

Issue: Non-compliance with the Fair Labor Standards Act; Hearing Date: 12/23/02;
Decision Issued: 05/07/03; Agency: Dept. of Forestry; AHO: Carl Wilson Schmidt,
Esq.; Case No. 5601/5602



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5601 / 5602

Hearing Date: December 23, 2002
Decision Issued: May 7, 2003

PROCEDURAL HISTORY

On November 19, 2002, Grievant filed two grievances challenging the Agency's compliance with the Fair Labor Standards Act regarding its on-call requirements. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. EDR Ruling 2002-002 consolidated the grievances and qualified them for hearing with certain restrictions. On December 5, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 23, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party
Agency Counsel
Seven witnesses

ISSUE

Whether Grievant is exempt or nonexempt from the Fair Labor Standards Act?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted.¹ Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Forestry² employs Grievant as a Forester.³ He has been a Forester since 1969. The purpose of his position is to:

Provide scientific based professional assistance in the management of the forest resources of the Commonwealth. Provide leadership in the administration and implementation of programs to protect, improve, and renew the forest resources. Conduct educational activities to improve understanding of resource management practice and their contribution to forest health and sustainability. Provide leadership in the prevention and suppression of wildfires. Enforce fire water quality and seed tree laws.⁴

In order to successfully perform his position, Grievant must possess knowledge, skills, abilities and/or competencies such as:

Knowledge and training in application of technical silviculture practices to provide healthy and sustainable forest resources. Ability to communicate and interact with customers and team members to maintain an effective work environment. Public speaking, writing, and computer skills are desirable. Ability to organize work, maintain records, and complete tasks efficiently.⁵

¹ DOF has the burden of proving its affirmative defenses.

² “The Department of Forestry is authorized to and responsible for (i) investigating insect infestations and disease infections which affect stands of forest trees, and (ii) devising and demonstrating control measures to interested persons. The State Forester shall administer the provisions of this article. Authority for quarantine procedure now vested in the Department of Agriculture and Consumer Services shall remain in that Department.” Va. Code § 10.1-1177.

³ “Forester’ means any person who is engaged in the science, profession and practice of forestry and who possesses the qualifications required by this article.” Va. Code § 10.1-1181.8.

⁴ Agency Exhibit 1.

⁵ Agency Exhibit 1.

Grievant's position is required to have certain education⁶ and licensure:

BS Degree in Forest Management or related Natural Resources Degree from a [Society of American Foresters] accredited college or university. Commercial Drivers License (VA). Commercial Pesticide Applicators Permit.⁷

Grievant is certified by the Society of American Foresters, a professional organization.

Grievant's Employee Work Profile sets forth the core responsibilities of his position and the percentage of time devoted to those responsibilities:

%	Core Responsibilities
A. 30%	Improve and Renew the Forest Resource: Provide scientifically based information on the proper silviculture to promote stewardship, sustainability and health of the forest resources. Perform stand exams, forest stewardship plans, cost share plans, and enforce the VA Seed Tree Law. Accomplish forest resource education through mgt talks and field days.
B. 30%	Improve and Renew the Forest Resource: Coordinate and ensure that silvicultural practices are implemented according to recommended guidelines. These accomplishments include timber stand improvement, reforestation, afforestation, reinspections, and assessment of forest health conditions.
C. 5%	Protect the Forest Resource from Wildfire: Assist with fire suppression activities. Enforce the forest fire laws, work with and direct fire fighting personnel through unified command. Participate in fire prevention and training activities to include school programs, parades and fire department training sessions.
D. 20%	Protect Water Quality Associated with Silvicultural Activity and Riparian Areas: Enforce the Water quality Law and promote protection and establishment of riparian buffers along streams. Educate landowners about the Riparian Tax Credit and assist with its implementation.
E. 10%	Administration: Manage and organize office to maintain records, technical information, correspondence, workload, follow-up of work, and historic records. Complete accurate reports, paperwork, special assignments and

⁶ "In order to use the title of forester in connection with any practice of forestry the person shall hold a baccalaureate or higher degree from a college or university curriculum accredited by the Society of American Foresters and such degree curriculum shall meet the minimum education criterion set forth by the Society in the fields of forest ecology and biology, management of forest resources, and forest resources policy and administration." Va. Code § 10.1-1181.9. Grievant has met this statutory requirement.

⁷ Agency Exhibit 1.

	requests by specified deadlines. Maintain office and assigned DOF equipment according to quality control standards.
F. 3%	Conserve the forest landbase: Educate local decision makers and landowners about the importance of this issue and the tools and programs available to help conserve this resource. Promote the Forest Legacy Program. Serve as a resource for forest resource information in development of the county comprehensive plan.
G. 2%	Teamwork: Serve as team leader for 2001-02. Coordinate development of team plan. Help foster team spirit. Coordinate and lead team meetings. Represent the team on R4 Advisory Group and facilitate communication/information exchange.

Seventy-seven percent of forests in Virginia are owned by private persons. DOF is responsible for advising landowners regarding how to best maintain Virginia forests. Grievant is responsible for coordinating and ensuring that silviculture practices are implemented according to recommended guidelines. Silviculture activity is any forest management activity such as harvesting timber, constructing roads and trails for forest management purposes, and preparation of property for reforestation. Grievant's expertise can be invaluable to landowners who often have little or no experience in forestry decisions. In addition to employing Foresters, DOF employs Technicians who often work along side Foresters.⁸

A Forester⁹ is responsible for drafting stewardship¹⁰ plans to help timberland owners develop healthy productive woodland. Stewardship plans take an inventory of tree species and wildlife conditions. They consider uses of the total forest resources and recommend ways to protect and preserve the land and water quality. Maps are often included in these plans. Foresters write stewardship plans and then submit them to the landowners. In January 2001, the Agency began charging fees for drafting stewardship plans. Once the fee was implemented, the demand for stewardship plans ended. As a result of the drop in demand, the Agency modified its fee schedule so that Foresters can write stewardship plans without cost for sites not exceeding 200 acres in size.

Several State and Federal programs provide financial assistance to landowners who wish to reforest or otherwise improve their land. Before a landowner can be reimbursed for costs under the program, a Forester must draft a cost share plan setting forth the necessary tree planting and other site preparation that the Forester believes is necessary. The Forester must exercise his independent judgment when drafting and verifying the implementation of the cost share plan. In prior years, Technicians could

⁸ Grievant does not supervise any employees.

⁹ Foresters are the only ones who can write stewardship plans.

¹⁰ A stand plan is different from a stewardship plan in that a stand plan involves the Forester looking only at a portion of the acreage that a forester would evaluate as part of a stewardship plan.

draft cost share plans. Since last year, only Foresters have been permitted to draft and implement cost share plans.

Grievant is responsible for ensuring compliance with several Virginia statutes including the Virginia Seed Tree Law and Water Quality Law. He must exercise his independent judgment to determine whether landowners have complied with these statutes. Virginia's Seed Tree Law places restrictions on landowners to assist in reforestation of cutover lands. To ensure compliance with Water Quality laws Grievant, for example, must make sure logging activities do not create erosion or other problems.

Landowners wishing to have aerial application of herbicides on their property must coordinate spraying through the DOF. Landowners pay the Agency who then pays the contractor completing the spraying. The Forester has absolute control and final authority regarding application of the herbicides. For example, if spraying is scheduled on a particular day but the wind changes or a piece of equipment fails, the Forester has the authority to stop the spraying. A Technician would not have this authority.

Many duties of Foresters and Technicians overlap. A significant difference between a Forester and a Technician is the depth of knowledge required for the positions. For example, a Forester must have a comprehensive knowledge of tree biology and the ability to identify tree species whereas a Technician must only have a general sense of tree biology and tree species. A Forester must have a comprehensive knowledge of forest stand dynamics (growth, mortality, etc.) while a Technician must only have an understanding of stand dynamics. A Forester must have comprehensive knowledge of silviculture and the practice of silviculture for Virginia tree species whereas a Technician must only have knowledge of these areas. A Forester possesses comprehensive knowledge of forest and land measurements. A Technician must only have a working knowledge of forest and land measurements.¹¹ A Forester possesses a comprehensive knowledge of forest management¹² and forest health programs and the ability for implementation and measurement of results. A Technician has a strong working knowledge of these matters.¹³

DOF has developed a Fire Readiness Procedure designed to give forest fire managers a decision making tool based on present or predicted weather factors.¹⁴ Forest Fire Readiness is determined by considering a number of factors such as the

¹¹ For example, a Forester should have a better understanding of global positioning satellite units than would a Technician.

¹² A Forester may be expected to draft a forest management plan extending fifty years into the future.

¹³ There are other examples of differences between Foresters and Technicians. Some duties are exclusive to Foresters such as understanding forest economics, marketing, and forest products industry. See, Agency Exhibit 6.

¹⁴ Agency Exhibit 5.

number of days since the last rainfall. Upon considering all of the factors, the risk of fire at a particular time is described by five levels.

Level I (Low)	Fires do not ignite readily. Fires that do start spread slowly and often burn irregularly. Control and mop-up is minimal
Level II (Moderate)	Occasional fire activity. Fires can start from most accidental causes, number of starts are generally low. Fires burn at low to moderate rate, heavy fuel concentrations may burn hot.
Level III (High)	Escalating fire activity. Fires start easily from most causes. Fires burn at moderate to fast rates, control can be difficult if suppression action is not started promptly. Suppression and mop-up is increasingly difficult.
Level IV (Very High)	Hazardous fire conditions. Fires start readily and spread rapidly. Erratic fire behavior and “blow up” conditions are possible. Control of the head may be difficult to impossible until the fire behavior factors change.
Level V (Extreme)	SEVERE FIRE CONDITIONS, POTENTIAL FOR FIRE RELATED DISASTERS ARE HIGH. Direct attack is virtually impossible, fires often escape initial attack. Erratic fire behavior and “blow up” conditions are probable. Resistance to control is high; fires are not usually controlled until the burning conditions subside. Mop-up is difficult and extensive. Constant patrol of contained fires is critical

The Forest Fire Readiness and Mobilization Plan is implemented from February 15 through April 30 and from October 15 through November 30 of each year.¹⁵ In addition, it may be put into effect at anytime when emergency situations develop. On Level II days, Grievant must be able to respond to a fire within one hour. On Level III days, he must be able to respond within a half hour.¹⁶

Grievant is provided a State vehicle for his use. The vehicle has red siren lights and a water tank. When Grievant is not using the vehicle for State business, he must park it at his residence. While on-call, Grievant must be accessible at all times by either carrying a pager, carrying a radio, or providing the Agency with a telephone number where he can be called. Grievant’s on-call response time is measured by the amount of time it takes him to reach his vehicle. In other words, when his response time is 30 minutes, he can be no further than 30 minutes away from his State vehicle. If he fails to timely respond to his vehicle, he is subject to disciplinary action¹⁷ under DHRM Policy 1.60, *Standards of Conduct*.

¹⁵ The Fall fire season is more unpredictable than is the Spring fire season when determining the risk of fire.

¹⁶ During Level 3, 4, and 5 days, both Grievant and a Technician are on-call.

¹⁷ Grievant Exhibit 8.

Grievant resides in a rural area close to a town of approximately 2,500 people. Grievant can engage in any personal activities of his choosing when he is on-call so long as he can meet his required response time. He cannot engage in any personal activities that would prevent him from responding on a timely basis. There are numerous personal activities that Grievant would otherwise engage in if he were not on-call. These include visiting family, going to the movie theater, going on fishing trips with family members, and many other personal activities that Grievant values. In some limited instances, such as deaths in the family, Grievant may obtain permission from the Regional Forester to have another employee assume Grievant's on-call responsibilities.

During the 76 days from February 15, 2001 to May 1, 2001, there were 21 Level III days and 31 Level II days. Grievant was on-call for 52 days or 68% of the time. During the 52 days from October 15, 2001 to December 5, 2001, there were 24 Level III days and 17 Level II days. Grievant was on-call for 41 days or 79% of the time.¹⁸

In 2000, Grievant did not have to respond to any fires on Saturdays and Sundays during Level III days in fire season. In 2001, he responded to six fires. In 2002, he did not have to respond to any fires on a Saturday or Sunday. When Grievant is called to respond to a fire, he is no longer in on-call status and he is paid for his time devoted to responding to the fire.

There are three volunteer fire departments in Grievant's county. They are the primary firefighters in the county. When Grievant responds to a fire, he usually arrives after the local firefighters have already responded and have suppressed or are about to suppress the fire. Grievant's responsibilities when assisting with fire suppression are oversight coordination, tracking resources, and providing logistics.

CONCLUSIONS OF POLICY

Every business must classify each of its employees as "exempt" or "nonexempt" from the overtime requirements of the FLSA.¹⁹ Unless an employee meets the criteria of an exemption, the employee is nonexempt and must receive the appropriate overtime compensation. A person employed in a bona fide executive, administrative or professional²⁰ capacity is exempt from the FLSA. Exemptions are an affirmative defense to a claim for unpaid overtime wages under the FLSA and the burden to establish the exemption is on the employer.

State agencies may provide an on-call supplement to employees who are required to be available to return to work.²¹ DHRM has delegated to individual agencies

¹⁸ Grievant Exhibit 3.

¹⁹ The Agency has classified Grievant as an exempt employee. Grievant Exhibit 1.

²⁰ Based on Grievant's duties, his position would not be considered executive or administrative.

²¹ DHRM Policy 3.05.

pay practice decision-making such as providing on-call²² supplements to employees.²³ When on-call²⁴ compensation is granted, it is usually provided at the rate of one hour of pay or compensatory leave for each eight hour shift served.²⁵ DOF may choose to pay on-call supplements to exempt or nonexempt employees. DOF's policy is not to pay anyone for being on-call.

In order to determine whether Grievant must be paid for being on-call, the Hearing Officer must first determine whether Grievant is an exempt²⁶ or nonexempt²⁷ employee under FLSA. Grievant earns more than \$250²⁸ per week.²⁹ His status under the FLSA must be determined using the "short test" rather than the "long test."³⁰ Thus, whether he is an exempt employee depends on whether (1) his duties primarily consist of work requiring knowledge of an advanced type in a field of science and (2) his duties include work requiring the consistent exercise of discretion and judgment.³¹ If either of these conditions is not met, Grievant is a nonexempt employee who may demand overtime compensation.³²

²² DOF's Time and Attendance Policy states, "Any employee who only has to leave work as to where he/she can be reached and is still able to respond according to the Fire Readiness Plan, or other Real Emergency situations, or an employee who can be reached by a per/portable radio or phone is on-call and thus unrestricted."

²³ DHRM Human Resource Manual, Chapter 8, p. 7.

²⁴ An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." 29 CFR § 785.17.

²⁵ DHRM Human Resource Manual, Chapter 9, p. 6.

²⁶ "An employee who is not subject to the overtime provisions of the Fair Labor Standards Act." DHRM Policy 3.10.

²⁷ "An employee who is subject to the overtime provisions of the Fair Labor Standards Act." DHRM Policy 3.10.

²⁸ Agency Exhibit 7.

²⁹ Grievant presented a substantial amount of evidence relating to the elements describing a bona fide professional capacity under 29 CFR § 541.3. Since Grievant earns more than \$250 per week, the Agency does not need to meet those elements in order to establish that Grievant works in a professional capacity. In other words, the "short test" applies to Grievant and it is not necessary for the Agency to show Grievant satisfies the elements of 29 CFR § 541.3(a) through (e). See, 29 CFR § 541.315(a).

³⁰ The "long test" applies when an employee does not earn at least \$250 per week. Under the "long test" a professional exemption exists only if the provisions of 29 CFR 541.3(b), (c), and (d) are met.

³¹ 29 CFR § 541.315(a).

³² If Grievant may demand overtime compensation (i.e. he is nonexempt), that does not necessarily mean he must be paid for being on-call. Only if being on-call is time spent "predominantly for the employer's benefit" must a nonexempt employee be compensated. See, Armour & Co. v. Wantock, 323 U.S. 126 (1944).

Whether an employee's duties primarily consist of work requiring advanced learning "must be based on all the facts in a particular case."³³ The amount of time spent in the performance of work requiring advanced learning is a useful guide in determining the employee's primary duty. "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time."³⁴ Time alone is not the only test. An employee who spends less than 50 percent of his time performing work requiring advanced learning might nevertheless be working in a professional capacity. Other factors supporting the conclusion that an employee is working in a professional capacity include: (1) the relative importance of the duties requiring advanced learning as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

A professional's knowledge "must be customarily acquired by a prolonged course of specialized intellectual instruction and study."³⁵ Knowledge of an advance type "must be knowledge which cannot be attained at the high school level"³⁶ and be in the field of science or learning.³⁷

A professional employee must perform work which requires the consistent exercise of discretion and judgment. A prime characteristic of professional work is that the employee applies his special knowledge with discretion and judgment.³⁸

Grievant is exempt from the overtime requirements of the Fair Labor Standards Act because he is employed in a bona fide professional capacity. As a Forester, Grievant possesses knowledge of an advanced type in the fields of forest ecology and biology, management of forest resources, and forest resources policy and administration. This knowledge cannot be obtained at the high school level because it requires a prolonged course of specialized study through an undergraduate degree.³⁹

³³ 29 CFR § 541.103. See, 29 CFR § 541.304.

³⁴ 29 CFR § 541.103.

³⁵ 29 CFR § 541.301(d).

³⁶ 29 CFR § 541.301(b).

³⁷ 29 CFR § 541.301(c).

³⁸ 29 CFR § 541.305.

³⁹ Grievant contends he has not met the advanced knowledge requirement because he does not have a master's degree. It is not necessary to have a master's degree before one can be considered as possessing advanced knowledge. The regulations specifically exclude fields which require only high school training. Grievant's field requires much more than high school training.

Grievant's duties primarily consist of work requiring advanced learning. Grievant operates essentially without direction and is free to determine what he will do and when. He exercises discretion and independent judgment in the performance of his duties. DOF has met its burden of proof to show that Grievant falls within the professional category of exempt employees.

Grievant contends he is no longer performing one of his professional duties, namely writing stewardship plans. Although Grievant is correct that he was not asked to write many stewardship plans in 2001, it is clear this is temporary. When the Agency attempted to raise revenue by charging for these plans, the demand for the plans ended. Now that the Agency has modified its fees for plans, that demand should return. It is too early to tell how much of the demand will return, but it is clear that Grievant will continue writing stewardship plans in the future.

Grievant argues he is nonexempt because he performs many of the same duties performed by Technicians who are nonexempt. This argument fails for two reasons. First, the evidence showed that although Technicians typically have a general understanding of specific topics, Foresters have a comprehensive knowledge. For example, a Technician may have a general understanding of tree biology and tree species; a Forester has a comprehensive knowledge of the field. Second, although the Agency has designated Technicians as nonexempt, some of their duties may otherwise be qualified as exempt duties. For example, given the level of training provided to Technicians and the expectation of them having earned Associate Degrees, one could argue Technicians meet the educational standards of an exempt position. If Grievant and a Technician are performing the same duty but that duty would otherwise fall within the duty of an exempt employee, it shows that the Technician was performing an exempt duty; it does not show that Grievant is a nonexempt employee.

Grievant points out that he does not manage anyone. If the Agency were contending Grievant was exempt under the Executive exception, then this would be relevant.⁴⁰ Since the Agency argues Grievant is exempt under the Professional exemption which does not require supervisory duties, Grievant's evidence is not persuasive.

Grievant contends that since he spends more than twenty percent of his time doing technician's work, he does not meet the short test. The twenty percent rule applies only using the long test set forth in 29 CFR 541.3(d).

Since Grievant is an exempt employee, the Agency is not obligated to compensate him even though the 30 minute response time is unduly restrictive.

Grievant contends the 30 minute response time during Level 3, 4, and 5 days is unreasonably restrictive and he asks the Hearing Officer to modify that time to one hour and thirty minutes. Although the Hearing Officer agrees the 30 minute response time is

⁴⁰ See, 29 CFR § 541.105.

unnecessary and overly restrictive, the Hearing Officer lacks the authority to modify an Agency's policy when that policy is in accordance with law and not contrary to DHRM policy. Grievant's request for relief must be denied.

In some respects this case is difficult to resolve. It seems unnecessary for the Agency to require Grievant to limit his travel to 30 minutes from his vehicle for such an extensive number of days when the likelihood Grievant's services will be needed is remote. On weekends during the 2000, 2001, and 2002 fire seasons, Grievant was required to respond to only six fires and all of those were in one year. Even in those instances where Grievant's services were needed, many of his duties are secondary to local firefighters. Having employees remain on-call without being compensated adversely affects the morale of those employees. Their personal freedom is restricted for lengthy periods of time. It is the Agency's management decision as to whether the benefits of the on-call requirement to the Agency outweigh the cost in terms of employee morale. Responsibility for management decisions is best left to Agency managers rather than to Hearing Officers. The Hearing Officer lacks the authority to override a management decision when that decision is consistent with applicable law and policy.

DECISION

For the reasons stated herein, Grievant's request for overtime compensation for on-call duties is denied.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴¹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.