employment contract was not controlling, Westphal is still not entitled to additional compensation for her drive time because she is an exempt employee. Finally, Granite County argues that the Department lacks statutory authority to consider Westphal's mileage reimbursement argument. That follows because a difference exists between non-payment of wages, which the Department has authority to investigate, and reimbursements, which the Department lacks authority to investigate.

Westphal responds that her Employment Agreement is just that, an agreement, and not a contract of employment for a specified term. This is so because Granite County, in the agreement, retained the right to terminate early without cause. Westphal continues that Granite County treated her as an hourly employee, not a salaried employee, with the addition of hourly rates of pay that is inconsistent with the claim of exemption. Moreover, Granite County continued to pay her hourly rates as well as overtime for tasks outside of her

base pay, which aligns with the non-exempt status per Granite County's policy. Westphal objects to Granite County's affidavit provided in support of its motion for summary judgment. Westphal contends the document filed is a declaration and not an affidavit, as it must be, since declarations do not purport to be made under oath. Strict compliance with Mont. R. Civ. P. 56(e) is required for summary judgment purposes.

Westphal contends the issue before the Hearing Officer is to determine if a question of fact exists whether Granite County fully paid Westphal all wages due under Montana law. Westphal continues that pursuant to Montana law "when a purported employment contract permits unilateral termination of the contract, it means the employee is subject to wage and hour overtime," according to *Brown v. Yellowstone Club Operations, LLC*, 2011 MT 155, 361 Mont. 124, 255 P.3d 205. According to Westphal, the purported contract is an employment agreement setting forth general terms of wages and benefits, whereas an employment contract would bind both parties to a term of performance with precise consideration for precise services. The document at issue is entitled "Employment Agreement," that Granite County "wrote in their own back-door to at-will status." Westphal contends that the employment agreement's "Termination with Notification" provision, which provides that either party may terminate the agreement "at any time without cause upon sixty (60) calendar day's written notice," negates Granite County's argument that Westphal is a contract, salaried employee. Moreover, Westphal contends she is an hourly employee for overtime purposes because Granite County labeled her as salaried but treated her as hourly. This is true, according to Westphal, because her base annual salary of $137,640 was for 2,559 hours of in-person and on-call hours worked. That is beyond the standard 2,080 hours annually. In addition, the agreement lists an expectation that all work be completed during the scheduled shifts but "[a]ny hours beyond scheduled hours must be pre-approved." For non-exempt employees, the same language is used in Granite County's policy, whereby for "Overtime/Over-Shift," "Employees must obtain pre-approval from their direct supervisor to work overtime . . . or over-shift[.]" This language, Westphal argues, makes clear that Granite County thought of her as an hourly employee. Westphal also argues that if the employment agreement is a contract, Granite County breached it and thereby violated wage and hour law. More specifically, Westphal contends that the rate of compensation for her work was defined by the employment agreement, as was the rate for excess hours worked. Granite County violated the terms of the agreement because, for example, in 2020, she agreed to work 2,559 hours for a certain base salary. Westphal states she worked "in excess of 3,000 hours . . . for which no overtime pay was received." These hours must be compensated for under the agreement, meaning that for the year 2020 alone, she is due over $30,000. Not following the terms of its own contract, Westphal argues "is a breach which violated wage law." In addition, Westphal indicates a question of fact exists about the hours paid and hours worked so summary judgment cannot be had. Finally, Westphal argues that the Hospital does not have the position classification for a non-exempt employee anywhere in the agreement. Instead, the agreement is "a hodgepodge of hourly

compensation mixed with salaried expectations." Such vagueness in the agreement should be construed against Granite County as the drafter.

Granite County makes several arguments in reply. First, Granite County argues it satisfied its evidentiary burden as the party moving for summary judgment. In particular, Granite County contends the "Declaration of John M. Semmens (Semmens Declaration) In Support of GCHD's [Granite County Hospital District] Motion for Summary Judgment" comports with Montana law. And, regardless, Westphal's discovery responses fully satisfy the Hospital's evidentiary burden standing alone. Elaborating on those points, Granite County continues that Montana law permits it to support its motion for summary judgment with a declaration, because the declaration authenticated the investigator's Report as well as Westphal's discovery responses. In addition, Granite County argues that no legal distinction exists between an affidavit and a declaration; that Montana law permits attorneys to submit affidavits to authenticate documents; and that the Semmens Declaration can be used to establish that the documents attached to the motion were delivered during the course of litigation, including discovery. Regardless, Granite County states Westphal's discovery responses alone support its motion for summary judgment. That follows because Westphal admitted in discovery all documents attached to the investigator's Report were authentic and she did not dispute the factual findings contained in the Report. Montana law permits the Hearing Officer to consider Westphal's discovery responses when considering a motion for summary judgment.

Second, Granite County asserts Westphal failed to satisfy her evidentiary burden as the party opposing a motion for summary judgment. In particular, Granite County asserts the only substantive evidence Westphal submitted in response to the motion for summary judgment is immaterial to the Hospital's motion. That evidence included an affidavit Westphal submitted that re-alleges her gender discrimination claims, which she is litigating separately, and where she invites the Hearing Officer to incorporate arguments from a district court case that is separately pending without submitting any of the briefing from that district court case. Granite County contends Westphal's allegation regarding gender discrimination is not material to her wage claim, nor does the Department have authority to investigate a gender discrimination claim under a wage claim docket. Accordingly, her gender discrimination allegations should be stricken. Granite County continues that rather than contesting the Hospital's statement of undisputed facts, Westphal devotes six pages attempting to undermine the undisputed facts "with legal arguments, untethered to admissible evidence." Westphal did not dispute any of the evidence provided by Granite County and, instead, alleged she disputed facts contained in "18-43 because this section of the Undisputed Fact is disputed, and the colloquy associated with this section is argument and not agreed facts." Granite County asserts this conclusory statement does not comport with Montana law which demands more to defeat a motion for summary judgment. To the extent, however, that the conclusory statement is material to her argument, Granite County also argues it fails to substantiate her

conclusory statement that she was treated as a non-exempt employee, being paid on an hourly rate for tasks assigned to her.

Third, Granite County argues Westphal's response ignores the controlling issues in this case. Namely, Granite County contends Westphal's response fails to identify disputed facts that are material and ignores the analysis in the investigator's Report and instead introduces irrelevant legal theories that do not govern her wage claim. Granite County continues that nurses like Westphal are always exempt employees as a matter of law and Westphal's response does not cite to controlling exemption regulations or statutes, which govern her overtime claim, a single time. In fact, Granite County contends Westphal does not dispute that under applicable Fair Labor Standards Act (FLSA) regulations adopted by Montana, registered nurses who are registered by the appropriate examining board in each State automatically meet the exemption standard. Nor does Westphal dispute that the Hospital employed her as an APRN or identify any cognizable legal theory that supports the proposition her exempt status as an RN can change to non-exempt. Additionally, Granite County argues Westphal's response did not identify evidence suggesting that the Hospital agreed to compensate her for her "drive time," and instead, did not even mention it in her response. Westphal also ignored, according to the Hospital, the legal reasons why the Department lacks authority to address her reimbursement claim.

Finally, Granite County contends Westphal's arguments regarding supplemental compensation, breach of contract, and wrongful discharge are irrelevant to whether she is an exempt employee entitled to overtime wages. In particular, Granite County argues that without citing to any authority in support, Westphal repeatedly suggests she is a non-exempt employee because her employment contract provided a base salary and additional compensation on an hourly basis for additional shifts not required by the contract. In reply, Granite County contends employers are permitted to provide salaried employees with additional compensation and doing so does not change the employees' exemption status. Granite County also contends Westphal's argument that because she was provided a base salary but also was able to obtain additional compensation on an hourly basis for work shifts not required by her contract is without authority, nor did Westphal cite to any authority in support of her argument. In addition, the Hospital argues that Westphal's novel theory that if it breached its terms of her employment contract that breach necessarily violated wage law. Granite County argues that Westphal fails to provide support for such an argument and, instead, no aspect of the FLSA or Montana's Wage Payment Act (MWPA) permits Westphal to pursue a breach of contract claim while under a wage claim docket. Nor has Westphal established the factual predicate for such a claim, even if she is permitted to pursue it. That follows because she has not identified substantial evidence establishing she engaged in additional work or that the Hospital approved the additional work to be paid additional compensation under the employment contract. Regarding her wrongful discharge theory, Granite County asserts the district court already concluded she was not entitled to relief under the Wrongful Discharge Employment Act (WDEA), yet she continues to argue

herein that because she is entitled to relief under the WDEA given the termination provision of her employment contract, she must also be considered a non-exempt employee under Montana's wage laws. And even if she was entitled to relief under WDEA, that fact does not alter Westphal's status under MWPA because the termination provision of her employment contract is wholly immaterial to whether she, as an RN, is an exempt employee under the FLSA.

B. Discussion

A motion for summary judgment should be granted only where there is a complete lack of any evidence that would justify deciding the issue, after considering all evidence and any legitimate inferences that might be drawn. *See Wagner v. MSE Tech. Applications, Inc.*, 2016 MT 215, ¶ 15, 384 Mont. 436, 383 P.3d 727. From the outset, the Hearing Officer finds no need to rule upon the purported issue of a declaration versus an affidavit. Suffice it to say that the Semmens Declaration, contrary to Westphal's argument, was sworn under penalty of perjury of law. Moreover, Montana Rule of Civil Procedure 56(a) provides that a party may move for summary judgment with or without supporting affidavits. It also provides that a court should grant summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(a). Without an affidavit or sworn discovery response of an individual with personal knowledge of the genuineness, relevance, and contents of documents, the attachments to a summary judgment motion are "little more than inadmissible hearsay." *Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 12, 372 Mont. 363, 313 P.3d 107 (citation omitted). Where no sworn authentication for the documents' contents exists, a decision is made only on the pleadings, answers to interrogatories, and admissions on file in the case and in the public record. *Id.*

Granite County submitted documentation in support of its motion for summary judgment. That documentation included Westphal's wage claim form; the spreadsheet Westphal developed; the Employment Agreement Westphal provided to the Department; the letter the Department sent Granite County; Granite County's response to Westphal's wage claim; the Hospital's written response to Westphal's wage claim; Westphal's timecard report from the Hospital; Westphal's pay summaries from the Hospital; Westphal's email correspondence regarding salary reduction and termination; the Investigator's request for information from Westphal; Westphal's response to the written request for information that the Department received; email correspondence between Westphal and the Hospital's CEO; information regarding Westphal's RN license; information regarding Westphal's APRN license; State employee travel information provided by the Department; the Investigator's Report; Westphal's responses to discovery requests; and Westphal's documents produced as a result of discovery. A court need only consider admissible evidence in deciding whether summary judgment is an appropriate remedy. *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 21, 368 Mont. 330, 296 P.3d 450. Authentication, or setting forth "evidence

sufficient to support a finding that the matter in question is what its proponent claims" is a condition precedent to admissibility. Mont. R. Evid. 901(a); *Alfson*, ¶ 13. The Hearing Officer concludes the documentation provided in support of Granite County's motion for summary judgment has been authenticated. The documents provided either came from Westphal herself or were provided by the Hospital. The Semmens Declaration only purports to state the obvious—that documents provided during the investigation and discovery of this claim are attached to Granite County's motion. That Semmens, himself, did not develop the documents matters not to its admissibility because, again, sufficient evidence exists through the existence of the documents that they are what they purport to be.

The Hearing Officer, having reviewed the briefs and supporting evidence, addresses the three separate claims in this case as follows. To the extent Westphal incorporated arguments in her blanket dispute of the facts regarding gender discrimination, the WDEA, and breach of contract, the Hearing Officer does not address them given that jurisdiction on Westphal's wage and hour claim is limited to just that. *See State v. Holman Aviation Co.*, 176 Mont. 31, 575 P.2d 925 (1978).

1. Unpaid Wages

Montana and federal law require employers to pay their employees overtime wages, unless an exemption applies. "Under the federal Fair Labor Standards Act (FLSA) and Montana law, an employer is required to pay overtime of at least one and one-half times of an employee's regular rate of pay for hours worked in excess of forty hours per week." *Arlington v. Miller's Trucking, Inc.*, 2012 MT 89, ¶ 31, 364 Mont. 534, 277 P.3d 1198; *See also* Mont. Code Ann. § 39-3-405; 29 U.S.C. § 207(a)(1). "If an employer does not comply with this provision, an employee may maintain an action against the employer to recover unpaid minimum wages, unpaid overtime compensation, and possibly liquidated damages." *Id.*; Mont. Code Ann. §§ 39-3-407, -207; 29 U.S.C. § 216(b). However, numerous exemptions exist under which employees are not eligible to receive overtime pay. *Arlington*, ¶ 32. Exemptions from or exceptions to FLSA's requirements are narrowly construed against the employer asserting them. *Montana Pub. Empls. Ass'n v. Montana DOT*, 1998 MT 17, ¶ 11, 287 Mont. 229, 954 P.2d 21.

One such exclusion applies to individuals "employed in a bona fide . . . professional capacity, as these terms are defined by regulations" adopted by the Department. Mont. Code Ann. § 39-3-406(1)(j); 29 U.S.C. § 213(a)(1). Of note, Admin. R. Mont. 24.16.211 states "the commissioner finds that it is appropriate that Montana harmonize its treatment of those employees [bona fide executive, administrative, professional employees, and for persons employed in an outside sales capacity] under state wage and hour laws with the federal treatment of those same classes of persons under the Fair Labor Standards Act, 29 USC 201, et seq." This includes "29 CFR part 541, subpart D" which includes "learned professionals." *See* Admin. R. Mont. 24.16.211(1)(d). Employees are considered to be employed in a bona fide

professional capacity under the FLSA where they are (i) paid on a salary or fee basis at a rate of $684 or more per week; and (ii) the work duties require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.300(a)(1)-(2)(i).

To qualify as a learned professional under the FLSA, (1) the employee "must perform work requiring advanced knowledge;" (2) the "advanced knowledge must be in a field of science or learning;" and (3) the "advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.301(a)(1)-(3). "An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level." 29 C.F.R. § 541.301(b). The phrase "field of science or learning" includes "traditional professions of . . . medicine, . . . various types of physical, chemical and biological sciences . . . and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades." 29 C.F.R. § 541.301(c). The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" "restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession." 29 C.F.R. § 541.301(d). "Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption." *See* 29 U.S.C. § 541.301(e)(2).

Here, the facts are not in dispute regarding Westphal's claim for overtime. She was compensated on a salary basis of not less than $684 per week as evidenced by her pay stubs and her employment contract. In addition, her primary duties included performance of work requiring knowledge of an advanced type in a field of science or learning that was acquired by a prolonged course of specialized intellectual instruction. In particular, Westphal holds a nursing degree and nurse practitioner degree, with a separate certificate as a nurse practitioner in psychiatric care, as well as RN and APRN professional licenses. She was employed as a nurse practitioner at the Hospital with varied duties regarding patient care. Accordingly, the Hearing Officer concludes Westphal meets the standard of a learned professional pursuant to 29 C.F.R. § 541.301(e)(2) and 29 C.F.R. § 541.301(a)-(d). That follows because Westphal had duties as a nurse practitioner for the Hospital along with specialized degrees in nursing, to include a master's degree in the nurse practitioner program and a post-master's certificate in psychiatric care. For these same reasons, the Hearing Officer also concludes Westphal was employed at the Hospital in a bona fide professional capacity, pursuant to Mont. Code Ann. § 39-3-406(1)(j) and 29 C.F.R. § 541.300(a). As a bona fide professional, Westphal was employed by Granite County as an exempt employee, whereby she is ineligible to receive overtime.

In that regard, Westphal's main contention is that because her employment agreement contained a provision allowing for either party to

terminate without cause, she did not really enter into a contract. It follows, then, according to Westphal that if she did not have an employment contract detailing her status as an employee, she was a non-exempt employee who is subject to receive overtime. Westphal's support for this proposition is the Montana Supreme Court's case in *Brown*. The employment contract at issue in *Brown* had a specific term for its length as well as a provision that allowed the employer to terminate the employee at will, without cause. *Brown*, ¶ 9. Such a distinction mattered in *Brown* because Montana's WDEA does not apply to an employee who is covered by a written contract of employment for a specific term. *Brown*, ¶ 8. Ultimately, the Montana Supreme Court held that "[i]f an employment contract for a specific term also allows the employer to terminate at will (after completion of the probationary period), it is not a 'written contract for a specific term' under" Mont. Code Ann. § 39-2-912(2) (the WDEA). *Brown*, ¶ 11. As such, "[a] discharged employee covered by such a contract is not excluded by § 39-2-912, MCA, from bringing a claim under the Wrongful Discharge from Employment Act." *Id.* Contrary to Westphal's argument, *Brown* does not stand for the proposition that if a contract has both a specific term provision and a termination without cause provision, the document is no longer a contract. Rather, a contract with both provisions is still a contract; it is just a contract with an at-will provision controlling for purposes of the WDEA. Moreover, the MWPA is not affected by the *Brown* decision, which does not even discuss the MWPA, nor does it change Westphal's status as an exempt employee as already analyzed.

Westphal also contends that she was treated as an hourly employee, she worked extra shifts for which she was paid an hourly rate, which she argues aligns with the non-exempt status per policy, and her contract was for more than 2,080 hours. These facts, according to Westphal, evidence she was a non-exempt employee entitled to overtime pay. These facts, however, do not change the undisputed facts already discussed that led to the Hearing Officer's exempt status conclusion. Westphal signed a contract that specifically delineated her rate of pay for hours worked, including extra hours worked. Aside from the conclusory assertion along with the self-made spreadsheet that she worked 3,000 hours, instead of 2,559 hours in 2020, Westphal provides no further evidence of that fact. A non-moving party to a summary judgment motion must set forth specific facts, not mere denials, speculation, or conclusory statements, to establish a genuine issue of material fact exists. *See* Mont. R. Civ. P. 56(e); *LaTray*, ¶ 14. Westphal has failed to do so. Moreover, an employer may choose to pay an exempt employee, like Westphal, extra compensation for extra work without jeopardizing that employee's exempt status. *See* 29 C.F.R. § 541.604. And Westphal provides no support for her contention otherwise. To the extent Westphal believes a breach of contract automatically equates to a breach of a wage claim, she provides no evidence of that contention either. She may pursue a breach of contract issue in a separate venue, but the fact remains under analysis of her wage claim Westphal is not entitled to overtime due to her status as an exempt employee with Granite County.

2. Unpaid Expenses (Travel Time)

The MWPA obligates an employer to pay the wages earned by an employee. *See* Mont. Code Ann. § 39-3-204(1) ("Except as provided in subsections (2) and (3), every employer of labor in the state of Montana shall pay to each employee the wages earned by the employee."). "Wages" include "any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly." Mont. Code Ann. § 39-3-201(6)(a). That said, Montana's wage statutes "do not apply to claims for wages that could have been earned but for breach of employment contract or wrongful termination because such wages were not 'earned' as required by the wage statutes." *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶ 38, 373 Mont. 92, 314 P.3d 920; *Myers v. Department of Agric.*, 232 Mont. 286, 291, 756 P.2d 1144, 1147 (1988) ("By the statutory description and references to wages earned, unpaid wages, and wages due and unpaid, it is apparent that the protection granted under the statutes is to apply to labor or services actually performed or completed, as distinguished from labor or services to be performed in the future."). The MWPA "does not govern disputes over the rate of pay; it only governs the payment of actual wages due an employee." *Harrell*, ¶ 38. The Montana Supreme Court in *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, 330 Mont. 48, 125 P.3d 1121 held that the rate of compensation for work performed is typically defined by the employment contract. *McConkey*, ¶ 24 (payment of 95 percent of the employee's personal time was proper because the other 5 percent did not constitute wages that were part of the employee's agreed-upon compensation). An "employer is free to set the terms and conditions of employment and compensation and the employee is free to accept or reject those conditions." *Langager v. Crazy Creek Prods.*, 1998 MT 44, ¶ 25, 287 Mont. 445, 954 P.2d 1169 (reviewed the employment contract to determine whether vacation pay was due and owing). "[I]t is the law in Montana that one party cannot unilaterally decide that more wages are owed than the amount upon which the employer and employee have agreed." *Harrell*, ¶ 41 (additional pay was not due and owing because the employee "made an assumption that he would be paid more [for interim executive director duties], and believed that he deserved to be paid more, despite receiving no assurance . . . that he would receive additional compensation").

Here, as in *Harrell*, Westphal believes she should be paid more for the time she spent traveling to and from the clinic in Drummond. In effect, she claims her travel time is an unpaid expense. However, as the following details, Westphal's time spent traveling to and from the clinic in Drummond is not an expense and is not additional uncompensated work time. Rather, it is instead part of the work she agreed to undertake for the salary she received in her employment contract. The facts are not in dispute regarding Westphal's claim for travel time. She plainly seeks payment on her travel time to the Granite County clinic in Drummond, claiming she traveled 54.8 hours between September 1, 2019, to August 31, 2021, at $65 per hour, totaling $3,562. The employment contract Westphal signed does not contain a provision for travel time. She was free to negotiate such a term, having worked for Granite County since 2013 and having most recently signed a new contract in 2019. Westphal

was aware of the contract's terms and what was required of her. For her base salary of over $137,000, Westphal was required to work at one of the Hospital's clinics. It may be the case that only Westphal traveled to the clinic in Drummond and that other clinics did not require as much travel time. However, those facts do not change the plain terms of the employment contract Westphal signed, which does not contain a travel time provision. The rate of compensation is typically governed by the employment contract for which both parties have the opportunity to set terms. *Langager*, ¶ 25. As already discussed, the contract is binding on Westphal and by its terms, again, she was required to work at the clinic which, in her case, resulted in travel time to Drummond. That travel time was in effect included in her base salary. Moreover, aside from the conclusory assertion along with the self-made spreadsheet regarding hours traveled, Westphal provides no further evidence of a dispute. A non-moving party to a summary judgment motion must set forth specific facts, not mere denials, speculation, or conclusory statements, to establish a genuine issue of material fact exists. *See* Mont. R. Civ. P. 56(e); *LaTray*, ¶ 14. Finally, as already above-concluded, Westphal is an exempt employee who, in that capacity, is not entitled to travel time. The Hearing Officer therefore concludes Westphal is not entitled to unpaid expenses by way of travel time under her wage claim because any time she spent traveling was included in her base salary.

3. Mileage Reimbursement

"The department will review complaints, claims, or other information received to enforce Montana's wage laws." Admin. R. Mont. 24.16.4007(1). Wages are governed by Mont. Code Ann. § 39-3-101 *et seq.*, MWPA. Again, Mont. Code Ann. § 39-3-201(6)(a) defines "wages" as "any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semimonthly, monthly or yearly." Montana's wage laws obligate an "employer . . . [to] pay to each employee the wages earned by the employee in lawful money." *See* Mont. Code Ann. § 39-3-204(1). In general, reimbursement for expenses is allowable where "an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer." Admin. R. Mont. 24.16.2519(2)(a). "If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work[.]" Admin. R. Mont. 24.16.2519(2)(b)(vii).

Here, the facts are not in dispute regarding Westphal's claim for mileage reimbursement. First, Westphal failed to brief her mileage reimbursement claim. *See Mt. W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 69 P.3d 652 ("if a party fails to raise an issue or argue it in his or her brief, we [the reviewing court] will deem the issue waived and will not address it"). Second, to the extent that Westphal's blanket challenge to the facts incorporates her argument for mileage reimbursement, the Hearing Officer concludes such an argument is unavailing. In her wage claim,

Westphal plainly seeks reimbursement for mileage at $0.56 per mile for a certain number of miles traveled between September 1, 2019, to August 31, 2021, totaling $5,760. As already above concluded, Westphal traveled to and from the clinic in Drummond as part of her work per her employment contract. An employee normally incurs their own expenses in traveling to and from work. Admin. R. Mont. 24.16.2519(2)(b)(vii). Westphal agreed to work in Dillon. Westphal is not entitled to mileage reimbursement because the gas money expended on those travels were also part of the work she agreed to undertake pursuant to her employment contract. Moreover, email correspondence exists describing the miles Westphal traveled and why she believed Granite County should reconsider its position regarding mileage reimbursement. The undisputed evidence shows Westphal understood travel to and from work was her responsibility and mileage reimbursement was not included in the employment agreement. In addition, as already concluded, she is an exempt employee who is not entitled to such reimbursement. Therefore, Westphal is not entitled to mileage reimbursement because it was her responsibility to pay her expense to get to and from work.

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. Holman Aviation*, 176 Mont. 31, 575 P.2d 925.

2. Granite County is subject to the Fair Standards Labor Act.

3. Westphal meets the statutory definition of a learned professional, and as such, she is exempt from receiving overtime. Mont. Code Ann. § 39-3-406(1)(j); 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.300(a); 29 C.F.R. § 541.301(a)-(e).

4. Westphal is not entitled to wages by way of travel time. By its plain terms, no travel time was due to Westphal under the employment contract and, instead, was included in her base salary. *Langager*, ¶ 25.

5. Westphal is not entitled to mileage reimbursement because she was responsible for the expense of her own travel to and from work.

6. There is no genuine issue as to any material fact and Granite County is entitled to judgment as a matter of law.

7. Due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute. *In the Proposed Disciplinary Treatment of the Occupational Veterinarian's License of Jeffrey C. Peila*, 249 Mont. 272, 281, 815 P.2d 139, 144 (1991).

VI. ORDER

IT IS THEREFORE ORDERED THAT Granite County's Summary Judgment Motion is hereby GRANTED. Westphal's wage and hour claim is DISMISSED in its entirety.

DATED this 5th day of July, 2023.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ JOSLYN HUNT
JOSLYN HUNT
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