SUMMARY
June 15, 2023

2023COA53

No. 21CA2057 — *Brennan v. Broadmoor Hotel*— Labor and Industry — Colorado Minimum Wage Order — Tipped Employees — Overtime — Commission Sales Exemption — Sales Employees

A division of the court of appeals interprets, for the first time, two terms in Colorado Minimum Wage Order Number 35. *See* 7 Code Colo. Regs. 1103-1 (effective Jan. 1, 2019-Dec. 31, 2019), https://perma.cc/GA3G-4ZUP (MWO). First, the division concludes that the hearing officer reasonably concluded that a "service charge" for food and drink consumed during a banquet does not constitute a "tip" under the MWO because banquet clients cannot decide whether to pay a service charge and, if so, how much. And second, the division concludes that a banquet server is not a "sales employee" under the MWO because a banquet server is not employed for the purpose of making sales.

The division therefore affirms the Department of Labor and Employment's order awarding wages and penalties to a former banquet server for the employer's failure to pay overtime, but it reverses the imposition of a fine for the same because the employer had good faith legal justifications for withholding payment.

COLORADO COURT OF APPEALS **2023COA53**

Court of Appeals No. 21CA2057
City and County of Denver District Court No. 20CV31154
Honorable Christopher J. Baumann, Judge

Rowean Brennan,

Plaintiff-Appellee and Cross-Appellant,

v.

Broadmoor Hotel Inc.,

Defendant-Appellant and Cross-Appellee,

and

Colorado Department of Labor and Employment, Division of Labor Standards and Statistics,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

Division IV
Opinion by JUDGE FOX
Welling and Kuhn, JJ., concur

Announced June 15, 2023

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¶ 1 This case presents two questions. First, we must decide whether a mandatory, fixed "service charge" for food and drink consumed during a banquet constitutes a "tip" under Colorado Minimum Wage Order Number 35, 7 Code Colo. Regs. 1103-1 (effective Jan. 1, 2019-Dec. 31, 2019), https://perma.cc/GA3G-4ZUP (MWO),[1] which implements the Colorado Wage Act (CWA), *see* §§ 8-4-101 to -123, C.R.S. 2022. Second, we must decide whether a banquet server is a "sales employee" as that term is defined in the MWO. *See* 7 Code Colo. Regs. 1103-1(6).

¶ 2 We conclude that the hearing officer reasonably concluded that a banquet service charge is not a tip because banquet clients cannot decide whether to pay the service charge and, if so, how much. We further conclude that a banquet server is not a sales employee because a banquet server is not employed for the purpose of making sales. Therefore, we affirm the hearing officer's decision

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[1] In July 2020, the Colorado Department of Labor and Employment promulgated a new regulation known as the Colorado Overtime and Minimum Pay Standards Order (COMPS Order), which replaced the Colorado Minimum Wage Order (MWO) in effect at the time of this action. However, all references to 7 Code Colo. Regs. 1103-1 in this opinion are to the 2019 MWO, as that regulation controlled when Brennan's wage complaint was filed.

in these respects, but we reverse the imposition of a fine for the reasons discussed below.

I. Factual and Procedural Background

¶ 3 From 2013 to 2019, Broadmoor Hotel Inc. employed Rowean Brennan as a banquet server at the Broadmoor, a luxury resort in Colorado Springs. The Broadmoor paid Brennan a base hourly wage of $2.17 plus a portion of the 22% service charge on food and drink consumed at an event.[2] The service charge was paid as a single expense by the banquet client after the event. It is undisputed that the Broadmoor told banquet clients that it retained a portion of that service charge for administrative costs and passed the rest on to the service staff. Banquet attendees also infrequently left banquet staff separate tips, which were passed through to them. Under this scheme, Brennan earned between $11.36 and $33.05 per hour during the relevant timeframe plus any passed through tips.[3]

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[2] Brennan's base hourly wage and the portion of the banquet service charge he received increased with the length of his employment. And the service charge increased to 24% in 2018.

[3] Although Brennan worked for the Broadmoor from 2013 to 2019, the Colorado Division of Labor Standards and Statistics is only

¶ 4 In February 2019, Brennan filed a complaint with the Colorado Division of Labor Standards and Statistics (the Division) within the Department of Labor and Employment. Brennan claimed that he was a "tipped employee" under the MWO, which established a distinct minimum wage for employees who regularly received more than thirty dollars in tips per month. *See* 7 Code Colo. Regs. 1103-1(2) (defining tipped employee); 7 Code Colo. Regs. 1103-1(3(c)) (delineating between the standard and tipped employee minimum wages). Brennan asserted that he was owed the difference between his base hourly rate and the tipped employee hourly rate ($6.28 in 2017; $7.18 in 2018; $8.08 in 2019).

¶ 5 The Division initiated an investigation of Brennan's complaint and, with his consent, expanded that investigation to include a potential failure to pay overtime. *See* § 8-4-111(2)(a)(I), C.R.S. 2022; MWO, 7 Code Colo. Regs. 1103-1(4). The Broadmoor responded that Brennan was (1) not entitled to the tipped employee

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authorized to investigate complaints concerning wages earned in the two years before the complaint is filed. *See* MWO, 7 Code Colo. Regs. 1103-1(15). Since Brennan filed his complaint in February 2019, the Division could only investigate violations dating back to February 2017.

minimum wage because the banquet service charge was not a tip and (2) exempt from overtime pay under the "Commission Sales Exemption." *See* MWO, 7 Code Colo. Regs. 1103-1(6).

¶ 6 The Division issued a citation to the Broadmoor for failing to pay Brennan the tipped employee minimum wage and overtime. *See* § 8-4-111(2)(c)(I). It ordered the Broadmoor to pay Brennan $7,500 in wages (the statutory maximum) and $9,375 in penalties, along with $1,850 in fines to the Division. *Id.*

¶ 7 The Broadmoor appealed the Division's citation to a hearing officer. *See* § 8-4-111.5, C.R.S. 2022. The Broadmoor submitted documentation in support of its position and requested a hearing. The hearing officer conducted a hearing during which several of the Broadmoor's senior management testified. In a written order, the hearing officer reversed the Division's citation in part and affirmed in part.

¶ 8 The hearing officer reversed the Division's conclusion that Brennan was a tipped employee because the banquet service charge

did not constitute a "tip" under the MWO.[4] The undisputed evidence showed that all banquet clients were assessed a mandatory, fixed charge of 22% for food and drink consumed at a banquet, to which they agreed in advance by contract. The hearing officer concluded that this type of charge did not fit the customary definition of a tip as being a payment that an individual customer voluntarily chooses to provide. Thus, the hearing officer determined that the Broadmoor did not owe Brennan the difference between his base hourly wage and the tipped employee minimum wage.

¶ 9 However, the hearing officer affirmed the Division's conclusion that Brennan was owed overtime. She rejected the idea that Brennan was exempt from overtime pay under the MWO's Commission Sales Exemption. *See* 7 Code Colo. Regs. 1103-1(6). The hearing officer interpreted the term "sales employee" in that exemption to mean someone employed for the purpose of making sales. She found that Brennan did not make sales and, therefore,

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[4] The Division's conclusion that Brennan was a "tipped employee" largely stemmed from the fact that the Broadmoor failed to provide the Division with evidence to support its characterization of the service charge. The Broadmoor provided that evidence on appeal to the hearing officer.

was not employed for the purpose of making sales. She otherwise affirmed the Division's imposition of penalties and fines.

¶ 10 Brennan appealed the hearing officer's conclusion that he was not a tipped employee and thus was not entitled to the difference between his base hourly wage and the tipped employee minimum wage. The Broadmoor cross-appealed the hearing officer's conclusion that Brennan was not exempt from overtime pay and thus was owed overtime wages. The Division opposed both appeals and, pursuant to section 24-4-106(7), C.R.S. 2022, asked that the hearing officer's order be affirmed in its entirety.

¶ 11 The district court consolidated the appeals at the parties' request. In a written order, the court affirmed the hearing officer's conclusion in full.

¶ 12 The Broadmoor now appeals the court's conclusion that Brennan was not exempt from overtime pay. Brennan cross-appeals the court's conclusion that he is not a tipped employee. The Division again opposes both appeals and asks us to affirm the hearing officer's order.

II. Standard of Review

¶ 13 Judicial review of state agency action is governed by section 24-4-106(7). As pertinent here, a reviewing court may only set aside an agency action if it is

> [a]rbitrary or capricious; . . . [i]n excess of statutory jurisdiction, authority, purposes, or limitations; . . . [a]n abuse or clearly unwarranted exercise of discretion; . . . [u]nsupported by substantial evidence when the record is considered as a whole; or . . . otherwise contrary to law.

§ 24-4-106(7)(b). We do not review the district court's decision; rather, we review the agency's action directly. *See HCA-HealthONE LLC v. Colo. Dep't of Lab. & Emp.*, 2020 COA 52, ¶ 27.

¶ 14 We review administrative regulations de novo. *Gomez v. JP Trucking, Inc.*, 2022 CO 21, ¶ 27. In construing an administrative regulation, we are guided by the same rules of construction that we would apply in interpreting a statute. *Id.* Our foremost goal is, of course, to give effect to the promulgating body's intent. *Id.* If the language of the regulation is unambiguous, we enforce it as written, giving the words and phrases their common and ordinary meaning. *Id.*

¶ 15 At the same time, "[w]e must give deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce the law." *Ybarra v. Greenberg & Sada, P.C.*, 2016 COA 116, ¶ 28 (quoting *Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996)), *aff'd*, 2018 CO 81. This means we may only reject an agency's interpretation of its regulation when the plain language of the regulation compels a different meaning. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 27.

¶ 16 We must sustain an agency's decision if it is supported by substantial evidence in the record. *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308 (Colo. 1986); *HCA-HealthONE LLC*, ¶¶ 27, 39. "Substantial evidence is the quantum of probative evidence that a fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 730 (Colo. App. 2009).

III. Discussion

A. A Mandatory, Fixed Banquet Service Charge is Not a Tip

¶ 17 Neither the CWA nor the MWO defines the term "tip." Recognizing this, the hearing officer adopted the ordinary meaning of a tip in this context as a customer's voluntary payment for service provided in an amount determined by that customer. With that definition in hand, the hearing officer concluded that the Broadmoor's banquet service charge was not a tip because it was a mandatory, fixed charge paid by banquet clients for banquet services.

¶ 18 We agree that the Broadmoor's service charge is not a tip.

¶ 19 Foremost, the service charge does not fit within the ordinary meaning of tip. Under the CWA and Division rules, a tip and a gratuity are equivalent terms that are used interchangeably. *See* § 8-4-103(6), C.R.S. 2022; Wage Protection Rule 2.14, 7 Code Colo. Regs. 1103-7. A gratuity is "something given voluntarily or beyond obligation usually for some service." Merriam-Webster Dictionary, https://perma.cc/EC27-RHLH; *see also Veith v. People*, 2017 CO 19, ¶ 15 (noting that courts may consult recognized dictionaries to ascertain a term's ordinary meaning). Thus, under this definition, a

mandatory banquet service charge is not a tip because it is not given voluntarily — both in terms of whether to provide payment and how much if so. The customer who tips decides whether to provide money for a service and, if so, how much. By contrast, banquet clients were required to pay the 22% service charge — and no more — to have the event at the Broadmoor.[5]

¶ 20 Second, construing the service charge here as a tip would be inconsistent with our court's prior interpretation of what constitutes a tip. In *Simmonds v. Eastman Kodak Co.*, 781 P.2d 140 (Colo. App. 1989), a division addressed whether a discretionary, company-wide annual bonus distributed fractionally to each employee was a part of the claimant's wage or was a gratuity. The division concluded that such a payment did not come within the customary meaning of a tip. *Id.* at 142. As noted, the Broadmoor's

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[5] It could be argued that, under this interpretation, a mandatory gratuity for a large restaurant party would not be considered a "tip" because it is not voluntary. But our interpretation of this service charge would not support that conclusion. As noted, the Broadmoor told banquet clients that a portion of the service charge went to administrative costs (40%). So, unlike a large party restaurant gratuity, the Broadmoor's service charge was not intended solely for service staff and did not benefit only service staff.

service charge is a mandatory, fixed amount paid by the banquet client (not the attendees) directly to the Broadmoor. In contrast, a tip is customarily provided by the individual patron on a voluntary basis directly to the worker. Just as the division in *Simmonds* declined to recognize a company-wide annual bonus as a tip because it ignored the practical differences between an annual bonus and a tip, we likewise decline to recognize the Broadmoor's service charge as a tip because it would ignore significant practical differences between that service charge and a tip.

¶ 21 Third, and perhaps most importantly, the hearing officer's interpretation of the term tip under these circumstances comports with the word's ordinary meaning and is therefore entitled to deference. *See Ybarra*, ¶ 27. Certainly, it is arguable that a banquet service charge could be a tip because it is in one sense a payment to banquet servers for banquet services. Nevertheless, the hearing officer declined to adopt this more expansive definition and instead interpreted the term as requiring a voluntary act by the patron. We may not disturb such a reasonable interpretation. *See id.*; *Rags Over the Ark. River, Inc.*, ¶ 27.

¶ 22 Brennan and amici argue that, in deciding whether the service charge is a tip, we should look exclusively to whether customers intended for the service charge to end up with banquet servers — regardless of whether the payments were voluntary. In support, they cite section 8-4-103(6), which prohibits employers from claiming a right in or control over gratuities "where the custom prevails of the giving of gratuities by patrons to an employee of the business." But even if we ignored the long-applied analytical framework used by our appellate courts to interpret undefined regulatory terms, this argument fails because it assumes that the banquet service charge is, in fact, a gratuity.

¶ 23 The undisputed evidence shows that the Broadmoor's service charge was mandatory and fixed at 22%. It was charged on all food and beverage served at the banquet, and the banquet client could not opt out of the charge. Moreover, banquet clients and attendees had the ability to leave separate gratuities for servers, which were passed through to them. While Brennan's alternative interpretations of "tip" may be reasonable under other circumstances, our inquiry is limited to whether the plain language of the regulation compels the conclusion that the Broadmoor's

service charge was a tip. We conclude that the plain language does not compel this conclusion.[6] Accordingly, we affirm the hearing officer's conclusion that Brennan is not owed wages for the difference between his base wage and the tipped employee minimum wage.[7]

B. A Banquet Server is Not a "Sales Employee"

¶ 24 Employees must be paid overtime (i.e., time and one-half) under certain conditions. *See* MWO, 7 Code Colo. Regs. 1103-1(4). Certain types of employees, however, are exempt from overtime pay. One such exemption is the Commission Sales Exemption. Under that exemption,

> *sales employees* of retail or service industries paid on a commission basis [are exempt from

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[6] Though the parties analogize to tipped employees in a restaurant or similar setting, we need not reach that question here. We express no opinion on whether a given restaurant service charge would be a tip or gratuity.

[7] We recognize that our holding permits a degree of opacity in the payment of banquet servers like Brennan. In fact, the Broadmoor's banquet servers did not know how much of the service charge they collectively received (approximately 60%). Be that as it may, the General Assembly and the Department of Labor and Employment are empowered to further delineate what constitutes a service charge and how that interfaces with wage regulation, as several other states have done. *See, e.g.*, Haw. Rev. Stat. § 388-1 (2022); Mass. Gen. Laws ch. 149, § 152A(a) (2022); Minn. Stat. § 177.23, subdiv. 9 (2022); Wash. Rev. Code § 49.46.020(3) (2022).

> overtime pay], provided that 50% of their total earnings in a pay period are derived from commission sales, and their regular rate of pay is at least one and one-half times the minimum wage. This exemption is only applicable for employees of retail or service employers who receive in excess of 75% of their annual dollar volume from retail or service sales.

7 Code Colo. Regs. 1103-1(6(b)) (emphasis added). Additionally, in its "Exemption Definitions" section, the MWO provides that an "Outside Salesperson" is

> any person employed primarily away from the employer's place of business or enterprise *for the purpose of making sales* . . . . Such outside *sales employee* must spend a minimum of 80% of the workweek in activities directly related to their own outside sales.

7 Code Colo. Regs. 1103-1(5(d)) (emphases added).

¶ 25 The hearing officer began her analysis by addressing the definition of a "sales employee." She determined that, although the Commission Sales Exemption did not define the term, Outside Salesperson is defined. And, within that definition, "salesperson" is clearly defined as someone who is employed "for the purpose of making sales." *See id.* She further observed that the terms "salesperson" and "sales employee" are used interchangeably; in

fact, "sales employee" is used to define "salesperson." *See id.* Bearing all this in mind, the hearing officer concluded that the terms mean the same thing — that is, a sales employee under the Commission Sales Exemption is someone employed for the purpose of making sales.

¶ 26 The hearing officer then concluded that, as a factual matter, Brennan was not employed for the purpose of making sales. Rather, he was employed to provide banquet services (primarily food and beverage service during events).

¶ 27 The Broadmoor argues that Brennan, as a banquet server, was a sales employee because he was part of a sales team that sold the experience of hosting an event at the Broadmoor. It argues that he "made sales" by providing exceptional banquet service (thus encouraging repeat customers) and attentive beverage service (thus increasing the total sales and, in turn, the size of the service charge and his payout from that charge). The Broadmoor asserts that the hearing officer applied an unduly narrow meaning to the term sales employee and that we should instead adopt its broader conception.

¶ 28 We conclude that a sales employee unambiguously means someone employed for the purpose of making sales.[8] As the hearing officer observed, the terms salesperson and sales employee are used interchangeably and thus mean the same thing in this context. Contrary to the Broadmoor's contentions, just because a concept is referred to with different terms does not mean the terms have distinct meanings. Indeed, when a promulgating body uses different terms interchangeably, our appellate courts have had no issue ascribing the same meaning to them when appropriate. *See, e.g.*, *Park Cnty. Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262, 270 (Colo. 1999) (the General Assembly used the term "the Denver Basin" interchangeably with "Dawson, Denver, Arapahoe, and Laramie–Fox Hills aquifers"); *City of Aurora v. Scott*, 2017 COA 24, ¶ 37 (the General Assembly used the term "effective date of the approval" interchangeably with "effective date of adoption" to express an act of agreement or endorsement).

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[8] Because we conclude that sales employee unambiguously means someone employed for the purpose of making sales, we decline the Broadmoor's invitation to look at overlapping federal authority. *See Gomez v. JP Trucking, Inc.*, 2022 CO 21, ¶ 32.

¶ 29 Additionally, the hearing officer's interpretation is consistent with the ordinary meaning of the term salesperson, which means someone who is employed "to sell a product or service." Merriam-Webster Dictionary, https://perma.cc/W74Q-PCDE. We see no reason to depart from this straightforward definition of the term. And even if we had reason to craft a new definition, we may not disregard an agency's interpretation of its own regulation when it is consistent with the plain meaning of the term. *Ybarra*, ¶ 27; *Rags Over the Ark. River, Inc.*, ¶ 27.

¶ 30 The Broadmoor quarrels with the hearing officer's factual conclusion that Brennan was not employed for the purpose of making sales. But this factual conclusion is supported by substantial evidence in the record. The record evidence supports that Brennan was employed to provide service to banquet customers — not to make sales. *See HCA-HealthONE LLC*, ¶ 27 (we may not reweigh the evidence). Once again, we are not at liberty to unravel such determinations when they enjoy sufficient evidentiary support. *See Ross*, 713 P.2d at 1308; *Black Diamond Fund*, 211 P.3d at 730.

¶ 31 The Broadmoor contends that the hearing officer's ruling was internally inconsistent. It asserts that, because the hearing officer ruled that Brennan was paid on a commission basis, she was *required* to conclude that he was a sales employee (the idea being that an individual paid on a commission basis is, by definition, a salesperson). *See* MWO, 7 Code Colo. Regs. 1103-1(6(b)).

¶ 32 We disagree. For one, if all employees paid on a commission basis are necessarily sales employees, then the term sales employee would be superfluous. Thus, the Broadmoor's proffered interpretation clashes with a fundamental tenet of statutory construction to not read words out of administrative regulations. *See Dep't of Revenue v. Agilent Techs., Inc.*, 2019 CO 41, ¶ 16 (observing that we must respect the promulgating body's choice of language and not add or subtract words). Additionally, because the MWO is remedial in nature, its coverage must be construed broadly and its exemptions construed narrowly. *See Bowe v. SMC Elec. Prods., Inc.*, 945 F. Supp. 1482, 1484-85 (D. Colo. 1996) (the Wage Orders are "remedial in nature and [their] coverage should be liberally construed . . . [and] reflect[] an intention to provide broad protection"); *Brunson v. Colo. Cab Co.*, 2018 COA 17, ¶ 23

("[E]xemptions, such as the overtime pay exemption, should be construed narrowly."). In asking us to classify Brennan as exempt from overtime pay under the Commission Sales Exemption, the Broadmoor construes the MWO's coverage narrowly and its exemptions broadly. We decline to adopt an interpretation directly inconsistent with these principles of statutory interpretation.

¶ 33 The hearing officer also determined that Brennan was not paid wages of at least one and a half times the minimum wage during certain weeks. *See* MWO, 7 Code Colo. Regs. 1103-1(4). The Broadmoor argues that these were not "standard weeks." It urges us to disregard the seven-day week as the framework and asserts that "any representative period of one month or more shows that Brennan consistently and routinely earned at least one-and-a-half times the minimum wage."

¶ 34 The MWO plainly establishes the seven-day week as the framework for assessing the applicability of overtime. It provides that "employees shall be paid time and one-half of the regular rate of pay for any work in excess of . . . forty (40) hours per workweek." *Id.* And the MWO defines a workweek "as any consecutive seven (7) day period starting with the same calendar day and hour each

week." 7 Code Colo. Regs. 1103-1(2). We reject the Broadmoor's bald contention that we should use a longer timeframe to determine whether overtime pay is warranted.

¶ 35 For these reasons, we discern no error in the hearing officer's conclusion that the Broadmoor owes Brennan overtime wages.

C. The Broadmoor Had a Good Faith Justification For Not Paying the Claimed Wages

¶ 36 The Division levied a fine of $1,850 on the Broadmoor for its failure to pay Brennan wages. The hearing officer and the district court affirmed the fine.

¶ 37 The fine was imposed pursuant to section 8-4-113(1)(a), C.R.S. 2022, which allows the imposition of a fine when the employer fails to pay the employee wages "without good faith legal justification." The Broadmoor argues that it had a good faith legal justification for not paying the claimed wages — specifically, its belief that (1) the service charge was not a tip and (2) the Commission Sales Exemption applied.

¶ 38 We agree that section 8-4-113(1)(a) does not permit the imposition of this fine under these circumstances. The Broadmoor had a good faith justification for not paying wages associated with

the first issue, as evidenced by the fact that the hearing officer, the district court, and we likewise conclude that its service charge was not a tip. As for the second issue, while we ultimately conclude that Brennan was not a sales employee and thus not exempt from overtime pay under the Commission Sales Exemption, the Broadmoor advanced plausible arguments in support of its position that he was exempt. *Cf.* C.R.C.P. 11; *In re Trupp*, 92 P.3d 923, 930 (Colo. 2004). It therefore had a good faith legal justification to not pay wages related to the overtime issue, as well.

IV. Disposition

¶ 39 The portion of the hearing officer's order compelling the Broadmoor to pay Brennan for wages owed and associated penalties is affirmed. The imposition of a fine for failing to pay him those monies is reversed.

JUDGE WELLING and JUDGE KUHN concur.