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June 15, 2026

Cindy Gross
Human Resources Director – MnDOT
Sent by email

Re: MnDOT – Policy on Overtime Requirements and Procedures

Dear Ms. Gross:

I represent the Minnesota Government Engineering Council ("MGEC"). I am writing on behalf of MGEC in response to the recently disseminated policy on Overtime Requirements and Procedures for MnDOT (the "Policy"). The MGEC is concerned that the Policy not only mischaracterizes the Fair Labor Standards Act ("FLSA") but also attempts to enable MnDOT management to circumvent our collective bargaining agreement regarding compensation payable to exempt employees. Our specific concerns are addressed below.

The first paragraph of the Policy states that the FLSA provides that exempt employees are "not eligible for overtime." It most certainly does not. In addition, at the bottom of page 1, the Policy states that: "Any [promise or expectation of additional compensation when working more than 40 hours a week] risks maintaining the employees' exemption status and subjects the employer to fines and penalties for misclassification under the FLSA." This statement is also categorically false.

Regardless of whether these statements are borne out of the drafter's ignorance of the law or their intentional mischaracterization of the law, the FLSA provisions relating to overtime establish threshold circumstances in which employees ***must*** be paid at time-and-one-half for certain hours of work. It does NOT prohibit employers from providing or negotiating to provide more generous benefits to employees — whether that is for: the rate payable for certain hours of work; which hours qualify for additional compensation; or which classes of employees qualify for additional compensation. Thus, the overtime sections of the FLSA establish "minimum" requirements, just like the minimum wage sections of the law. In the same way that the FLSA allows an employer to pay more than the minimum wage, it also allows an employer to pay "overtime" even when it is not *required* to do so.

Based on the above-cited language of the Policy, we presume that the such language is based on management's concern about violating the "salaried employee" requirement for exempt employees. However, that requirement ONLY applies to ***reductions*** from an employee's salary — it does not prohibit ***additions*** to salary, whether such additions are based on the quality ***or the quantity of work.*** *See, 29 C.F.R. § 541.602(a)* which states in relevant part:

> (a) General rule. An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.
>
> (1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.
>
> (2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

You will note, there is ***no language*** in the regulation that conditions salaried status on ***additions*** to the employee's salary. Rather, as stated above, it addresses only reductions.

In fact, there is nothing in the statute, the regulations promulgated thereunder, or caselaw providing that an employee's salaried status is lost if the employee is paid above and beyond their salary for ***additional*** hours of work. Moreover, case law establishes the opposite. *See, e.g., Cavanaugh v. Southern California Permanente Med.,* 583 F.Supp.2d 1109 (C.D. Cal. 2008). In *Cavanaugh,* the Court held:

> Similarly, **the exemption is not lost if an exempt employee** who is guaranteed at least $455 each week paid on a salary basis **also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.**
>
> Thus, paying Plaintiff for working additional shifts or overtime on a basis other than a "base amount" does not adversely impact her exempt status.

Cavanaugh at 1138 (emphasis added).

Moreover, the following language of the collective bargaining agreement at issue in *Cavanaugh* is quite similar to the language of the MGEC CBA in many key respects:

> The parties recognize the Professional nature of work performed by employees covered by this Agreement. While each full-time employee will be scheduled to work an average of eighty (80) hours biweekly, the actual daily and weekly work schedule may vary due to time requirements or specific assignments and seasonal variations in work load. The Employer agrees to provide full-time employees eighty (80) hours of pay on a biweekly basis. However, if an employee is off work on a non-compensated employee initiated absence, the employee is not guaranteed eighty (80) hours of pay. The scheduling of hours during the week shall be established by the Chief of Service, or designee. The CRNA schedule will be facility specific. * * * *
>
> Should a full-time CRNA accept a work assignment to begin prior to the start of his/her normal shift which results in the CRNA working hours additional to his/her normal scheduled shirt, or should a CRNA accept the assignment of additional hours (following the completion of all work contemplated in the first sentence of Paragraph 803 and/or Paragraph 2010) **all such additional hours shall be paid at the CRNAs regular straight time hourly rate.**

Cavanaugh at 1117 (emphasis added).

Thus, the premise upon which MnDOT's policy is based is legally flawed as to the purported prohibition on the payment of additional compensation to exempt employees on an hourly basis.

More importantly, it is well established that an employer may not repudiate the terms of a collective bargaining agreement by policy or fiat. The MGEC labor agreement states the following with regard to compensating exempt employees for additional work:

> B. **Normal Payroll Period**. The normal payroll period shall consist of eighty (80) hours of work within a two (2) week payroll period.
>
> C. **Time Management**. The Agency and the Council recognize that because of the professional and supervisory nature of their work, the employees covered by this agreement may be required to work varied hours, hours in excess of the normal workday and/or payroll period, work on holidays and weekends, and during several periods within a single day, making the maintenance of consistent starting and stopping times or the assignment of the number of hours worked in a day sometimes impossible.
>
> It is recognized that employees are responsible for managing and accounting for their own hours of work and may make adjustments in hours of work in subsequent workdays and/or payroll periods, provided such time management does not result in overtime nor guarantee hour-for-hour for occasional excess hours worked.

D. **<u>Overtime</u>**.

Overtime shall be subject to approval by the Agency in advance of being worked.

Overtime worked may be liquidated at the rate of straight time in either cash or compensatory time at the option of the Agency after consulting with the employee. Holidays shall be considered hours worked for purposes of this section.

MGEC Labor Agreement, Article 6, Section1.

Under this language, an exempt employee may be paid additional compensation on an hour-for-hour basis at straight time so long as they receive approval prior to working the additional hours. **Please note that prior approval is the only condition**. Because the Labor Agreement contains no further requirements of the nature created in the Policy (limiting "overtime" to emergencies or special projects), no such conditions may be unilaterally imposed or enforced.

More egregiously, the Policy purports to require that overtime be approved only when time balancing is not feasible and that "failure to balance time *** is subject to the overpayment collection process." Again, there is no such language in the Labor Agreement. Therefore, these statements not only directly conflict with the language of the Labor Agreement but also, as to "overpayment," violate both the Labor Agreement and established law.

Further, the Policy purports to limit additional compensation to 16 hours in a 24-hour period. There is no such limitation in the Labor Agreement and, thus, it cannot be unilaterally imposed.

Finally, the Policy states that employees may not "balance" their time without the prior approval of their supervisor. The above-cited language contains no such requirement and, in fact, states the opposite. It clearly provides that "employees are responsible for managing and accounting for their time *** and may make adjustments in hours of work."

In summary, please be advised that an attempt to take any of the following actions pursuant to the Policy will violate the law (FLSA and/or PELRA) and the MGEC Labor Agreement:

1. Denial (or refusal to approve) additional compensation on an hour-for-hour basis for exempt employees merely because of their exempt status.

2. Denial (or refusal to approve) additional compensation because the additional work does not constitute an "emergency" or a "special project."

3. Require prior approval by a supervisor when an exempt employee adjusts their hours in a current or subsequent pay period as a result of excess work.

4. Limit compensation to 16 hours in a 24-hour period.

5. Any attempt to assert or collect an "overpayment" for hours actually worked. Both state and federal wage and hour laws are clear that an employer may not refuse to compensate an employee for hours worked without prior approval. The Employer's sole recourse is disciplinary action to the extent that such work violates an enforceable policy.

Please be further advised that any violation of the law and/or the Labor Agreement will result in legal action by MGEC to protect the statutory and contractual rights of the Union and the employees it represents:

If the Employer wants to impose such limitations or conditions on compensation for additional work, it must bargain for those changes. The attempt to unilaterally impose them constitutes an Unfair Labor Practice in violation of PELRA.

We trust that you will rescind or modify the Policy as it relates to exempt employees, or at the very least comply with your obligations under the law and our Labor Agreement.

Please contact me if you have any questions.

Very truly yours,

James P. Michels

cc: Jennifer Ziegler, Director of Labor Relations
Benton Campbell, MGEC President
Anthony Kelly, MGEC Interim Executive Director