SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0845-20

IN THE MATTER OF
SEAN MCMANUS,
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

Argued September 28, 2022 - Decided August 1, 2023

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the New Jersey Civil Service Commission, Docket Nos. 2020-835 and 2020-2671.

David B. Beckett argued the cause for appellant Sean McManus (Beckett & Paris, LLC, attorneys; David B. Beckett, of counsel and on the briefs).

Pamela N. Ullman, Deputy Attorney General, argued the cause for respondent New Jersey Civil Service Commission (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Pamela N. Ullman, on the brief).

Daniel P. Resler, Deputy Attorney General, argued the cause for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant

Attorney General, of counsel; Daniel P. Resler, on the brief).

PER CURIAM

Petitioner, Sean McManus, appeals from the November 6, 2020 final agency decision of the New Jersey Civil Service Commission (Commission) concerning his claims the New Jersey Department of Environmental Protection (DEP) improperly calculated his overtime pay. Following our review of the record and applicable legal principles, we vacate the Commission's decision and remand for further proceedings.

I.

Petitioner worked for the DEP as a Conservation Officer 3. This title is a non-limited, non-exempt position meaning employees in this title have irregular or variable working hours and are covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA); N.J.A.C. 4A:3-5.2, 4A:6-2.3(b)(3). Instead of having a workweek fixed at thirty-five hours, petitioner was required to "work at least a [thirty-five-]hour workweek with occasional requirements for a longer workweek to complete projects or assignments." N.J.A.C. 4A:6-2.3(b)(1). The Conservation Officer title had the same class code as comparable titles with a fixed thirty-five-hour workweek, but the salary range was one higher. N.J.A.C. 4A:3-4.9(g).

In 2019, the DEP sought approval and funding for an "overtime project" to enhance its ability to ensure compliance with oyster harvesting restrictions.[1] On May 23, 2019, the Commission granted the DEP's request for an "exceptional emergency declaration" for employees in the titles Conservation Officer 2 and Conservation Officer 3 "to provide law enforcement support to allow for the harvest of oysters from [the] Delaware Bay, Mullica River and surrounding tidal areas . . . ." The declaration allowed DEP to pay overtime pursuant to N.J.A.C. 4A:3-5.7(d). The letter explained that "[a]ll hours worked" between thirty-five and forty hours per week "shall be paid at the hourly proration of their base salary[,]" while overtime after forty hours would be compensated at one-and-one-half times that rate.[2]

Petitioner filed a grievance on the ground that recent legislation designated the State as an employer subject to the New Jersey Wage and Hour

[1] The program was designed to minimize the public health risk from consuming contaminated oysters.

[2] Although petitioner initially sought overtime compensation for the oyster-related emergency time period, the Commission and the DEP maintain petitioner later conceded his overtime dispute did not involve this oyster-emergency time period. As noted below, the Commission and the DEP argue the time period for which petitioner challenges the overtime calculations is irrelevant because his pay for hours thirty-six to forty was within the discretion of the appointing authority.. N.J.A.C. 4A:3-5.3(a)(3), (d)(2).

Law,[3] and the DEP's method of calculating his overtime compensation conflicted with the statute's new provisions. On August 29, 2019, the DEP issued its decision denying the grievance. On September 16, 2019, petitioner challenged the denial to the Commission. The Commission issued its initial decision on April 17, 2020. It noted the DEP's calculations properly relied on the regulation for overtime compensation during an exceptional emergency, which deemed the workweek of all employees with non-limited workweeks to be forty hours. It rejected petitioner's statutory argument by finding the new legislation only covered the State as an "employer" for the purpose of ensuring payment of the minimum wage, which his salary exceeded.[4] On November 6, 2020, the Commission denied petitioner's motion for reconsideration because it determined the DEP properly calculated his cash overtime compensation consistent with Civil Service regulations.

[3] N.J.S.A. 34:11-56a1 to -56a41.

[4] The Commission initially determined the amendments to the Wage and Hour Law expanding its coverage to State employees did not apply to overtime pay, but subsequently agreed it did in fact apply to State employers for the purposes of overtime compensation. However, the Commission opposed petitioner's appeal on other grounds.

Petitioner subsequently appealed. Thereafter, the Commission moved for a remand, which we granted.[5] On January 21, 2022, the Commission issued a remand opinion in which it again denied the grievance appeal and issued an expanded opinion. It emphasized that overtime was discretionary even for employees not exempt from FLSA coverage, and noted compensation for overtime hours worked as part of an exceptional emergency is calculated for all eligible employees on the basis of a forty-hour workweek.

The Commission further determined a higher salary range is assigned to petitioner's non-limited workweek and explained a base salary predicated on working at least thirty-five hours per week is not "based upon working a fixed [thirty-five] hours per week." The higher salary range for petitioner's non-limited title "compensates for the irregular or variable nature of the work hours . . . ." It also accounts for the fact that compensation at any rate for work hours between thirty-five and forty in a non-limited title is deemed to be "overtime compensation" and is therefore paid, or not, at the employer's discretion. Thus, "employees [who] work at minimum [thirty-five] hours per week . . . may at

[5] The Commission sought to "clarify its prior decisions" because factual issues arose regarding its calculations of petitioner's overtime. The Commission also implicitly acknowledged it had wrongly interpreted the new legislation as applying to the State only for the purposes of enforcement of minimum wage related issues.

times be called upon to fulfill a longer workweek—even up to [forty] hours—to complete projects or assignments, without additional compensation." In other words, the higher salary range compensates the non-limited title employees for lacking entitlement to any compensation for overtime before working forty hours.

The Commission further found a non-limited employee's lack of entitlement to overtime compensation before working forty hours means the use of thirty-five hours of regular pay in the numerator, and forty hours in the denominator, when calculating the hourly proration of base salary is consistent with the parameters of petitioner's title. The actual payment of discretionary overtime, particularly when it was paid hour-for-hour between thirty-five and forty hours rather than at an "overtime premium" rate, did not change those parameters or the application of the relevant statutes and regulations. That was true even for the new legislation, which the Commission had come to recognize as covering the State for all purposes, because it contained nothing to limit the discretionary nature of compensation in petitioner's title for work between thirty-five and forty hours per week. The Commission concluded the payments for petitioner's work between thirty-five and forty hours per week were therefore properly excluded from the calculation of the hourly proration of his regular

hourly wage for overtime compensation, and the Commission accordingly upheld its denial of his application for reconsideration. This appeal followed.

II.

A.

Petitioner argues the Commission's decision should be reversed because the amendments to the Wage and Hour Law supersede the Civil Service regulations relied upon by the Commission and "wrongly places these . . . regulations above the Legislature's clear intention to expand overtime protections to State employees . . . ." He further asserts the statutory interpretation is a purely legal question that is reviewable de novo, because the Wage and Hour Law is not within the Commission's expertise.

Petitioner contends the Civil Service statutes bound the Commission to secure his rights under all statutes, and the new legislation had no exception for emergencies declared pursuant to Civil Service regulations. N.J.S.A. 11A:1-2(e). He maintains his cash compensation for work hours beyond forty per workweek was paid at a rate less than one-and-one-half times his "regular hourly wages[,]" contrary to N.J.S.A. 34:11-56a1 and N.J.S.A. 34:11-56a4(b)(1).

Specifically, petitioner contends the Commission erred by failing to consider all the compensation he was paid at a non-overtime rate in calculating

his "regular hourly wage" by disregarding the compensation he earned for working the hours between thirty-five and forty.[6] In addition, he claims his compensation for his work between thirty-five and forty hours was not "discretionary" because the DEP always compensated him and his title cohort for those hours, and expressly promised to compensate petitioner for those hours. Petitioner argues that regardless of the Commission's arguments regarding his regular workweek and base pay, and whether his overtime is based on forty hours under N.J.A.C. 4A:3-5.7(d) and 4A:3-5.2, it is "legally irrelevant to setting an overtime rate under the Wage and Hour Laws because that is set by non-overtime wages earned [in a] week divided by [forty]." In short, petitioner asserts that if the Commission uses a forty-hour workweek as the denominator or divisor in calculating his regular hourly rate, the numerator must include his compensation at non-overtime rates for the hours he worked between thirty-five

[6] Petitioner originally argued before the hearing officer his overtime rate should have been calculated by using a thirty-five-hour workweek and his regular base pay. His current contention is the forty-hour workweek is a proper denominator provided the Commission utilizes his "regular hourly wage" as determined by his total earnings for a particular week as a numerator in the calculation.

and forty, in addition to his compensation for the first thirty-five hours pursuant to N.J.S.A. 34:11-56a1.[7]

B.

Ordinarily, our review of a final decision from an administrative agency is limited. In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 571, 582 (App. Div. 2014). "A court may reverse only if it 'conclude[s] that the decision of the administrative agency is arbitrary, capricious, or unreasonable, or is not

[7] To illustrate, petitioner explains the specific impact of the Commission's calculations noting:

> [Petitioner's] base salary is $90,390 for his regular work at [thirty-five] hours or $1,738.26 per week . . . . The additional five hours paid on an hour for hour basis [for his work between thirty-five and forty hours] are worth $248.30. That total is the non-overtime wages earned and should be divided by [forty] hours resulting in an hourly rate of $49.66 per hour and an overtime rate (at [one-and-one-half]) of $74.50 per hour. Instead, the []DEP divided the base pay of $1,738.26 by [forty], excluded the [five] hours of pay at $248.30 from the total, and so reduced the hourly rate to $43.46, which in turn reduced overtime pay to $65.14 per hour. The rulings by [the Commission] wrongly endorse this reduction of the overtime rate for [petitioner] below the required [one-and-one-half] threshold set by the Wage and Hour laws, notably N.J.S.A. 34:11-56a1 and N.J.S.A. 34:11-56a4.

supported by substantial credible evidence in the record as a whole.'" Ibid. (alteration in original) (quoting J.D. v. N.J. Div. of Dev. Disabilities, 329 N.J. Super. 516, 521 (App. Div. 2000)). We are, however, not "bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Ardan v. Bd. of Rev., 231 N.J. 589, 604 (2018) (quoting US Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012)). Nonetheless, as a general rule, "deference is given to the interpretation of statutory language by the agency charged with the expertise and responsibility to administer the scheme." Acoli v. N.J. State Parole Bd., 224 N.J. 213, 229 (2016); accord Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015). Conversely, an agency's interpretation of statutes that do not guide its action and that it is not charged with administering is not entitled to deference. In re Ridgefield Park Bd. of Educ. & Ridgefield Park Educ. Ass'n, 459 N.J. Super. 57, 69 (App. Div. 2019), rev'd on other grounds, 244 N.J. 1 (2020). "[If] an agency's determination . . . is a legal determination, [the appellate court's] review is de novo." L.A. v. Bd. of Educ. of Trenton, Mercer Cty., 221 N.J. 192, 204 (2015).

We further observe, "[t]he Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing

Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)). Furthermore, "[w]e ascribe to the statutory words their ordinary meaning and significance . . . and read them in context with related provisions so as to give sense to the legislation as a whole . . . ." Ibid. (first citing Lane v. Holderman, 23 N.J. 304, 313 (1957), then citing Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999)). More importantly, "[i]t is not the function of this Court to 'rewrite a plainly-written enactment of the Legislature[ ]or presume that the Legislature intended something other than that expressed by way of the plain language.'" Ibid. (alteration in original) (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). Simply put, "[w]e cannot 'write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment,' . . . or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" Ibid. (first quoting Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230 (1952); then quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)). Therefore, "[o]ur duty is to construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. at 548).

C.

The issue before us is whether the Commission's calculation of petitioner's overtime pay is consistent with the Wage and Hour statutes and the various

administrative code provisions relied upon by the Commission. In 2019, legislation was enacted modifying the Wage and Hour Law by expanding the definition of "employer" in N.J.S.A. 34:11-56a1(g) to include the State. N.J.S.A. 34:11-56a4(b)(1) mandates overtime compensation for each hour of work per week beyond forty hours at "not less than [one-and-one-half] times such employee's regular hourly rate . . . ." Importantly, N.J.S.A. 34:11-56a1(e) defines "regular hourly wage" as "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."

The Commission asserts, "discretionary payments by an employer are not considered part of an employee's base salary for purposes of determining overtime pay. Here, [petitioner] had no contractual or civil service entitlement to additional payment for working between [thirty-six] and [forty] hours per week." See N.J.A.C. 12:56-6.6(a)(4). The Commission asserts, as a non-exempt, non-limited title, petitioner has irregular and variable work hours not

limited to a specific thirty-five or forty-hour workweek. See N.J.A.C. 4A:6-2.3(b)(3); N.J.A.C. 4A:3-5.2.[8]

The Commission notes petitioner's "overtime pay was calculated based on his regular base pay divided by [forty] hours a week, multiplied by [one-and-one-half] times, to arrive at an hourly overtime rate." (Emphasis added). The Commission relies on N.J.A.C. 4A:3-5.2 for calculating petitioner's overtime. N.J.A.C. 4A:3-5.2 defines the "regular rate," in pertinent part, as "the hourly proration of the employee's annual base salary . . . ." The regulation further provides, "[e]mployees in covered non-limited titles . . . shall be deemed to have a [forty]-hour workweek for determining the hourly proration . . . ." Ibid. By using this approach in calculating petitioner's overtime, the Commission excluded the amounts he earned for working between the hours of thirty-five to forty because it determined his hourly proration should be based on his annual base salary. We are unpersuaded.

[8] Petitioner maintains he has always been paid for working between thirty-five and forty hours. The Commission asserts even if that is accurate, it does not change the fact the payments were discretionary. That petitioner's compensation for working between thirty-five and forty hours may have been discretionary does not, in our view, change the analysis required under the new legislation, even if the Commission's interpretation of the regulations would have previously yielded a different result.

Although the Commission's opinion references the definition of "regular wages" in N.J.S.A. 34:11-56a1(e), there is no explanation why the statute was not applied to calculate petitioner's overtime wages in this case. Similarly, the Commission's and the DEP's submissions do not analyze the statute at all, but instead rely on various, inconsistent, administrative code provisions. We observe N.J.S.A. 34:11-56a1(e) defines "regular hourly wage" as "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." (Emphasis added).

First, there is no indication in the statute that discretionary payments, as argued by the Commission, are somehow excluded when calculating an "employee's total earnings for the week." Second, by excluding the hours petitioner worked between the hours of thirty-five and forty, the Commission's analysis failed to properly calculate petitioner's overtime because it did not first determine his total earnings for the week. Moreover, the Legislature could have carved out an overtime exemption for non-limited employees, such as petitioner, as it did for other positions under N.J.S.A. 34:11-56a4(b)(1), but it did not do

so.[9] "'[T]he Legislature is presumed to be aware of judicial construction of its enactments,' and . . . 'a change of language in a statute ordinarily implies a purposeful alteration in [the] substance of the law . . . .'" DiProspero, 183 N.J. at 494 (first quoting N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 195 n.6 (2002), then quoting Nagy v. Ford Motor Co., 6 N.J. 341, 348 (1951)). Therefore, "[o]ur duty is to construe and apply the statute as enacted." Id. at 492 (quoting In re Closing of Jamesburg High Sch., 83 N.J. at 548).

The Commission's decision stated it "does not understand the Wage and Hour statutes cited by the petitioner as invalidating the framework concerning hours of work and overtime compensation under Civil Service law and rules or its application to the petitioner." However, the methodology set forth in N.J.S.A. 34:11-56a1(e) was not utilized by the Commission in calculating

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[9] N.J.S.A. 34:11-56a4(b)(1) did exclude certain classes of employees outside of petitioner's title. Specifically, the overtime statute does 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.
>
> [Ibid.]

petitioner's overtime. By using petitioner's "regular base pay" as opposed to his "regular hourly wage" as defined by N.J.S.A. 34:11-56(a)(1), the Commission applied the wrong figures in calculating petitioner's overtime pay. N.J.S.A. 34:11-56a1(e) does not speak in terms of "regular base pay" as the regulations cited by the Commission. The Commission's reliance on N.J.A.C. 4A:3-5.2 is misplaced because N.J.S.A. 34:11-56a1(e) provides that petitioner's "regular hourly wage" is calculated by "dividing the total hours of work during the week into the employee's total earnings for the week . . . ."

By using the "the hourly proration of the employee's annual base salary" in accordance with N.J.A.C. 4A:3-5.2, the Commission's calculations improperly excluded petitioner's earnings for the hours for which he was compensated between thirty-five and forty. This is inconsistent with the plain language of N.J.S.A. 34:11-56a1(e), which requires an employee's "total earnings for the week" to be utilized in computing an employee's "regular hourly wage." Similarly, the Commission's utilization of N.J.A.C. 12:56-6.6(a)(4) is unpersuasive. N.J.S.A. 34:11-56a1(e) does not exclude wages earned during the week, even if the wages were discretionary. The Commission's methodology must use the framework of the Wage and Hour Law when calculating petitioner's overtime, and the regular hourly wage figure derived from N.J.S.A. 34:11-

56a1(e) must, in turn, be utilized when calculating overtime pursuant to N.J.S.A. 34:11-56a4(b)(1).

In short, the Commission's decision was untethered to N.J.S.A. 34:11-56a1(e) and N.J.S.A. 34:11-56a4(b)(1), and it did not properly consider the specific calculation required under these statutes when determining petitioner's overtime, but instead relied on its own regulations. Therefore, we remand for the Commission to calculate petitioner's overtime in accordance with this opinion.

To the extent we have not specifically addressed any other arguments, it is because we conclude they are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Vacated and remanded. We do not retain jurisdiction.