



STATE OF NEW JERSEY

In the Matter of Sean McManus,
Department of Environmental
Protection

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

CSC Docket No. 2022-1342

Court Remand

ISSUED: JANUARY 21, 2022

The Superior Court of New Jersey, Appellate Division, has remanded the matter of Sean McManus’s grievance concerning the rate of cash overtime compensation. Copies of the Appellate Division’s December 7, 2021 order and the Civil Service Commission’s (Commission) decision, *In the Matter of Sean McManus* (CSC, decided November 4, 2020).

As background, the Department of Environmental Protection (DEP), on or about May 23, 2019, declared an exceptional emergency for the period June 1, 2019 through August 31, 2019 for the provision of law enforcement support, to allow for the harvest of oysters from Delaware Bay, Mullica River and surrounding tidal areas, by employees serving in the titles of Conservation Officer 2 (class code 21, salary range K21) and Conservation Officer 3 (class code 19, salary range FA19¹). These are nonexempt, non-limited titles (NE), meaning that they have irregular or variable work hours and are subject to the provisions of the Fair Labor Standards Act (FLSA). *See N.J.A.C. 4A:3-5.2*. The appellant was one of several employees approved for oyster-related emergency work. Pursuant to *N.J.A.C. 4A:3-5.7(d)*, the employees were deemed to have a 40-hour workweek for purposes of determining the rate of cash overtime compensation for the oyster-related emergency work. The appellant filed a grievance, claiming that the determination of the rate should have been based on a 35-hour workweek as that was his workweek. DEP maintained that it followed this agency’s guidelines. Following a departmental grievance hearing, the Hearing Officer denied the grievance, finding that since DEP was only compelled to

¹ Conservation Officer 3 is a career service title. “FA” is a reference to the State Law Enforcement Unit Employee Relations Group, represented by the Policemen’s Benevolent Association, State Law Enforcement Unit.

compensate NE employees for overtime after 40 hours had been worked, it was appropriate that the rate be based on a 40-hour workweek. The appellant appealed to the Commission, which upheld the denial of his grievance. *See In the Matter of Sean McManus* (CSC, decided April 15, 2020). The appellant requested reconsideration, which was denied. *See In the Matter of Sean McManus* (CSC, decided November 4, 2020). The appellant appealed the Commission's decision to the Appellate Division, which remanded the matter to the Commission on December 7, 2021 and ordered that the remand proceedings be completed within 45 days.

On remand, DEP, represented by Daniel Resler, Deputy Attorney General, provided the appellant's timesheets for the period of the oyster-related emergency, June 1, 2019 through August 31, 2019. The timesheets describe the following in that period:

- June 29, 2019 – July 5, 2019 Workweek: The appellant, on July 3, 2019, performed five hours of work in excess of 35 for the week on work described as follows: "craigs, drop of 201, Greenwood WMA check quail area, stuck vehicle." For this work, the appellant received compensatory time off. On July 4, 2019, the appellant performed 12 hours of work in excess of 40 for the week on work described as follows: "Liberty SP 7/4 detail." For this work, the appellant received cash overtime compensation at time-and-a-half.
- July 13, 2019 – July 19, 2019 Workweek: The appellant, on July 19, 2019, performed two hours of work in excess of 35 for the week on work described as follows: "Called out to Assunpink for a party and fire." For this work, the appellant received compensatory time off.
- For the remaining full workweeks that fell within the period of the emergency, the appellant accounted for 35 hours, split between work and leave time.
- The appellant was on vacation on August 31, 2019.

The appellant, represented by David Beckett, Esq., argues that Conservation Officers receive the regular biweekly pay based upon working 70 hours or 35 hours each week and that they are paid hour-for-hour for work between 35 and 40 hours, then receive overtime pay for working more than 40 hours. He contends that the problem is that overtime pay is set by an hourly rate that uses a "40" divisor but does not include any earnings between 35 and 40 hours. *N.J.A.C. 4A:3-5.2*. As a result, according to the appellant, overtime pay is less than 1.5 times the current regular hourly rate in violation of the Wage and Hour laws as amended in 2019 by *P.L. 2019, c. 32*.² The appellant states that Conservation Officers regularly work 35 hours each week but may alter their scheduled hours due to field contingencies. He claims that

² The appellant mentions a letter that was filed with the Commissioner of the Department of Labor and Workforce Development regarding this matter. The status of the letter with that department is not apparent from the record.

even with their schedule changes, the Conservation Officers' regular pay is based upon 70 hours for each two-week pay period or 35 hours per week. The appellant asserts that as they are then compensated on an hour-for-hour basis for work between 35 and 40 hours (cash in the case of the oyster-related emergency and compensatory time off during other periods), they are not "salaried" employees as they are paid an hourly rate for each hour worked.

The appellant notes that there is no dispute that Conservation Officers are overtime eligible. He states that they are employees who may not work a set schedule given the urgency of certain field operations. The appellant states that the fact that field operations may require the Conservation Officers to work 10:00-5:00 on one day and 8:00-3:00 on another does not change the fact that each Conservation Officer must account for 35 hours of paid time each week. According to the appellant, the 35 hours is paid at an hourly rate that reflects his or her annual salary being earned by working a 35-hour workweek, not a 40-hour workweek. He states that Conservation Officers work a minimum of 35 hours each week to earn their annual salary. Moreover, for the hours worked between 35 and 40 hours for the oyster-related emergency work, Conservation Officers were paid cash on an hour-for-hour basis, as determined by his or her weekly salary. For all other overtime work between 35 and 40 hours, Conservation Officers receive compensatory time off on an hour-for-hour basis. Either way, the appellant states, the Conservation Officer is paid an hourly rate for work between 35 and 40 hours in a week at the same hourly rate he or she would receive for the first 35 hours based on his or her weekly salary. However, the appellant states, the hourly rate is reduced when calculating overtime pay for a Conservation Officer for work beyond 40 hours in a week due to the use of base salary and the "40" divisor.

The appellant contends that this reduction in the hourly rate when calculating overtime is due to DEP ignoring the non-overtime earnings each week (cash in the case of the oyster-related emergency and compensatory time off during other periods) that are in excess of 35 hours. By doing so, in the appellant's view, the employer and the Commission regulation is being applied to create a scenario where the employee is inevitably shorted overtime pay. He argues that this occurs because the employer is using the 40-hour divisor in the regulation for calculating the overtime rate, but it is only counting the non-overtime earnings in the first 35 hours and excluding non-overtime earnings between 35 and 40 hours. According to the appellant, if the employer wants to only count his earnings for the first 35 hours, the divisor for the hourly rate must be 35 and not 40. The appellant argues that because the divisor is instead 40 hours, the employer must count *all* non-overtime earnings in any form for the first 40 hours in the week, thus adding to the base pay from 35 hours, the earnings between 35 and 40 hours, to determine the total non-overtime pay, that is then divided by 40 to create a correct hourly rate for calculating overtime pay.

The appellant proffers that prior to the passage of *P.L. 2019, c. 32*, the Commission regulations could allow an overtime rate that used 40 as a divisor but did not count non-overtime earnings by excluding earnings between 35 and 40 hours without being in violation of the law. This calculation, according to the appellant, now runs afoul of the Wage and Hour laws because the Legislature expanded the definition of employers covered by Wage and Hour laws to include State employees. *See P.L. 2019, c. 32*. The appellant states that by including State and local government employees, the Legislature required that each State employee who is eligible for overtime be compensated with an overtime rate that is equal to one and one-half times their regular hourly rate. He argues that there is no exemption from the calculation of overtime by virtue of an emergency or any other situation, and if there were, then any employer could claim to be in an emergency and not pay employees the proper and required overtime rate.

The appellant states that the regular hourly rate set by the Wage and Hour laws in New Jersey for overtime pay is generally consistent with the FLSA requirement that a calculation of the regular hourly rate for overtime must include all compensation received by an employee for working for their employer in the first 40 hours. *See N.J.S.A. 34:11-56a1*. Thus, according to the appellant, if an employee received a piece work bonus or some other benefit that is beyond the hourly salary that is paid for work performed during the first 40 hours of employment, that hourly rate must include those additional earnings in the total sum that is divided by 40 to determine the regular hourly rate that is then multiplied by 1.5 to create the correct overtime rate. *See N.J.A.C. 12:56-6.5* and 29 C.F.R. § 778.200. The appellant states that in a week in which he is receiving overtime pay at time-and-a-half, he will have been paid a base pay equal to 35 hours at his base salary rate plus will have received hour-for-hour compensation for the additional five hours between 35 and 40. He argues that it is that total compensation for the first 35 hours plus earnings between 35 and 40 hours that comprises the non-overtime earnings that is to be divided by 40 to determine the hourly rate for setting overtime pay, which must be at least one and one-half times that hourly rate. The appellant contends that the way in which DEP is calculating overtime does not count all non-overtime earnings and so creates a reduced hourly rate with an overtime rate that is approximately \$9 per hour below the legally required overtime pay at one and one-half times the correct hourly pay.

The appellant states that the timesheets submitted by DEP and his submitted records show that in each week in which he was working more than 35 hours, he was compensated on an hour-for-hour basis for the time spent after 35 hours and up to 40 hours. He argues that whether that compensation was in the form of compensatory time off or cash is of no consequence; either way, it is compensation paid on an hour-for-hour basis between 35 and 40 hours and is part of the total non-overtime earnings for that week. According to the appellant, it is not discretionary, and it is the same as pay. In this regard, he cites *N.J.S.A. 11A:6-24*, which provides that:

State employees in the career, senior executive and unclassified services in titles or circumstances designated by the Civil Service Commission shall be eligible for overtime compensation and holiday pay. Overtime compensation and holiday pay shall be either cash compensation at a rate representing 1 ½ times the employee's hourly rate of base salary or compensatory time off at a rate of 1 ½ hours for each hour worked beyond the regular workweek, at the discretion of the department head, with the approval of the commission.

The commission shall adopt rules for the implementation of hours of work, overtime compensation and holiday pay programs, which shall include but need not be limited to application and eligibility procedures (appellant's emphasis).

The appellant notes that at the same time, the Legislature has declared that it is the public policy of this State that Civil Service rules and laws must be consistent with "securing rights" that employees enjoy from collective bargaining and other statutory authority. *See N.J.S.A. 11A:1-2e.* This, in the appellant's view, applies with force to the changes in Wage and Hour laws, which expanded the group of covered employees to State employees like him as of 2019. The appellant maintains that this means, in a practical sense, that the Commission has both the authority and obligation to act by amending the rules. The appellant urges the Commission to amend the regulation governing the determination of the regular hourly rate for NE employees like him to require that each employer calculate overtime pay for "35 hour NE employees" like the Conservation Officers in *N.J.A.C. 4A:3-5.2* by amending that regulation as applied to NE employees in one of two ways:

- a. dividing the regular base pay by the hours worked in the regular workweek, 35, to determine the "regular hourly rate" and overtime pay must be at least one and one-half times that regular hourly rate; or
- b. if the Commission determines to use 40 as a divisor, the regulation defining regular hourly rate in *N.J.A.C. 4A:3-5.2* should be amended to state that earnings between 35 and 40 (whether it be in the form of cash or compensatory time off) should be added to the employee's regular base pay and that total should be divided by 40 to determine the "regular hourly rate" and overtime pay must be at least one and one-half times that regular hourly rate.

In support, the appellant submits various exhibits, including a memorandum dated May 8, 2019 from J.S., Conservation Officer 3 with DEP, concerning the oyster-related emergency and the May 23, 2019 letter from the Division of Agency Services (Agency Services) to DEP concerning DEP's request to declare oyster-related emergency. The memorandum states, among other things, that "[w]e anticipate, as

in prior years, that [DEP] will approve and fund an overtime project to allow for the additional patrols” and that “[f]unding for overtime compensation to cover this detail is currently being sought.” The memorandum further states:

COMPENSATION: Assignment hours for an officer’s work week over 35 up to 40 will be compensated in cash at the officer’s “straight time” hourly rate (coded using the designated Job Number and Activity Code). Assignment hours for an officer’s work week exceeding 40 hours will be compensated at one and one half the officer’s hourly compensation rate and will be coded using the designated Job Number and Activity Code.

Agency Services’ May 23, 2019 letter states, among other things:

Overtime compensation under these circumstances shall be deemed to have a 40-hour workweek. All hours worked over 35 hours but not over 40 hours per week shall be paid at the hourly proration of . . . base salary. All hours worked in excess of 40 hours per week shall be paid at [1.5] times . . . hourly proration of . . . base salary.

CONCLUSION

N.J.S.A. 11A:3-7 provides:

The commission shall administer an equitable State employee compensation plan which shall include pay schedules and standards and procedures for salary adjustments other than as provided for in the State compensation plan for the career, senior executive and unclassified services.

N.J.S.A. 11A:6-24 provides:

State employees in the career, senior executive and unclassified services in titles or circumstances designated by the Civil Service Commission shall be eligible for overtime compensation and holiday pay. Overtime compensation and holiday pay shall be either cash compensation at a rate representing 1 1/2 times the employee’s hourly rate of base salary or compensatory time off at a rate of 1 1/2 hours for each hour worked beyond the regular workweek, at the discretion of the department head, with the approval of the commission.

The commission shall adopt rules for the implementation of hours of work, overtime compensation and holiday pay programs, which shall include but need not be limited to application and eligibility procedures.

N.J.A.C. 4A:6-2.2(a) provides that job titles which meet all of the following criteria shall be assigned a fixed workweek of either 35 or 40 hours: (1) the work schedule is consistently regular, amenable to administrative control and determined by the direction of a supervisor rather than by the nature of the service and employees have minimal discretion over their work schedule; (2) the hours of work conform to a standard pattern of work time for the typical work location; (3) employees normally work under direct supervision within a formal work program in a State office, location or place of business, and field work without direct supervision is minimal; and (4) an appointing authority can certify with assurance when an employee performs work beyond the normal workweek.

N.J.A.C. 4A:6-2.3(a)2 provides that non-management titles which do not meet all of the criteria for a fixed workweek set forth in *N.J.A.C.* 4A:6-2.2(a) shall be assigned a non-limited workweek. *N.J.A.C.* 4A:6-2.3(b) provides that non-limited, non-exempt (NE) titles are those titles having irregular or variable work hours, where employees work at least a 35-hour workweek with occasional requirements for a longer workweek to complete projects or assignments, and which are subject to the provisions of the FLSA, 29 U.S.C. § 201, *et seq.*

Under *N.J.A.C.* 4A:3-5.2, “[r]egular rate” means the hourly proration of the employee’s annual base salary plus the fair market value of goods and facilities received as part of the wages, and employees in covered non-limited titles (NE) shall be deemed to have a 40-hour workweek for determining the hourly proration.

N.J.A.C. 4A:3-5.3 (40 hours or less in a workweek: State service) provides that employees in non-limited titles (NL, NE) who meet unusual work time requirements may, at the discretion of the appointing authority, be compensated through either a provision for flexible work 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 collective negotiations with established salary ranges at or above range 32, and in such exempt positions in titles with single rates or no range who are receiving a salary at or above the first step of such ranges, shall not be granted such compensation. In no event shall employees in non-limited titles have any entitlement to cash overtime compensation.

N.J.A.C. 4A:3-5.5 (Federal fair labor standards applicable to more than 40 hours in a workweek for 35, 40 and NE titles: State service) provides that covered employees (35, 40, or NE titles) shall be compensated either in cash payment or compensatory time off at the discretion of the department head with the approval of the Chairperson or designee for time worked in excess of 40 hours per week as provided in *N.J.A.C.* 4A:3-5.5(a)1 and that cash compensation for overtime work shall be at the rate of 1.5 times the regular rate.

N.J.A.C. 4A:3-5.7(d)1i 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. For these circumstances, employees in non-limited titles shall be deemed to have a 40-hour workweek.

The definition section of the job specification for Conservation Officer 3 states:

Under general supervision of a Conservation Officer 1, or other supervisory official, as a sworn law enforcement officer, in the Division of Fish, Game, and Wildlife, Department of Environmental Protection, enforces all of the laws of the State of New Jersey and Federal Government enacted for the protection and management of fish and wildlife resources and other related environmental enforcement activities to protect the natural resources and the health of the public within the State in accordance with Titles 23, 39, 50, 58, 2C-Code of Criminal Justice and the Administrative Code *N.J.A.C.* 7:25 et. seq., executes all processes issued for the violation of these laws, serves subpoenas issued for the examination, investigation or trial of all offenses against these laws, conducts environmental inspections and investigations and collects field information to determine compliance with the appropriate environmental laws and regulations; exercises all the powers and duties conferred by law while conducting regular duties; educates and informs the public regarding the rules, laws, procedures and management practices regarding the recreational and commercial uses of fish, game and wildlife to ensure the protection of the environment; provides security services for the waters, land, flora and fauna under the guidelines for Homeland Security; does related work.

At the outset, it is noted that Conservation Officer 3 is a salaried title assigned a salary range of FA19³ and an NE workweek. The appellant states that Conservation Officers regularly work 35 hours each week but may alter their scheduled hours due to field contingencies; they are employees who may not work a set schedule given the urgency of certain field operations; field operations may require the Conservation Officers to work 10:00-5:00 on one day and 8:00-3:00 on another; and Conservation Officers work a minimum of 35 hours each week. All of this would appear to be consistent with a non-limited workweek designation as opposed to a fixed 35-hour workweek designation. See *N.J.A.C.* 4A:6-2.2(a) and

³ According to the most recent Compensation Compendium, the salary range is from \$59,038.97 (Step 1) to \$90,390.09 (Step 10).

N.J.A.C. 4A:6-2.3(b).⁴ The assignment of a non-limited workweek, as opposed to a 35-hour fixed workweek, has consequences for the salary range that is assigned to the title. Specifically, *N.J.A.C.* 4A:3-4.2(b) provides, in pertinent part, that the salary range for NE titles shall be the same as the class code, but the salary range for 35-hour fixed workweek titles shall be one range *lower* than the class code.⁵ In other words, NE titles are compensated one salary range higher than 35-hour fixed workweek titles in recognition of the fact that non-limited titles do not have a fixed workweek. Thus, the base salary for an NE title such as Conservation Officer 3 is *not* based upon working a fixed 35 hours per week. Rather, the higher salary range assigned to the NE title compensates for the irregular or variable nature of the work hours and for the requirement that employees work *at minimum* 35 hours per week but may at times be called upon to fulfill a longer workweek—even up to 40 hours—to complete projects or assignments, without additional compensation. In this regard, for working 40 hours or less in a workweek, employees in non-limited titles (NL, NE) have no entitlement to compensatory time off or cash overtime compensation. *See N.J.A.C.* 4A:3-5.3(d)2. In short, a non-limited workweek and a 35-hour fixed workweek are not strictly equivalent: the non-limited workweek garners a comparatively higher salary *precisely because* the workweek is *not* fixed at 35 hours. This is further evidenced by the fact that non-limited employees, unlike 35-hour fixed workweek employees, are *not entitled* to compensatory time off or cash overtime compensation for working 40 hours or less in a workweek.

Turning to *N.J.A.C.* 4A:3-5.2, this regulation defines “[r]egular rate” to mean the hourly proration of the employee’s annual base salary plus the fair market value of goods and facilities received as part of the wages and provides that employees in NE titles shall be deemed to have a 40-hour workweek for determining the hourly proration. For employees in NE titles, 35 cannot be the appropriate “divisor” because, as discussed above, an NE workweek is, by definition, not equivalent to a 35-hour fixed workweek. Deriving the hourly proration from a base salary based on the higher salary assigned to the NE title—as compared to the salary assigned to a 35-hour fixed workweek title with the same class code—and a divisor of 35 is a mismatch and would be at odds with the Commission’s obligation to both “administer an equitable State employee compensation plan” and “adopt rules for the implementation of hours of work, overtime compensation and holiday pay programs, which shall include but need not be limited to application and eligibility procedures.” *See N.J.S.A.* 11A:3-7 and *N.J.S.A.* 11A:6-24. Forty, however, is the appropriate divisor, and it is not fictitious because employees in NE titles do not begin to earn overtime compensation at time-and-a-half until more than 40 hours are *in fact* worked in a week, which is consistent

⁴ Nevertheless, if the appellant still believes that the workweek designation for his title should be changed, there is a mechanism under Civil Service regulations that he may wish to avail himself of. *See N.J.A.C.* 4A:3-4.3 (Job reevaluation requests and appeals: State service).

⁵ Thus, assuming for argument’s sake that Conservation Officer 3 had been assigned a 35-hour fixed workweek, the assigned salary range would have been 18, one range lower than the class code. According to the most recent Compensation Compendium, salary range FA18 runs from \$56,228.63 (Step 1) to \$86,087.96 (Step 10).

with the FLSA standard. *See* 29 U.S.C. § 207(a).⁶ Further, the hourly proration is appropriately based on the annual base salary (plus, if applicable, the fair market value of goods and facilities received as part of the wages). For one, *N.J.S.A.* 11A:6-24 provides, in relevant part:

Overtime compensation and holiday pay shall be either cash compensation at a rate representing 1 1/2 times the employee's hourly rate of *base salary* or compensatory time off at a rate of 1 1/2 hours for each hour worked beyond the regular workweek . . . (emphasis added)

For another, under the FLSA, the regular rate is deemed not to include discretionary items. *See* 29 C.F.R. § 778.200(a)(3).⁷ In that regard, for working 40 hours or less in a workweek,

[e]mployees in non-limited titles (NL, NE) who meet unusual work time requirements *may, at the discretion of the appointing authority,* be compensated through either a provision for flexible work patterns or a grant of comparable amounts of time off to a maximum of one hour for each hour of unusual work time . . . *In no event shall employees in non-limited titles have any entitlement to cash overtime compensation.*

⁶ *See also*, 29 C.F.R. § 778.101:

As a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Act, to which the pay requirements of section 6 (minimum wage and equal pay) but not those of section 7(a) are applicable.

⁷ “As used in this section the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include:

. . .

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs; [discussed in §§ 778.208 through 778.215 and 778.225].”

N.J.A.C. 4A:3-5.3(d)2 (emphases added). Additionally, nothing in *N.J.A.C.* 4A:3-5.7(d) creates an entitlement for a non-limited employee to receive compensatory time off or cash overtime compensation for working 40 hours or less for emergency-related work. Rather, *N.J.A.C.* 4A:3-5.7(d)1 provides that when *an agency head* declares an exceptional emergency involving a critical service disruption that poses a danger to health or safety, *he or she may* authorize cash overtime compensation for non-limited employees in titles with established salary ranges below range 32 performing emergency related work, and for these circumstances employees in non-limited titles shall be deemed to have a 40-hour workweek. Thus, the definition of “regular rate” in *N.J.A.C.* 4A:3-5.2 is appropriate.⁸

P.L. 2019, *c.* 32 did include the State as an employer under the Wage and Hour laws, which concern minimum wages and overtime, but the primary concern of the legislation appears to have been raising the minimum wage over time. The legislation also created a task force; directed the Commissioner of Workforce Development to issue certain reports; and established a program to provide certain tax credits. Moreover, the Legislature, when it passed *P.L.* 2019, *c.* 32, was presumably aware of *N.J.S.A.* 11A:6-24 and its directive that the Commission “adopt rules for the implementation of hours of work, overtime compensation and holiday pay programs, which shall include but need not be limited to application and eligibility procedures.” Given that presumed awareness; the fact that the FLSA had already applied to NE employees prior to the passage of *P.L.* 2019, *c.* 32; and the objectives of *P.L.* 2019, *c.* 32, it is not clearly evident that the legislation was intended to reach the specific issue of the manner in which the rate of overtime compensation is determined for NE employees.

Nor is it apparent that the Wage and Hour laws, as amended, and the regulations promulgated thereunder are in conflict with Civil Service law and regulations. “Wages” under the Wage and Hour laws means:

. . . any moneys due an employee from an employer for services rendered or made available by the employee to the employer as a result of their employment relationship including commissions, bonus and piecework compensation and including the fair value of any food or lodgings supplied by an employer to an employee, and, until December 31, 2018, “wages” includes any gratuities received by an employee for services rendered for an employer or a customer of an employer. The commissioner may, by regulation, establish the average value of

⁸ It should also be noted that according to the appellant’s timesheets for the period of the oyster exceptional emergency, it appears that the appellant did not actually work in excess of 35 hours in any week due to the oyster-related emergency. Thus, it is not apparent that the appellant was impacted by the application of the *N.J.A.C.* 4A:3-5.2 definition of “regular rate” to any emergency-related work he performed.

gratuities received by an employee in any occupation and the fair value of food and lodging provided to employees in any occupation, which average values shall be acceptable for the purposes of determining compliance with this act in the absence of evidence of the actual value of such items.

N.J.S.A. 34:11-56a1(d). “Regular hourly wage,” under the Wage and Hour laws, means the amount that an employee is regularly paid for each hour of work as determined by dividing the total hours of work during the week into the employee’s total earnings for the week, exclusive of overtime premium pay. *N.J.S.A.* 34:11-56a1(e). *N.J.A.C.* 12:56-6.5(b) further provides:

The act does not require employers to compensate employees on an hourly rate basis. Their earnings may be determined on a piece-rate, salary, bonus, commission or other basis, but the overtime compensation due to employees shall be paid on the basis of the hourly rate derived therefrom. Therefore, the regular hourly wage of an employee is determined by dividing his or her total remuneration for employment, exclusive of overtime premium pay, in any workweek, by the total number of hours worked in that workweek for which such compensation was paid.

N.J.A.C. 12:56-6.6(a)4 provides that the regular hourly wage is deemed not to include discretionary items. In full, *N.J.A.C.* 12:56-6.6(a)4 provides that the “regular hourly wage” shall not be deemed to include:

Sums paid in recognition of services performed during a given period if either:

- i. Both the fact that payment is to be made and the amount of payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement or promise causing the employee to expect such payments regularly; or
- ii. The payments are made pursuant to a bona fide profit-sharing plan or trust, or thrift or savings plan to the extent to which the amounts paid to the employee are determined without regard to hours of work, production or efficiency[.]

See also 29 C.F.R. § 778.109 and 29 C.F.R. § 778.200(a). *N.J.S.A.* 34:11-56a4b(1) provides:

An employer shall also pay each employee not less than 1 1/2 times such employee’s regular hourly rate for each hour of working time in excess

of 40 hours in any week, except that this overtime rate shall not apply: to any individual employed in a bona fide executive, administrative, or professional capacity; or to employees engaged to labor on a farm or employed in a hotel; or to an employee of a common carrier of passengers by motor bus; or to a limousine driver who is an employee of an employer engaged in the business of operating limousines; or to employees engaged in labor relative to the raising or care of livestock.

Overtime and minimum wage pay shall be computed on the basis of each workweek standing alone. *N.J.A.C.* 12:56-6.2(a). Thus, based on the foregoing statutes and regulations, nothing in any of them requires discretionary amounts to be included as regular rate of pay for the purposes of calculating an overtime amount.

Further, as noted by the appellant, the employment relationship between the appellant and DEP is subject to the Civil Service Act and regulations promulgated thereunder. To repeat, *N.J.A.C.* 4A:3-5.2, the Civil Service regulation, defines “[r]egular rate” to mean the hourly proration of the employee’s annual base salary plus the fair market value of goods and facilities received as part of the wages and provides that employees in NE titles shall be deemed to have a 40-hour workweek for determining the hourly proration. As previously noted, the salary assigned to an NE title, as compared to a 35-hour fixed workweek title, compensates for the irregular or variable nature of the work hours and for the requirement that employees work *at a minimum* 35 hours per week *but* may at times be called upon to fulfill a longer workweek to complete projects or assignments. Thus, in a week in which the NE employee works, say, 40 hours, the higher salary range assigned to that title, as compared to the salary range assigned to a 35-hour fixed workweek title with the same class code, already compensates an employee in the NE title for the “longer workweek to complete projects or assignments,” *N.J.A.C.* 4A:6-2.3(b), that was required in that particular week.⁹ Even under the overtime requirement stated in the Wage and Hour laws, 35 still cannot be the appropriate divisor because a non-limited workweek is not equivalent to a 35-hour fixed workweek and for the other reasons that have been discussed earlier. Forty remains the appropriate divisor because the Wage and Hour laws do not require overtime compensation at time-and-a-half until more than 40 hours are worked in a week. *See N.J.S.A.* 34:11-56a4b(1). Further, the hourly proration is appropriately based on the annual base salary (plus, if applicable, the fair market value of goods and facilities received as part of the wages) in light of the reference in *N.J.S.A.* 11A:6-24 to base salary and the exclusion for discretionary items in *N.J.A.C.* 12:56-6.6(a)4.¹⁰ Thus, it appears the definition of “regular rate” in *N.J.A.C.* 4A:3-5.2 is appropriate under the Wage and Hour laws.

⁹ Again, for working 40 hours or less in a workweek, employees in non-limited titles (NL, NE) have no entitlement to compensatory time off or cash overtime compensation. *See N.J.A.C.* 4A:3-5.3(d)2.

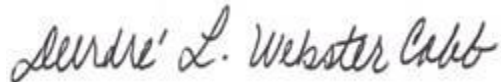
¹⁰ Whether the annual base salary is used or the salary paid for the employee’s regular workweek is used, the hourly rate of compensation would be the same as there is no entitlement to additional compensation between 35 and 40 hours worked.

ORDER

Therefore, the Civil Service Commission finds that the additional arguments and documentation do not change its previous decision. Accordingly, it reaffirms its previous November 4, 2020 decision on this matter.

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 19TH DAY OF JANUARY, 2022



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