COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2602 **Cir. Ct. No. 2014CV9**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PAUL J. MERTZ,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT AND WISCONSIN DEPARTMENT OF CORRECTIONS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Paul Mertz appeals a circuit court order that affirmed a decision of the Department of Workforce Development (DWD) dismissing Mertz's claim that he was entitled to unpaid wages for activities he

performed as a correctional officer with the Department of Corrections (DOC). The circuit court determined that the DWD's factual findings were uncontested and that those facts supported the DWD's decision that Mertz was not entitled to the additional compensation he sought. Mertz contends that: (1) Mertz challenged the DWD's factual findings in his circuit court briefs; (2) the DWD's factual findings were not supported by substantial evidence; (3) Mertz was involved in "law enforcement" activities during the time for which he sought compensation; (4) the activities were compensable under the law; and (5) the DWD's decision to deny Mertz's claim for compensation was contrary to its own rule. We conclude, first, that the DWD's factual findings are supported by substantial evidence in the record.[1] We then conclude that Mertz was not engaged in compensable activity during the time for which he sought unpaid wages. We affirm.

¶2 Mertz filed a Labor Standards Complaint with the DWD in May 2012, seeking compensation for time Mertz was required to submit to a fitness-for-duty check prior to reporting to his assigned post at the start of his shift. Mertz also sought compensation for time Mertz was required to walk from the fitness-for-duty-check at the "Muster Room" to his assigned post, and for time following the end of his shift when he was required to walk back through the institution and follow institution policies and procedures before exiting.

¶3 The DWD dismissed Mertz's complaint in December 2013. The DWD's final decision found that the time for which Mertz sought compensation

[1] The State argues that Mertz forfeited his challenge to the DWD's factual findings by failing to raise that challenge in the circuit court. Mertz argues that he did challenge the DWD's factual findings in the circuit court, but fails to highlight where in his circuit court briefs he did so. In any event, because we determine that the DWD's factual findings are supported by substantial evidence, we need not resolve whether Mertz forfeited that argument.

was not compensable work time. Mertz sought review in the circuit court, and the circuit court affirmed the DWD's decision. Mertz appeals.

¶4 In an appeal of a circuit court decision affirming an administrative agency's ruling, we review the decision of the agency, not the circuit court. ***Target Stores v. LIRC***, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). We accept the agency's findings of fact as long as those findings are supported by substantial evidence. WIS. STAT. § 227.57(6) (2013-14).[2] When the agency decides a question of law based on the interpretation of a statute that the agency is charged with administering, we give that decision at least due weight deference. ***DWD v. LIRC***, 2006 WI App 241, ¶18, 297 Wis. 2d 546, 725 N.W.2d 304. We also afford due weight deference to a state agency's interpretation of a federal statute when the agency's responsibility requires it to apply the federal statute. ***Id.***, ¶18 n.6. "When applying due weight deference, a court will sustain an agency's interpretation if it is not contrary to the clear meaning of the statute—unless the court determines that a more reasonable interpretation exists." ***Washington Cty. v. WERC***, 2011 WI App 49, ¶13, 332 Wis. 2d 409, 797 N.W.2d 902.

¶5 Mertz contends that the following findings by the DWD are contrary to the record: (1) that Mertz knew his assigned post in the institution prior to arriving at the institution for work; (2) that the check-in procedure is limited to the supervisor observing the correctional officer to ensure that the officer is present, in uniform, and not impaired; that supervisors do not pass on information or

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

instructions; and that the process lasts less than a minute; and (3) that officers are not required to respond to emergencies during the time between check-in and reporting to their post. Mertz points to a reply brief that he submitted to the DWD in August 2012, in which he asserted that:

> During roll call, I am frequently provided with information related to medical trips scheduled to depart or return during my shift. I am also routinely informed by the shift supervisor if urinary analysis collection and/or area searches are to be conducted during the shift. Additionally, I have been told by the shift supervisor that the officer I am supposed to relieve is not where the post orders indicate s/he should be. In the event there is mandatory training conducted during the shift, I am provided with a list of staff that I am to relieve so they can attend that training. Overtime slips are routinely signed by the supervisor, time sheets are collected and institution mail is checked in the muster room. Because it is difficult for the DOC to argue that the roll call activities described above are not "an integral part of the employee's principal activity or which are closely related to the performance of the principal activity," [t]hey simply deny that they even occur. Just because the DOC may not know these things occur or does not want them to, does not mean that they don't occur. This is exactly the kind of activity and information that should be communicated during roll call. (Footnotes omitted.)

Mertz then points to the DOC's statements acknowledging that it had discovered that a supervisor occasionally conveyed work information and post assignments to Mertz during check-in, and that the DOC had taken steps to remedy that situation. He argues that both parties confirmed that much more than simply checking that officers are present, in uniform, and sober occurs at check-in.

¶6 In response, the State points to the DOC's response brief to the DWD as negating Mertz's claims. There, the DOC asserted that Mertz would know his assigned post prior to arriving at the institution for his shift because that is scheduled in advance; that the check-in procedure requires officers to report for check-in prior to arriving at the officer's post so that the supervisor can verify that

the officer is present, in uniform, and not impaired; and that the procedure is informal, with no information as to work responsibilities being conveyed to the officer. The DOC also stated that it had been unaware that Mertz ever received additional information during check-in prior to receiving Mertz's complaint; that the DOC had learned through its investigation that one supervisor occasionally communicated that type of information to Mertz at check-in; and that the DOC had since taken steps to remedy that situation.[3] The DOC also stated that officers are required to respond to emergencies only when they are at their posts, and thus Mertz was not required to do so when travelling to or from his post.

¶7 We conclude that the DWD's findings that Mertz knew his shift assignment prior to arriving for work, that the standard check-in procedure is limited to a supervisor checking that officers are present, in uniform, and not impaired, and that Mertz was not required to respond to emergencies when travelling to and from his post are supported by substantial evidence. While Mertz points to his own statements that would have supported contrary findings, the DWD was entitled to rely on the assertions of the DOC as to procedure within the institution. In reaching this conclusion, we disagree with Mertz's assertion that the DWD's findings are contrary to the record based on the DOC's

[3] In reply, Mertz argues that the fact that the DOC has now taken steps to correct the check-in procedure does not negate his argument that he was subject to that procedure during the time for which he sought compensation. However, the DOC statements Mertz cites acknowledge only that, on occasion, one supervisor conveyed some information to Mertz at check-in. As explained below, we conclude that the standard check-in procedure is not a "roll call." Mertz does not explain why he is entitled to compensation for the occasional deviation from that procedure.

Mertz also argues in his reply that the State did not address the requirement for Mertz to return to the Muster Room at the end of his shift to obtain or deposit paperwork. However, Mertz did not develop an argument in his brief-in-chief disputing the DWD's finding that there was little evidence that work was performed at the end of his shift.

acknowledgement that a supervisor occasionally conveyed information to Mertz contrary to the standard check-in process. Rather, the DOC's acknowledgement that the occasional transfer of information occurred contrary to standard procedure reinforces that the check-in process is meant to be a simple visual of the officer by the supervisor. Because the DWD's findings are supported by substantial evidence in the record, we do not disturb them.

¶8 Next, Mertz contends that he was involved in "law enforcement" activities as a correctional officer and thus was entitled to compensation for "all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call." *See* 29 C.F.R. § 553.221(b) and (f). Mertz argues that his check-in procedure is a "roll call" and thus compensable. Mertz argues that his check-in procedure is not equivalent to "checking in and out and waiting in line to do so," which "would not ordinarily be regarded as integral parts of the principal activity or activities." *See* WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c. (through Oct. 2015). Rather, Mertz contends, his check-in is integral to his workday because he receives necessary work information during the check-in. Further, Mertz asserts the time Mertz spends walking to his post after check-in is compensable as time following the beginning of his work day. *See* ***IBP, Inc. v. Alvarez***, 546 U.S. 21, 37 (2005) (holding that, "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" is compensable). Finally, Mertz asserts that the DWD disregarded its own rule, WIS. ADMIN. CODE § DWD 274.08, which requires the DWD to rely on 29 C.F.R. § 553.

¶9 The State responds that Federal and Wisconsin law interpret compensable work time as limited to an employee's "principal duties," excluding preliminary and postliminary activities. It asserts that the check-in procedure in this case is a preliminary activity that is not part of Mertz's principal duties, and thus is not compensable. It argues that the time Mertz spends doing check-in and walking to his post are comparable to the pre- and post-shift activities the United States Supreme Court found non-compensable in ***Integrity Staffing Solutions, Inc. v. Busk***, 135 S. Ct. 513 (2014), and ***IBP***. The State also points out that, under WIS. ADMIN. CODE § 274.08(2) (through Oct. 2015), compensation for public employees is governed by:

> the federal Fair Labor Standards Act, 29 C.F.R. Part 553, the regulations of the U.S. department of labor relating to the application of the Act to employees of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employees of state and local governments.

Thus, the State asserts, the federal regulation providing that checking in and checking out and waiting in line to do so are non-compensable preliminary activities is applicable to this case. *See* 29 C.F.R. § 790.7(g). The State asserts that, even assuming that Mertz is involved in "law enforcement activities" as a correctional officer, the check-in procedure here has none of the characteristics of a "roll call" that would be compensable under the federal regulations. *See. e.g.*, ***Bishop v. United States***, 74 Fed Cl. 144, 150-51, 154 (U.S. Ct of Fed. Cl. 2006) (describing "roll call" activities as involving "checking to make sure all of the correctional officers coming on duty were present and discussing various issues and concerns"). The State then asserts that, because the check-in procedure is not compensable time commencing Mertz's workday, the time between check-in and Mertz's arrival at his post at the start of his shift is not compensable.

¶10 We agree with the State. We determine that, under controlling case law and federal regulations, the time Mertz spends at check-in is not compensable. Because the check-in is not compensable work time, it does not commence Mertz's workday. It follows that Mertz is also not entitled to compensation for time Mertz spends walking to his post after check-in.

¶11 The Supreme Court has explained that any preliminary or postliminary activity that is not "integral and indispensable to the principal activities that an employee is employed to perform," that is, an activity that is not "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities," is not compensable. ***Integrity Staffing***, 135 S. Ct. at 517. Thus, in ***Integrity Staffing***, "the employees' time spent waiting to undergo and undergoing Integrity Staffing's security screenings" after the end of their shifts was not compensable. ***Id.*** at 519. Similarly, in ***IBP***, 546 U.S. at 42, "time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday" was not compensable.

¶12 We conclude that the time Mertz spends at check-in—allowing a supervisor to view Mertz and confirm that Mertz is present, in uniform and sober—is the type of preliminary activity that is not compensable because it is not integral and indispensable to Mertz's principal activities as a correctional officer. We discern no basis to distinguish the quick check-in prior to the start of a shift from the activities that were required but not compensable in ***Integrity Staffing*** and ***IBP***. Additionally, we are persuaded that the activity in this case is the

"checking in" that 29 C.F.R. § 790.7(g) explains is excluded from compensable time.[4]

¶13 We assume for purposes of this discussion that Mertz is involved in "law enforcement" as defined under the federal regulations. However, we are not persuaded that the check-in process in this case amounts to a compensable "roll call" under 29 C.F.R. § 553.221(b). Under § 553.221(b), compensable time "includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses." To qualify as time that is "an integral part of the employee's principal activity," a "roll call" must be more than simply "checking in." *See* 29 C.F.R. § 790.7(g) ("Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, include checking in and out and waiting in line to do so…."). Thus, "roll calls" have been identified as time officers spend for purposes of attendance and briefing. ***Bishop***, 74 Fed Cl. at 150-51. Here, the check-in is a non-compensable "checking in," as opposed to a compensable "roll call."

¶14 Because the check-in procedure in this case is not compensable worktime, the check-in does not commence the workday. Accordingly, Mertz is not entitled to compensation for the check-in time or the subsequent time walking to his post prior to the start of his shift. We affirm.

[4] We disagree with Mertz that we may only consider 29 C.F.R. § 553, to the exclusion of § 790.7(g). We consider § 790.7(g) a statement of the effect of other federal legislation on the Fair Labor Standards Act.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.