



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Michael Moran,
Department of Transportation

CSC Docket No. 2021-129

Administrative Appeal

ISSUED: FEBRUARY 23, 2021 (HS)

Michael Moran, a former Manager 1, Department of Transportation (Construction & Maintenance Engineering) (Manager 1), represented by Jennifer Meyer-Mahoney, Esq., requests relief regarding his compensation.

As background, the appellant served in the Manager 1 title from April 29, 2006 through his retirement on December 31, 2020. From December 28, 2013 through August 3, 2018, the appellant was represented and covered under the collective negotiations agreement between the State and the International Brotherhood of Electrical Workers. Manager 1 is an exempt, non-limited, 40-hour title (N4) having a salary range of 34.

In his appeal to the Civil Service Commission (Commission), postmarked July 2020, the appellant states that previously he had received emergency compensation under emergency rate codes for hours spent beyond his normal workday on winter weather, through the Department of Transportation's (DOT) Winter Operations Support Team (WOST), and other emergencies. However, on October 10, 2017, Human Resources (HR) informed him that because his salary range was at or above 32, he was not eligible to participate in the WOST program. The appellant maintains that new administrators in HR had decided not to permit anyone in a title having a salary range of 32 or above to participate in the program based on HR's new interpretation of a Civil Service regulation though the language of the regulation never changed. In other words, according to the appellant, DOT unilaterally changed the terms of his employment, violating its promise that he would continue to receive all the benefits he had always received so long as he

remained in his title. He maintains that DOT misinterpreted Civil Service regulations in deciding to prohibit him from being paid special project rate compensation pursuant to *N.J.A.C.* 4A:3-5.7(e)2. The appellant states that, nevertheless, he continued to work winter weather events because his responsibilities required him to be on call at minimum and go in if needed whether or not he was paid the WOST rate or provided with compensatory time off. He states that he continued to work other emergencies as well. Thus, the appellant argues that he is owed emergency compensation dating back to 2017. He maintains that DOT's position is also unreasonable in light of a 2017 declaration of exceptional emergency pursuant to *N.J.A.C.* 4A:3-5.7(d) by the Department of Environmental Protection (DEP) whereby cash overtime compensation was authorized for certain non-limited employees providing fire suppression assistance.

The appellant also states that since 2017, he has, on multiple occasions, been activated by the Federal Emergency Management Agency (FEMA) and deployed as part of New Jersey Task Force 1, the State's Urban Search and Rescue Team. The appellant contends that he should have been compensated for these deployments as required by the Memorandum of Agreement for Participation in the National Urban Search and Rescue Response System (MOA) between FEMA and the State through the Office of Emergency Management (OEM).¹ In this regard, the appellant maintains that the MOA, in conjunction with FEMA regulations codified at 44 C.F.R. § 208.39, calls for those who are mobilized to be compensated for 24 hours per day from the time of mobilization through the time of demobilization and for the number of hours permitted for personal recovery post-mobilization. The appellant states that DOT nevertheless only sought reimbursement from FEMA for eight hours per day at his normal salary.

The appellant states that he has spent years trying to resolve these issues. In this regard, he states that he attempted to resolve the issues internally with DOT; through his union and the Public Employment Relations Commission (PERC); and through political channels. To redress the issues, the appellant requests that he be reimbursed for unpaid compensation or, in the alternative, that DOT raise his base salary by \$15,000 per year retroactive to October 1, 2017.

In support, the appellant submits, among other documents, copies of the MOA; a May 2019 complaint he filed with PERC alleging that the determination to change the terms of his employment and deny proper compensation for his emergency work for DOT and on FEMA deployments constituted unfair labor

¹ OEM, in this case, is the "Sponsoring Agency," which means "a State or Local Government that has executed an MOA with [the Department of Homeland Security, the parent department to FEMA,] to organize and administer a Task Force." See 44 C.F.R. § 208.2(a). DOT is a "Participating Agency," which means "a State or Local Government, non-profit organization, or private organization that has executed an agreement with a Sponsoring Agency to participate in the National [Urban Search and Rescue] Response System." See *id.*

practices;² and documentation concerning DEP's 2017 declaration of exceptional emergency. It is noted that the non-limited employees who were authorized to receive cash overtime compensation pursuant to DEP's declaration served in the following titles during the relevant time period (salary range noted in parentheses): Supervising Forest Firewarden (29); Division Forest Firewarden (26); Assistant Division Forest Firewarden (24); Supervisor Forest Fire Equipment (26); Geographic Information Systems Specialist 3 (21); and Forest Fire Pilot (21).

In response, DOT, represented by Nonee Lee Wagner, Deputy Attorney General, notes that *N.J.A.C.* 4A:3-5.6(b)2 provides, in part, that for regular eligibility for overtime, no compensation, in cash or compensatory time off, is available to:

. . . a commissioner or department head; an assistant or deputy commissioner; a division director or equivalent; and employees in exempt positions in titles which are not represented in collective negotiations with established salary ranges at or above range 32.

DOT also notes that exempt employees in N4 titles do not have entitlement to overtime for on call instances (*N.J.A.C.* 4A:3-5.7(a)2); for overtime relating to training (*N.J.A.C.* 4A:3-5.7(b)3); and for overtime relating to travel (*N.J.A.C.* 4A:3-5.7(c)3). Under *N.J.A.C.* 4A:3-5.7(d)1, after a special declaration by an agency head, only personnel "in titles with established salary ranges **below range 32** performing emergency related work" are eligible for overtime compensation (DOT's emphasis). DOT states that routine emergencies that arise within the State regularly, however, are further excluded from *N.J.A.C.* 4A:3-5.7(d)1 by *N.J.A.C.* 4A:3-5.7(d)3 as:

. . . work performed beyond the regular work hours on emergency maintenance, construction, snow removal, or other related work in situations that constitute unreasonable safety hazards to the public, employees, other persons, or property of the State. [This agency] shall establish emergency condition rates for these circumstances.

DOT, highlighting that "snow removal" is specifically listed above, states that for the emergency condition rates that apply to such activity, the requirements of *N.J.A.C.* 4A:3-5.6(b)2 and *N.J.A.C.* 4A:3-5.7(d)1 remain unchanged. DOT adds that this agency's Compensation Compendium appropriately controls the payments it makes for snow duty under emergency condition rates.³

² According to the appellant, he received a verbal response from PERC stating that it could not process the complaint as the appellant was not covered by a union.

³ See Salary Regulation FY2021 Section 2 – Emergency Condition Rates. Earlier iterations of the Compensation Compendium contain a similar salary regulation respecting emergency condition rates.

DOT maintains that for the entire period of the appellant's employment as a Manager 1, it was not obligated to pay him overtime compensation or provide compensatory time off pursuant to *N.J.A.C.* 4A:3-5.7. As it is an N4 title having a salary range of 34, the appellant's former title of Manager 1 exceeds the regulatory threshold for overtime cash compensation or compensatory time off, according to DOT. DOT contends that whether or not the appellant had been paid emergency compensation previously is of no consequence to the instant matter. For those instances where DOT denied emergency compensation covered within the instant appeal, DOT maintains it properly applied the regulatory guidelines. It adds that there is no provision for a special project just for the appellant and his volunteer activities. In this regard, DOT states that the Compensation Compendium takes into account all special rates for the activities described in *N.J.A.C.* 4A:3-5.7(d)3 and is subject to the approval of both DOT and this agency. Thus, DOT rejects the appellant's argument that it should treat payments under emergency condition rates for those activities like a special project rate.

Relating to the appellant's external work with FEMA, DOT states he was operating as a volunteer. His work with FEMA was approved by his supervisor, and he obtained emergency civilian duty leave from the performance of his regular duties with DOT to assist in these matters. Because the FEMA work was not a part of DOT operations, according to DOT, there was no application by it for an emergency declaration, special circumstance or special project. DOT maintains the overtime regulations forbid overtime to an employee serving in a title with a salary range of 32 or higher. As such, the appellant was paid his regular rate and given the opportunity to participate in the FEMA missions. The appellant's reliance on the MOA, in DOT's view, is inapplicable to this appeal. Specifically, DOT highlights that according to its terms, the State is responsible for "processing state and local employee benefit claims for which a System Member may be eligible." DOT maintains the MOA is devoid of any federal rules superseding the State's established compensation requirements; thus, the application of *N.J.A.C.* 4A:3-5.6(b)2 and *N.J.A.C.* 4A:3-5.7(d)(1) is appropriate. DOT adds that the appellant has not presented any instance wherein it applied for a rule relaxation under *N.J.A.C.* 4A:3-5.7(d)(1) for his FEMA work or that the prohibitions on overtime in *N.J.A.C.* 4A:3-5.7 for his N4 workweek or salary range were otherwise overturned.

CONCLUSION

Initially, *N.J.A.C.* 4A:2-1.1(b) provides, in pertinent part, that an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation, or action being appealed. In this case, the DOT practices with which the appellant takes issue were apparently in place in 2017, yet the instant appeal was not filed until July 2020. For that reason, the appeal has not been timely presented. Nor is there any basis in this case to extend or to relax the time for appeal. *See N.J.A.C.* 4A:1-1.2(c) (the Commission

has the discretionary authority to relax rules for good cause). In this regard, it is appropriate to consider whether the delay in asserting the petitioner's right to appeal was reasonable and excusable. *Appeal of Syby*, 66 *N.J. Super.* 460, 464 (App. Div. 1961) (construing "good cause" in appellate court rules governing the time for appeal); *Atlantic City v. Civil Service Com'n*, 3 *N.J. Super.* 57, 60 (App. Div. 1949) (describing the circumstances under which delay in asserting rights may be excusable). Among the factors to be considered are the length of delay and the reasons for the delay. *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982). See e.g., *Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993) (allowing relaxation of former Merit System Board's appeal rules where police officer repeatedly, but unsuccessfully, sought clarification of his employment status). In this case, beyond noting that he has spent years attempting to resolve the issues raised through various channels, the appellant has not presented any substantial explanation for the delay in seeking relief from the Commission. Nevertheless, the Commission finds it necessary to address the appellant's arguments as discussed below.

Employees in exempt positions (3E, 4E, NL, N4) shall have no entitlement to compensation for on call time. *N.J.A.C.* 4A:3-5.7(a)2. Employees in exempt non-limited titles (NL, N4) shall not be eligible for cash overtime compensation except as provided in *N.J.A.C.* 4A:3-5.7(d). *N.J.A.C.* 4A:3-5.6(a)3. *N.J.A.C.* 4A:3-5.7(d)1i, in turn, provides that when an agency head declares an exceptional emergency involving a critical service disruption that poses a danger to health or safety, the agency head may authorize cash overtime compensation for non-limited employees in titles with established salary ranges below range 32 performing emergency related work. *N.J.A.C.* 4A:3-5.7(d)3 provides that the foregoing shall not apply to work performed beyond the regular work hours on emergency maintenance, construction, snow removal, or other related work in situations that constitute unreasonable safety hazards to the public, employees, other persons, or property of the State, and that this agency shall establish emergency condition rates for these circumstances.⁴

Exempt employees in non-limited workweek titles (NL, N4) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated through either a provision for flexible work time patterns or a grant of comparable amounts of time off to a maximum of one hour for each hour of unusual work time, provided that employees serving as a commissioner or department head; an assistant or deputy commissioner; a division director or equivalent; and employees in exempt positions in titles which are not represented in

⁴ Prior to September 7, 1993, the reference was to non-limited employees in titles with established salary ranges below range 35, and the term "special project" rates instead of "emergency condition" rates was used. See 25 *N.J.R.* 4064(a). The change to the current range cutoff was made for consistency with changes made previously restricting comp time for non-limited employees in salary range 32 or above. See 25 *N.J.R.* 1916(a). And "emergency condition" rates was deemed the more accurate term. See *id.*

collective negotiations with established salary ranges at or above range 32 shall not be granted such compensation. *N.J.A.C.* 4A:3-5.6(b)2. Employees in exempt positions who are not eligible for cash overtime compensation shall not receive a cash payment for unused comparable time off upon separation from service. *N.J.A.C.* 4A:3-5.6(b)3. NL and N4 employees who perform extraordinary work activities on a limited or periodic basis necessitating work time beyond the general workweek in the same capacity from which the employee is regularly employed may be paid special project rates as approved by this agency. *N.J.A.C.* 4A:3-5.7(e)2.

State employees in the career or senior executive service shall be given time off with pay to perform emergency civilian duty in relation to national defense or other emergency, other than [volunteer service with the American Red Cross], when so ordered by the Governor or by the President of the United States. *N.J.A.C.* 4A:6-1.18(b).

Upon review, the Commission finds reasonable DOT's determination that the appellant was not eligible to receive emergency compensation under emergency condition rates for work on winter weather and other emergencies while he served as a Manager 1. In this regard, the provisions within *N.J.A.C.* 4A:3-5.7(d) must be read together. In this regard, *N.J.A.C.* 4A:3-5.7(d)1i provides for cash overtime compensation for non-limited employees in titles with established salary ranges *below range 32* performing emergency related work in an agency head-declared exceptional emergency. *N.J.A.C.* 4A:3-5.7(d)3, however, qualifies that provision and provides for compensation under emergency condition rates for work performed beyond the regular work hours on emergency maintenance, construction, snow removal, or other related work in situations that constitute unreasonable safety hazards to the public, employees, other persons, or property of the State. *N.J.A.C.* 4A:3-5.7(d)3 does not include any language that would express an intent to otherwise alter the group of employees eligible for additional compensation, *i.e.*, non-limited employees in titles with established salary ranges below range 32 as already specified in *N.J.A.C.* 4A:3-5.7(d)1i. The appellant's reliance on the special project rate provision of *N.J.A.C.* 4A:3-5.7(e)2 is inapposite since *N.J.A.C.* 4A:3-5.7(d) governs the circumstances of this case. Further, DEP's 2017 declaration of an exceptional emergency is not evidence of any inconsistency as it was an explicit application of *N.J.A.C.* 4A:3-5.7(d)1i, and the only non-limited employees who were authorized for cash overtime were those in titles with salary ranges below range 32. As such, DOT's determination concerning the appellant was reasonable since the salary range for Manager 1 is 34. The appellant was not entitled to continue receiving emergency compensation even if he was paid such compensation in error before. In this regard, no vested or other rights are accorded by an administrative error. See *Cipriano v. Department of Civil Service*, 151 *N.J. Super.* 86 (App. Div. 1977); *O'Malley v. Department of Energy*, 109 *N.J.* 309 (1987); *HIP of New Jersey v. New Jersey Department of Banking and Insurance*, 309 *N.J. Super.* 538 (App. Div.

1998). To the extent the appellant alleges DOT engaged in an unfair labor practice, the Commission lacks jurisdiction to decide the question. *See N.J.S.A. 34:13A-5.4.*

DOT's determination that the appellant was not eligible to receive compensatory time off was also reasonable. In this regard, *N.J.A.C. 4A:3-5.6(b)2* provides, in pertinent part, that exempt employees in non-limited workweek titles (NL, N4) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated through a grant of comparable amounts of time off to a maximum of one hour for each hour of unusual work time. However, employees serving as a commissioner or department head; an assistant or deputy commissioner; a division director or equivalent; and employees in exempt positions in titles which are not represented in collective negotiations with established salary ranges at or above range 32 shall not be granted such time. Manager 1 is an exempt title with a salary range of 34. Thus, the appellant was not entitled to compensatory time off during the time he was serving in that title without representation in collective negotiations. As to the time period when the appellant was serving in the title with representation in collective negotiations, there is no evidence in the record that his union had negotiated for compensatory time off or that DOT chose not to exercise its discretion to grant the appellant compensatory time off in bad faith.

Turning to the appellant's claim that he was undercompensated by DOT for time on FEMA deployments, it bears noting the appellant's argument in this regard: that the failure to provide the full compensation allegedly owed constituted a violation of *FEMA* regulations and an agreement between *FEMA and OEM*. The Commission is not convinced that it has any jurisdiction to adjudicate a dispute of such nature. However, the Commission's jurisdiction is on firm ground in addressing whether its own regulation has been followed. In that regard, DOT indicates that it granted the appellant leave for emergency civilian duty, which is addressed at *N.J.A.C. 4A:6-1.18(b)*. In pertinent part, this regulation calls for employees to be given *time off with pay* to perform the duty. There is no dispute that this occurred with respect to the appellant. The regulation does not require that the employee be compensated for 24 hours per day. As such, as far as Civil Service regulations are concerned, the appellant received what he was entitled to with respect to his time deployed with FEMA.

Accordingly, the appellant would not have been entitled to any relief even if this appeal had been timely filed.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 17TH DAY OF FEBRUARY, 2021

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