STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 9, 2015)

BEAUTY WALK, LLC.	:	
	:	**C.A. No. PC-13-0809**
V.	:	
	:	
DEPARTMENT OF LABOR AND TRAINING, CHARLES J. FOGARTY, in his official capacity as Director of the Department of Labor and Training, and KRISTEN TAIBL	:	

DECISION

PROCACCINI, J. Beauty Walk, LLC. (Beauty Walk) and its principal, Kathleen Walsh-Dwyer (Ms. Walsh-Dwyer) (collectively Appellants), appeal from a decision of the Rhode Island Department of Labor and Training (DLT), finding that Kristen Taibl (Ms. Taibl or Appellee) was entitled to premium pay for the Sundays and holidays as well as overtime that she worked while employed by Beauty Walk. Jurisdiction is pursuant to G.L. 1956 § 28-7-29.

I

Facts[1] and Travel

Ms. Walsh-Dwyer hired Ms. Taibl in September of 2010 to work at Beauty Walk, a boutique beauty care store located in Newport, Rhode Island, as a personal assistant/manager. (DLT Hr'g Tr. at 4.) Ms. Taibl was initially uncertain whether she was being paid as an hourly or salaried employee. Id. at 17. The confusion about Ms. Taibl's employee status was resolved by the first week of October 2010, and from then on she was paid a set salary of $540 per week. Id. at 18, 59.

[1] Appellants have agreed to accept the DLT's findings of fact as accurate for purposes of this appeal.

This arrangement continued until October of 2011 when Ms. Taibl contacted the DLT and received information regarding premium pay, and, specifically, that she qualified for time-and-a-half pay on Sundays and holidays as well as for overtime. Id. at 19. She brought this information to Ms. Walsh-Dwyer's attention several times, and, beginning in November of 2011, Ms. Taibl was paid as an hourly employee and received premium pay for Sundays and holidays for the first time. Id. at 19-20. Subsequently, Ms. Taibl sent a letter to Ms. Walsh-Dwyer on January 25, 2012 indicating that she was owed for the Sundays and holidays she worked during the previous year. (DLT R., Complainant's 3.)

Ms. Taibl's employment at Beauty Walk was terminated by Ms. Walsh-Dwyer on January 26, 2012. (DLT R., Complainant's 4.) At issue in the instant appeal is whether Ms. Taibl was properly exempted from premium pay for overtime, Sundays, and holidays she worked at Beauty Walk between October of 2010 and October of 2011.

Both Ms. Taibl and Ms. Walsh-Dwyer testified at the DLT hearing[2] conducted on November 26, 2012. Ms. Taibl testified about her responsibilities at Beauty Walk. She often opened the store by herself, but Ms. Walsh-Dwyer typically left her a note with a list of tasks to complete. (DLT Hr'g Tr. at 5.) Ms. Taibl would rearrange displays with some discretion, but Ms. Walsh-Dwyer would tell her where to place the product lines. Id. at 6. Ms. Taibl also testified as to her interactions with customers, which included assisting customers and making suggestive sales. Id. at 7. She worked with Beauty Walk's website and would pull items from

[2] The recording equipment malfunctioned during the hearing, and the parties agreed to continue in order to avoid repeating the entire proceeding. The record comprises of a partial transcript (that covers Ms. Taibl's direct examination and part of her cross-examination), a set of official notes from the hearing (compiled by DLT Examiner Elaine J. Heiss, who was present for the full hearing), and a set of exhibits.

the store's stock to prepare for shipping. Id. at 8. Ms. Taibl also testified as to closing the store, which included tallying sales totals and cleaning. Id. at 9-10.

Ms. Taibl further testified that she did not manage, hire, or fire any employees while working at Beauty Walk. Id. Nor was she involved in deciding what products were to be ordered for Beauty Walk. Id. She did testify that she was involved in sending out marketing/advertising emails, but she only sent such communications at the direction of Ms. Walsh-Dwyer approximately twice a month. Id. at 11-12. Ms. Taibl was never involved in any bookkeeping or financial matters for Beauty Walk. Id. at 12. She also testified that she did not submit time records to Ms. Dwyer-Walsh, nor was she ever asked to track her hours. Id. at 18. Furthermore, Ms. Taibl testified that while she was able to give discounts, she was not allowed to take returns without Ms. Walsh-Dwyer's permission. (DLT Notes from Hr'g at 11.)

During January 2011, Beauty Walk moved to a new location in Newport, Rhode Island. (DLT Hr'g Tr. at 27.) The store was closed during the move, but Ms. Taibl testified she continued to work for Beauty Walk during this time. Id. She began regularly-scheduled work at the new location on March 13, 2011. Id. at 32.

Ms. Taibl testified that she worked at Beauty Walk for fifty-two Sundays—for a total of 380 hours—from October 2010 to October 2011.[3] Id. at 21-25; DLT R., Complainant's 5. She further testified that she worked on ten holidays—for a total of 77 hours—between October 2010

[3] The exhibit chart shows six dates crossed out; without these days, the hour total is 340. (DLT Hr'g Tr. at 21-25.)

and October 2011.[4] Id. at 25-26; DLT R., Complainant's 5. Ms. Taibl also testified that she worked more than forty hours per week twice—for a total of 24 hours of overtime.[5]

Ms. Taibl testified that Ms. Walsh-Dwyer contributed $1000 toward her health insurance. (DLT Hr'g Tr. at 35-36.) This offer, Ms. Taibl claims, was made in January of 2011 prior to the store's location change, and Ms. Walsh-Dwyer began to pay the sum in February 2011. Id. at 36-38. Ms. Taibl also testified as to her claim for vacation pay. She stated that she received two weeks, or what she believed to be fourteen days, of vacation but only used eleven of those paid vacation days. Id. at 33-34.

On cross-examination, Ms. Taibl testified about her previous jobs where she was an hourly employee and received neither paid vacation nor any contributions toward her healthcare. Id. at 46-53. She stated that she left her previous job to work at Beauty Walk because she was looking for a "higher position." Id. at 52. Ms. Taibl testified about the contract Ms. Walsh-Dwyer gave her, a document labeled, "A-G-R-E-E-M-E-N-T." Id. at 54-55; DLT R., Respondent's 1. While neither party signed this document, Ms. Taibl did acknowledge that she never objected to the terms contained therein. (DLT Hr'g Tr. at 55.) It was also confirmed on cross-examination that Ms. Taibl knew she was not receiving premium pay for Sundays and holidays, but she never complained to Ms. Walsh-Dwyer. Id. at 60.

Ms. Walsh-Dwyer testified that she has been the sole owner of Beauty Walk for eight years. (DLT Notes from Hr'g at 15.) She stated that she was aware of the premium pay requirements when she opened the store. Id. Ms. Walsh-Dwyer further testified that because business was good she wanted someone to be her "mirror image" to work with customers while

[4] Ms. Taibl incorrectly included Martin Luther King Day and Rhode Island Independence Day; without these days, the hour total is 61. (DLT Hr'g Tr. at 26.)
[5] Overtime occurred during the weeks of Mar. 7, 2011-Mar. 13, 2011 and Apr. 25, 2011-May 1, 2011.

she was away, which was why she hired Ms. Taibl. Id. at 15-16. She testified that she gave Ms. Taibl a credit card to use for the store, had business cards made, and wanted Ms. Taibl to manage the store and make decisions. Id. at 16. Ms. Walsh-Dwyer, however, acknowledged that Ms. Taibl did not place orders with the credit card unless she received approval. Id.

During Ms. Walsh-Dwyer's testimony, a comparison was made between the hours Ms. Taibl claimed to have worked and the hours Ms. Walsh-Dwyer believed were actually worked. Id. at 17. She challenged Ms. Taibl's hours on various dates as being incorrect because the store was only open from 12-5. Id. As to Ms. Taibl's vacation, Ms. Walsh-Dwyer had understood two weeks to mean two work weeks or ten days, but that she was lenient in allowing Ms. Taibl to take time off and in allowing vacation time to carry over into the second year. Id. Upon Ms. Taibl claiming she was owed back pay for the first year of Sundays and holidays, Ms. Walsh-Dwyer felt she was being "blackmailed" and that Ms. Taibl had been a manager whose advice she always took under advisement. Id. at 18.

Following the hearing, a decision was issued by the DLT on January 15, 2013, finding that Ms. Taibl was a non-exempt employee and was thus owed premium pay for Sundays—totaling $2342.25—and holidays—totaling $411.75—as well as overtime pay for the weeks she worked more than forty hours—totaling eight hours, or $54. The hearing officer further found that Ms. Taibl was not entitled to vacation pay, and that the DLT did not have jurisdiction to grant her compensation for a healthcare premium. The Appellants filed a timely notice of appeal with this Court.

II

Standard of Review

This Court's review of the DLT's decision is governed by G.L. 1956 § 42-35, entitled the Administrative Procedures Act. See Rossi v. Emps.' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). Section 42-35-15(g) provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing a decision under the Administrative Procedures Act, this Court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).

However, "[q]uestions of law determined by the administrative agency are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." State Dep't. of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. R.I. Conflict of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986)). Thus, "'[a]lthough this Court affords the factual findings of an

administrative agency great deference, questions of law—including statutory interpretation—are reviewed de novo."' Heritage Healthcare Servs., Inc. v. Marques, 14 A.3d 932, 936 (R.I. 2011) (quoting Iselin v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008)).

III

Analysis

A

Vacation

Under Rhode Island law, "[w]henever an employee separates or is separated from the payroll of an employer after completing at least one year of service, any vacation pay accrued, . . . written or verbal company policy, or any other written or verbal agreement between employer and employee shall become wages and payable in full or on a prorated basis . . . ." Sec. 28-14-4(b). At issue in this case is whether Appellants owe Ms. Taibl vacation pay after terminating her in January of 2012.

Under the employment agreement that Ms. Walsh-Dwyer presented to her, Ms. Taibl was given two weeks paid vacation to vest after six months of employment. (DLT R., Respondent's 1.) There was confusion on the part of Ms. Taibl, who understood two weeks to mean fourteen days; however, in the "Vacation Time" paragraph of the agreement, two weeks—meaning two five-day work weeks—of vacation is differentiated from "two (2) calendar weeks." Id. During her first year of employment, Ms. Taibl used five vacation days in May, and in October and November of her second year she took six days of vacation.[6] (DLT Notes from Hr'g at 12.) Interpreting two weeks to mean ten days, Ms. Taibl took all the vacation days that were due to

[6] The Notes from the hearing state that Ms. Taibl took five vacation days in Oct.-Nov. of 2011, but the decision and the exhibits state that she used eleven vacation days total, including six during the fall of 2011.

her, and she was not due any paid vacation time once she became an hourly employee and was no longer covered by the agreement. As such, the DLT hearing officer's finding that Ms. Taibl was not due any vacation time upon separation from her employment was not clearly erroneous in view of the reliable probative evidence.

B

Health Care

The DLT's director has the duty "to insure compliance with the provisions of this chapter 28-14 and 28-12. The director or his or her designee may investigate any violations thereof, institute or cause to be instituted actions for the collection of wages . . . ." Sec. 28-14-19.

Sections 28-14 and 28-12 address wages, but there is nothing in either section regarding employee health care that would suggest the DLT could properly resolve a dispute between employee and employer regarding a health care premium. As such, the DLT hearing officer's finding that Ms. Taibl's claim for $1000 toward her health care premium was outside the scope of the DLT hearing and could not be adjudicated was not in violation of statutory provision and not clearly erroneous in view of the reliable probative evidence.

C

Overtime

Under Rhode Island law, overtime pay is governed by Sec. 28-12-4.1. "[N]o employer shall employ any employee for a workweek longer than forty (40) hours unless the employee is compensated at a rate of one and one-half (1 1/2) times the regular rate at which he or she is employed . . . ." Id. Sundays and/or holidays are excluded from the calculation of overtime pay. Sec. 28-12-4.1(b). There are, however, exemptions to this statute, which include "[a]ny employee employed in a bona fide executive, administrative, or professional capacity, as defined

by the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 et seq., compensated for services on a salary basis of not less than two hundred dollars ($200) per week." Sec. 28-12-4.3(a)(4).

The FLSA exempts "any employee employed in a bona fide executive,[7] administrative, or professional[8] capacity . . . ." 29 U.S.C. § 213(a)(1). To qualify as an "employee employed in a bona fide administrative capacity," the employee must be paid ". . . not less than $455 per week," his or her ". . . primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and the ". . . primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). The United States Supreme Court has held that "these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). The question of exemption generally turns on either the second prong—whether the primary duty directly relates to management or general business operations—and the third prong—discretion regarding matters of significance. It is also important to note that "the particular title given to an employee is not determinative, as an employee's exempt status must instead be predicated on whether his or her duties and responsibilities meet all of the applicable regulatory requirements." Reich v. John Alden Life Ins. Co., 126 F.3d 1, 10-11 (1st Cir. 1997).

[7] To qualify for the executive employee exemption, the employee's primary duty must be management of the enterprise, and he or she must customarily and regularly direct the work of two or more other employees and have the authority to hire or fire other employees. 29 C.F.R. § 541.100(a).

[8] To qualify for this exemption, an employee must perform work requiring advanced knowledge in a field of science or learning. Id. at § 541.301(a).

To meet the requirement of the second prong, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from . . . selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Such work includes "work in functional areas such as tax; finance; accounting; budgeting; auditing . . . purchasing; procurement; advertising; marketing . . . internet and database administration . . . and similar activities." Id. at § 541.201(b). In Hines v. State Room, Inc., 665 F.3d 235, 242 (1st Cir. 2011), the court found this prong was satisfied where the sales aspect performed by employees for a banquet company was ". . . ancillary to the principal function of actually providing the banquet services themselves." Furthermore, in that case, the sales manager employees ". . . were focused on more than simple individual sales transactions . . . . [T]hey worked to establish long-term relationships, to keep clients happy and to maintain the overall reputation of their employers." Id. at 242-43.

For the third prong, ". . . the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). Some factors to consider include whether the employee has authority regarding management policies or operating practices; whether the employee does work that substantially affects the business; or whether the employee may commit the employer in matters of serious financial impact. See id. at § 541.202(b). The exercise of discretion "does not include clerical or secretarial work . . . or performing other mechanical, repetitive, recurrent or routine work." Id. at § 541.202(e). In Hines, the employees' work of organizing banquet events was considered to require "a significant degree of 'invention, imagination, and talent.' . . . The fact that, after engaging a potential client and arriving at a proposed agreement . . . the sales managers submitted the

proposal to management for approval does not . . . detract from the judgment . . . exercised in arriving at the proposal . . . ." Hines, 665 F.3d at 245-46.

Ms. Taibl claimed she worked more than forty hours during the week of March 7, 2011 and the week of April 25, 2011, for a total of forty-eight and fifty-six hours, respectively. (DLT Hr'g Tr. at 32-33.) The Appellants objected to this issue being raised at the hearing because it was not part of the complaint. Id. at 30. However, the hearing officer allowed testimony on the issue of overtime and ultimately made a decision permitting the issue to be added to the complaint under a liberal theory of pleadings. (DLT Decision at 12.) The Appellants do not raise the admission of this evidence on appeal.

It is uncontested that Ms. Taibl earned $540 per week. (DLT Hr'g Tr. at 59.) At issue in the instant appeal is whether the DLT hearing officer's finding that Ms. Taibl was a non-exempt employee was not clearly erroneous. Ms. Taibl worked as a sales clerk. She primarily was responsible for interacting with customers and making sales. Id. at 7. She had no role in managing Beauty Walk's finances. Id. at 12. She did track online sales, but her role was merely to remove items from stock and prepare them for shipping or to upload merchandise pictures to the website. Id. at 8, 15. Ms. Taibl, unlike the sales managers in Hines, did not have ongoing relationships with clients beyond assisting return customers. 665 F.3d at 242-43. She did perform some activities related to advertising but entirely at the direction of Ms. Walsh-Dwyer. (DLT Hr'g Tr. at 11-12.) As such, the DLT hearing officer's determination that Ms. Taibl did not satisfy the first prong to qualify as an exempt employee was not affected by error of law. The regulation specifically distinguishes exempt employees from those who are ". . . selling a product in a retail or service establishment," which was precisely Ms. Taibl's role at Beauty Walk. 29 C.F.R. § 541.201(a).

As to discretion regarding matters of significance, Ms. Taibl again falls short of qualifying as an exempt employee. Ms. Taibl had no authority to hire or fire other employees. (DLT Hr'g Tr. at 10.) She was usually left a list of instructions by Ms. Walsh-Dwyer each day covering the tasks she was to complete. Id. at 5. Ms. Taibl did not even have authority to choose where to put various product lines in the store. Id. at 6. There was little to nothing in Ms. Taibl's duties that could be considered to require "a significant degree of 'invention, imagination, and talent.'" Hines, 665 F.3d at 245. Ms. Taibl was given a credit card to use for the store, but Ms. Walsh-Dwyer testified that Ms. Taibl was not permitted to place orders without approval. (DLT Notes from Hr'g at 16.) Furthermore, nothing in Ms. Taibl's duties included ordering merchandise or otherwise entering into contracts for Beauty Walk. Ms. Walsh-Dwyer may have hired Ms. Taibl to be her "mirror image" at the store while she was away, but this intent and the title of "manager" are not enough to find that Ms. Taibl was exempt from overtime pay. Id. at 15-16; see Arnold, 361 U.S. 388.

Thus, the DLT hearing officer's finding that Ms. Taibl was a non-exempt employee was not clearly erroneous, and Ms. Taibl is due overtime pay under Rhode Island law. The hearing officer found it credible that Ms. Taibl worked over forty hours during the week of March 7, 2011 as it was the week prior to Beauty Walk reopening at its new location. (DLT Decision at 12.) Removing the Sunday hours worked as required by § 28-12-4.1(b), the hearing officer determined Ms. Taibl was due ten hours of overtime, or $67.80. Given that Ms. Taibl was not an exempt employee, this Court will not substitute its judgment for that of the agency on questions of fact. See Johnston Ambulatory Surgical Assocs., 755 A.2d at 805. The hearing officer's determination regarding overtime pay is upheld.

D

Sundays and Holidays

When hourly employees work on Sundays and holidays, they "must be paid for at least one and one-half (1 1/2) times the normal rate of pay for the work performed . . . ." G.L. 1956 § 25-3-3(a). As with overtime pay, the employees referred to in § 28-12-4.3(a)(4) are exempt from Sundays and holidays premium pay. See G.L. 1956 § 5-23-2(d). This Court has already determined that the DLT hearing officer's finding that Ms. Taibl was not an exempt employee was not clearly erroneous. See Sec. III, C, supra. As such, the hearing officer's determination that Ms. Taibl was due premium pay for the Sundays and holidays she worked was not affected by error of law and is affirmed. The parties differed on the number of Sunday hours Ms. Taibl worked, and the hearing officer found it credible that she was in the store earlier than it opened and later than it closed, but that it was not credible that Ms. Taibl worked Sundays during Beauty Walk's move. (DLT Decision at 17.) See Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988) (stating that "[a] court must not substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact"). Excluding those days, the hearing officer found that Ms. Taibl was owed $2342.25 for Sundays. As to holidays, excluding two erroneously included holidays, the hearing officer determined that Ms. Taibl was due $411.75.

IV

Conclusion

After reviewing the entire record, this Court finds the DLT's decision granting Ms. Taibl premium pay for Sundays, holidays, and overtime was not in violation of constitutional or statutory provisions; in excess of the DLT's statutory authority; affected by error of law; made

upon unlawful procedure; clearly erroneous in view of the reliable, probative, and substantial evidence; or arbitrary or capricious. The substantial rights of the Appellants have not been prejudiced. Accordingly, the DLT's decision is affirmed. Counsel shall prepare the appropriate order for entry.

Notwithstanding this Court's affirmance of the hearing officer's award of compensation in this matter, the Court is compelled to note that in its review and analysis of this Decision, it was legally constrained from considering Appellants' alleged monetary claims that may constitute a set-off against compensation awarded to Ms. Taibl. Section 28-14-24(a)(3) specifically prohibits an employer from deducting as a set-off or counterclaim "[a]ny money allegedly owed to the employer by the employee." The nature and scope of the employment relationship between Ms. Taibl and Ms. Walsh-Dwyer was established by a written, albeit unsigned, employment contract, and the full legal consequences that may flow from that relationship remain unexplored. Nothing in this Decision shall be construed as preventing the Appellants from pursuing an independent action to enforce its legal rights flowing from this agreement or the employment relationship that followed as permitted by subjection (b) of Section 28-14-24.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Beauty Walk, LLC. V. Department of Labor and Training, et al.**
CASE NO:	**PC-13-0809**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 9, 2015**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
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For Defendant:	**Chip Muller, Esq.**