

**CAPITAL CASE: EXECUTIONS SET OCTOBER 9, 2013 at 10:00 A.M.  
AND OCTOBER 23, 2013 at 10:00 A.M.**

No. 13-16978

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD HAROLD SCHAD

Appellant-Petitioner

AND

ROBERT GLEN JONES, JR.

Intervenor-Plaintiff

v.

JANICE K. BREWER, ET. AL

Appellee-Respondent

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA  
NOTICE OF SUPPLEMENTAL AUTHORITY PURSUANT TO FRAP 28(j)

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Appellants by counsel, hereby give notice of supplemental authority in support of his appeal. Harris, Craig and O'Dell, Rob "Overtime issue arises at Arizona Board of Executive Clemency," October 7, 2013, *Arizona Republic*, <http://www.azcentral.com/news/politics/articles/20131004arizona-board-clemency-overtime-issue.html>. Attached.

Respectfully submitted this 7<sup>th</sup> day of October, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I also certify that I emailed a copy of the same to counsel, Dale Baich, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

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# Overtime issue arises at Arizona Board of Executive Clemency

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By Craig Harris and Rob O'Dell  
The Republic | azcentral.com  
Sun Oct 6, 2013 9:27 PM

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The state Department of Administration is trying to determine if four current and former Arizona Board of Executive Clemency members are owed potentially hundreds of hours of overtime pay.

One former board member said it's likely they are owed "something less than 500 hours" each of overtime pay, but the former clemency board executive director who quit this summer following allegations of misconduct said his former colleagues are owed nothing and are "greedy."

The cost for repayment is unknown because the situation remains under investigation, according to the Department of Administration.

The pay controversy is the latest problem for the clemency board, a five-member group appointed by the governor that decides the fate of inmates seeking early release from custody. The agency, which also has just six full-time positions, typically functions below the public's radar but has recently created numerous headaches for Gov. Jan Brewer.

Five former board members, including one who claims he is owed overtime pay, alleged last month in an unrelated federal appeal of a death-penalty case that Brewer was so concerned about appearing tough on crime that her top aides pressured the board to show no mercy for prisoners in high-profile cases. Brewer disputed their claims.

Meanwhile, ex-Director Jesse Hernandez — appointed last year by Brewer despite having no criminal-justice experience — abruptly quit in August after a state investigation concluded he had engaged in nine cases of inappropriate behavior, including giving an unqualified female employee he was dating a promotion and a \$21,300 pay raise.

Hernandez and two other appointees were seated last year after Brewer sacked their predecessors, including the prior, longtime board chairman.

Brewer's spokesman, Andrew Wilder, said that the Administration Department has been in the process of looking into potential pay issues involving clemency-board members. The state will provide additional information once the inquiry is complete, he said.

Wilder declined to answer questions about how the state would finance



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compensation if the employees are found to be owed back wages.

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Alan Ecker, a Department of Administration spokesman, said it was Hernandez who approved board members' timecards, as agency directors generally do. He said the Administration Department would not have known that timecards did not reflect hours worked because it cannot audit them.

"ADOA doesn't have oversight over the other agencies," Ecker said. "The other agencies are responsible for their own internal controls."

Those possibly owned money are three current board members — Jack LaSota, Ellen Kirschbaum and Brian Livingston, who became executive director when Hernandez resigned — and former member Melvin Thomas, who resigned from the board in early August because of problems he had with Hernandez.

Each board member is paid about \$23.50 an hour. The executive director, who also serves as a board member, is paid more.

The Arizona Republic obtained board financial records under the state's open-records law. Its review found that board members during the past fiscal year were paid for working up to 40 hours a week, and none was paid overtime during a period when the board was trying especially hard to whittle down a backlog of cases.

Ecker said the state as soon as possible will resolve the issue. But he said the cases are complex because employees potentially were shorted pay, and also did not financially contribute to the Arizona State Retirement System, which is required by law. The agency also did not make its required contributions to ASRS.

"It's being worked out," Ecker said.

Employees could be entitled to payment of 1 1/2 times their normal pay for overtime hours.

Livingston, the new board chairman, said the Arizona Legislature changed the law so that clemency-board members would be paid as hourly employees starting in early August 2012. Previously, they were salaried, which meant they were not entitled to overtime pay.

Livingston said the period being examined regarding overtime pay for board members is from early August to mid-December 2012, when the board was working long hours to clear its backlog of clemency cases. Members had thought they were exempt from overtime, but later found out they were eligible for additional pay and made their claims with the state.

Hernandez, however, said none of his ex-colleagues worked overtime during that time. He claimed some didn't even work the total hours they were paid for, as some left early.

"They have no overtime coming to them whatsoever," he said. "They are greedy retired individuals who want to supplement their income. ... It's just pure greed."

Hernandez abruptly quit Aug. 16, after a Department of Administration probe substantiated nine claims of misconduct by Hernandez, who stood accused of making discriminatory and inappropriate comments to female employees and ogling them.

The Republic found that while Hernandez did not report any overtime worked by fellow board members, he meticulously recorded extra hours he worked as a salaried employee.

Hernandez reported that he worked 484 extra hours in fiscal 2013, or nearly 19 overtime hours per two-week pay period, according to clemency-board payroll data analyzed by The Republic.

However, he never was paid for those extra hours despite submitting them, according to Ecker.

Ecker said salaried employees can put down extra hours but they aren't paid for them. He said the state allows employees to enter the extra time because it adds to the "knowledge base" and helps keep track of hours worked and potential burnout.

Hernandez said he documented all of his hours to show how hard he had worked.

"If anyone called me at 5 o'clock on a Friday, I was there, and I showed up at 6 in the morning (to work)," Hernandez said. "That is what people (the public) expected out of us."

Hernandez, who was paid \$84,146 a year, added that he brought it to the attention of the Department of Administration and the Governor's Office that board members were not contributing to the Arizona State Retirement System.

...ied to clean it all up," Hernandez said.

Hernandez declined to discuss the allegations against him, except to acknowledge he dated an employee from whom he promoted. However, he said she was qualified for the job and the promotion. In the wake of his departure, the woman was recently demoted and had her pay cut.

Former board member Thomas said he had difficulty believing Hernandez.

During the unrelated federal court hearing last week, Thomas testified said that he quit because he was



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cheated out of pay by Hernandez.

By the end of his time on the board, "Half of the stuff that came out of his (Hernandez's) lips I didn't believe," Thomas told the court.

Kirschbaum could not be reached for comment.

But LaSota said he knows he is owed hours of overtime.

LaSota said he did not realize he was entitled to overtime, so he didn't track his hours, and relied on the Hernandez to log his hours.

LaSota put much of the blame on Brewer and legislators, who he said treated the clemency board like "second-class citizens" by first cutting their hours, then making them hourly employees and giving the board members no health insurance or paid sick and vacation time.

"We certainly put in the time," LaSota said. "It's wrong for Mr. Hernandez to describe any person on that board as greedy, because every member on that board is underpaid."

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