STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

SUSAN M. KENT, as President of the NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO; and MICHAEL UFKO, HUGH CIRRITO, JOAN BOBIER, and HEIDE-MARIE DUDEK, on behalf of themselves and all others similarly situated,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

DECISION and ORDER
INDEX NO. 1146-13
RJI NO. 01-13-ST4396

ANDREW M. CUOMO, as GOVERNOR of the STATE OF NEW YORK; THE STATE OF NEW YORK; the NEW YORK STATE DIVISION OF THE BUDGET; ROBERT L. MEGNA, as Budget Director of the NEW YORK STATE DIVISION OF THE BUDGET; the NEW YORK STATE DEPARTMENT OF TRANSPORTATION; JOAN McDONALD, as Commissioner of the NEW YORK STATE DEPARTMENT OF TRANSPORTATION; the DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES; JEROME M. HAUER and the Commissioner of the DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES; the DEPARTMENT OF HEALTH; NIRAV R. SHAH, as the Commissioner of the DEPARTMENT OF HEALTH; the DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOSEPH MARTENS, as the Commissioner of the DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

Supreme Court Albany County All Purpose Term, May 3, 2013
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Petitioners commenced this CPLR Article 78 proceeding to challenge Respondents' determination to pay overtime to otherwise overtime ineligible employees[1] for the hours they worked on Hurricane Sandy[2] related issues in excess of 47.5 hours per week. Seeking instead overtime payments for the hours they worked in excess of 40 hours per week. Respondents answered. Because Petitioners failed to demonstrate the irrationality of Respondents' non-payment of overtime for the time Petitioners worked between 40 and 47.5 hours per week, that portion of their petition is denied. Petitioners demonstrated their entitlement, however, to an Order invalidating the Department of Health's (hereinafter "DOH") refusal to authorize any overtime.[3]

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[1] It is undisputed that the "overtime ineligible employees" hold Civil Service positions categorized as Grades 23 through 27 with the Respondent agencies.

[2] General familiarity with the widespread devastation Hurricane Sandy caused and the enormous efforts the State took to address the catastrophe are presumed.

[3] While the petition also sought this Court's "certif[ication of] petitioners as representative of the [relevant] class," their Reply characterizes Respondents' opposition to class certification as "premature" because they "have not yet moved to certify the class." Although

It is axiomatic that this Court cannot disturb Respondents' determination unless "it has no rational basis... or the action complained of is arbitrary and capricious." (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). "[C]ourts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (Meyers v. New York State Div. of Housing and Community Renewal, 68 AD3d 1518, 1519 [3d Dept. 2009], quoting Matter of Peckham v. Calogero, 12 NY3d 424 [2009]; O'Connor v Ginsberg, __AD3d__, 2013 NY Slip Op 03363 [3d Dept 2013]), and defer to Respondents' statutory "interpretation or application[, which] involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." (New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation, 18 NY3d 289, 296 [2011], quoting Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation, 14 NY3d 161 [2010]).

Respondents' challenged determination starts with Civil Service Law §134(6) (hereinafter "CSL §134[6]") and is entitled to deference. Such statute, in pertinent part, states:

> Notwithstanding any other provisions of law to the contrary, any employee in any title or individual position ineligible to accrue overtime credits under the rules and regulations promulgated by the director of the budget pursuant to the provisions of this section who is required to work beyond a normal workweek during a period deemed by the director of the budget to be an extreme emergency, may be granted additional compensation upon the approval of and at a rate established by the director of the budget; provided, however, that such additional compensation shall not exceed one and one-half times the hourly rate of pay

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such positions are contradictory, because class certification in an Article 78 proceeding is generally unnecessary (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C901:9), but may be appropriate herein (Maurer v State Emergency Mgt. Off., 13 AD3d 751 [3d Dept 2004]) the petition's request for class certification is denied without prejudice to a later motion for such relief.

received by such employee in his regular position.

With its broad scope, this statute provides Respondent "director of the budget" (hereinafter "Director") wide discretionary authority. Its "normal workweek" language, left undefined, requires the Director to interpret and implement CSL §134(6) using his "knowledge and understanding of underlying operational practices [along with his] evaluation of factual data and inferences to be drawn therefrom." (New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation, supra at 296). As such, Respondents' statutory interpretation of CSL §134(6) is entitled to deference.

So too is its regulatory interpretation. The above statute's regulatory counterpart was established by Budget Policy and Reporting Manual Item G-140 (hereinafter "G-140"). Such regulation explains both the procedure and the criteria for determining what constitutes a CSL §134(6) "extreme emergency." It also provides a "Compensation Rates..." section. Absent from such regulation, however, is an explicit definition of CSL §134(6)'s "normal workweek" provision.

At issue here, on October 29, 2012, the Director interpreted and applied CSL §134(6) and G-140 by issuing Budget Bulletin G-1034 (hereinafter "G-1034"). It authorized overtime payments to be made to overtime ineligible staff "who work in excess of 47.5 hours per work week, provided that such overtime is both essential and directly related to Hurricane Sandy... Staff authorized to incur overtime shall be paid at a rate determined by the agency head, so long as such rate... does not exceed one and one half times the regular hourly rate for time worked in excess of 47.5 hours per week."

On this record, the Director's G-1034 interpretation and application were neither arbitrary

nor capricious, but instead, entirely rational.

G-1034 rationally recognizes that CSL §134(6) does not require extreme emergency overtime pay to begin once the overtime ineligible employee works forty hours in one week. Rather, CSL §134(6) authorizes overtime only for those "required to work beyond a normal workweek," but again, does not define "normal workweek." A Chief Budget Examiner with the New York State Division of Budget (hereinafter "Brondi") explains that G-1034's "47.5 hours per work week" interprets CSL §134(6)'s "normal workweek" language. According the Director's interpretation with the requisite deference due, Petitioners did not demonstrate that G-1034's "47.5 hours per work week" violates CSL §134(6) or is an irrational interpretation of CSL §134(6)'s "normal workweek" provision. In addition, as demonstrated by Respondents, the validity of the Director's interpretation is bolstered by the "flexibility" noted in CSL §134(6)'s legislative history.

Similarly, G-140's language requires no different interpretation. The "Purpose, Scope and Regulations" section of G-140 states that "[e]mployees normally ineligible to be compensated for work in excess of 40 hours per week may, under special emergency circumstances, be made eligible for compensation for such hours of work." Contrary to Petitioner's assertions, such sentence neither explicitly nor implicitly defines CSL §134(6)'s "normal workweek." Rather, it merely set a lower limit for those who could be "made eligible" for emergency overtime under the regulation. Such explanation of eligibility alone, however, is not enough. In contrast, G-1034 interpreted CSL §134(6)'s "normal workweek" eligibility within the current overtime ineligible state employee context and used such determination to calculate the amount of overtime earned.

Moreover, Petitioners failed to offer sufficient evidence to establish the length of their "normal workweek." The time sheets attached to the petition, left unexplained, offer no "normal workweek" proof. Similarly, while each of the four individually named Petitioners submitted an affidavit in support of the petition, their allegations did not establish what constitutes a "normal workweek." Two simply failed to allege how many hours make up their "normal workweek." The other two offered conclusory allegations of their "normal 37.5 hour work week." Upon such proof, Petitioners failed to demonstrate that Respondents' interpretation of CSL §134(6)'s "normal workweek" is irrational, arbitrary or capricious.

Although relied upon by Petitioners as controlling precedent, Neary v New York State Div. of Budget (192 Misc 2d 375 [Sup Ct, Albany County 2002][hereinafter "Neary"]) is neither controlling nor persuasive. Because Neary was issued by a court of equal jurisdiction, it is not controlling but is entitled to "respectful consideration." (McKinney's Cons Laws of NY, Book 1, Statutes §72[b][comment]). Affording the Neary decision the respect it is due, because it is distinguishable it is not persuasive. Neary annulled the Director's determination to impose CSL §134(5)'s 12% overtime cap on CSL §134(6)'s "extreme emergency" overtime. Here, no such cap is being imposed. Rather, the Director is interpreting CSL §134(6)'s undefined "normal workweek" term, which was not at issue in Neary. Because the legal issues in this proceeding are completely distinguishable from those in Neary, Petitioners' reliance on such decision is misplaced.

Accordingly, to the extent the petition sought relief from the Director's determination not to pay overtime for the time Petitioners worked between 40 and 47.5 hours per week, the petition is denied.

Due to the foregoing conclusion, Petitioners are not entitled to an Order requiring the agency Respondents to request the Director to authorize overtime payments for the time Petitioners worked between 40 and 47.5 hours per week.

Turning to DOH's determination not to pay any overtime in accord with G-1034, DOH offered no rational justification. DOH explained its denial of overtime with an affidavit made by its Deputy Director of Fiscal Management (hereinafter "Hefner"). She admitted that DOH "mobilized to support [Hurricane Sandy] recovery efforts" and recognized the Director's authorization, G-1034, to pay overtime to DOH's overtime ineligible staff. While she correctly noted that DOH was "not required" to make G-1034 overtime payments, DOH is now required to properly justify its non payment decision. (Brooks v Forsythe, 189 AD2d 26 [3d Dept 1993]). Hefner's affidavit, however, failed to do so.

Hefner first alleged that DOH determined that it would not pay its overtime ineligible employees "in advance of the storm's arrival to New York, [and] that employees would work on Sandy-related activities as part of their work duties." Such statement provides no justification for DOH's non-payment decision, only a time frame. Moreover, she did not state that such decision was ever revisited in light of G-1034's issuance. Without such reconsideration, DOH's non-payment determination was premature and not rationally based on the relevant facts.

Hefner further states that DOH's denial was due to its being "unsure of how overtime compensation [for overtime ineligible staff] would impact [its] budget." While an informed budgetary analysis could properly justify denial or a decreased rate of overtime compensation, DOH's reliance on ignorance is not rationally based. Especially since Hefner did not state that the once unknown budgetary impact is neither currently known nor ascertainable.

Nor did Hefner demonstrate the rationality of DOH's non-payment determination with her "past practice" allegation. She did not explain the prior non-payment circumstances, and failed to demonstrated their similarity to the instant scenario. Without such proof, her conclusory allegation fails to sufficiently justify DOH's determination.

Lastly, Hefner's extensive account of the numerous times DOH informed its overtime ineligible staff that it would not receive overtime, offers no justification for the decision. Rather, it merely recounts the ways in which the non-payment decision was communicated. Conspicuously lacking from Hefner's affidavit is any fact based explanation justifying DOH's decision not to pay any G-1034 authorized overtime.

Accordingly, the Petition is granted only to the extent that the DOH's determination denying any G-1034 overtime is vacated. The matter is remanded to DOH for further consideration in accord with this Decision and Order.

Additionally, to the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be either lacking in merit or moot.

This Decision and Order is being returned to the attorneys for Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 14, 2013
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated February 26, 2013; Petition, dated February 26, with attached Exhibits A-J; Affidavit of Michael Ufko, dated February 21, 2013; Affidavit of Hugh Cirrito, dated February 22, 2013; Affidavit of Joan Bobier, dated February 22, 2013; Affidavit of Heide-Marie Dudek, dated February 22, 2013.
2. Answer, dated April 19, 2013; Affidavit of Mary Elizabeth Hefner, dated April 19, 2013, with attached Exhibits A-H; Affidavit of Robert Brondi, dated April 19, 2013, with attached Exhibits A-F; Affidavit of Suzanne Coonley, dated April 12, 2013; Affidavit of Jeffrey Bender, dated April 17, 2013; Affidavit of Nancy Lussier, dated April 18, 2013.