

Issue: Compensation (FLSA/Overtime); Hearing Date: 09/07/07; Decision Issued: 09/10/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8656; Outcome: No Relief, Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8656

Hearing Date: September 7, 2007
Decision Issued: September 10, 2007

PROCEDURAL HISTORY

On January 8, 2007, Grievant timely filed a grievance to seek reimbursement for overtime hours he worked. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 19, 2007, the EDR Director issued Ruling No. 2007-1632 qualifying the grievance for a hearing. On August 7, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Representative

ISSUES

1. Whether Grievant's overtime work was authorized in advance by management?

2. Whether the Agency misapplied policy by refusing to pay Grievant for his additional work?

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. 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 Department of Corrections employs Grievant as a Corrections Lieutenant at one of its facilities. Grievant is scheduled to work eight hours per day beginning at 6 a.m. and ending at 2 p.m., Sundays through Thursdays. He does not work on Fridays or Saturdays. Grievant's normal schedule consists of working 160 hours in a 28 day cycle. Grievant holds an exempt position. This means he is not subject to the overtime provisions of the Fair Labor Standards Act. Grievant receives a salary and is not paid at an hourly rate.

A schedule adjustment occurs when the Agency permits an employee to work fewer than eight hours on a particular day in order to compensate for that employee's additional work on a prior day. For example, if the employee is scheduled to work eight hours on Day 1 but instead works 10 hours that day, the Agency may permit the employee to work six hours on Day 2 instead of working eight hours as scheduled on Day 2.

Grievant is responsible for supervising staff working in Housing Unit 3. If Grievant or another Lieutenant is not scheduled to work as a supervisor in Housing Unit 3, a Corrections Sergeant may work in Housing Unit 3 as the supervisor. Because of staffing shortages at the Facility, there are times when neither a Corrections Lieutenant nor a Corrections Sergeant is assigned to supervise Housing Unit 3. When a supervisor has not been assigned responsibility for Housing Unit 3, a Corrections Lieutenant or a Corrections Sergeant assigned to another housing unit will assume responsibility for Housing Unit 3 as well as the housing unit to which he or she is assigned. In other words, one supervisor will supervise more than one housing unit.

Grievant was not obligated to obtain permission from the Watch Commander prior to leaving at the end of his shift at 2 p.m. Because Grievant was a dedicated employee and had a good working relationship with his Watch Commander, Grievant routinely would call his Watch Commander prior to 2 p.m. and indicate that he wished to

leave at 2 p.m. The Watch Commander would sometimes instruct Grievant to remain and work additional hours until a supervisor could be obtained for the 2 p.m. to 10 p.m. shift. On those occasions, Grievant remained at work beyond his eight hour shift. If he had left at 2 p.m. as scheduled and disregarded the Watch Commander's instruction to remain, he would have been subject to disciplinary action.

On certain dates, Grievant worked more than the eight hours he was scheduled to work as follows:

<u>Date</u>	<u>Hours</u>
October 30, 2006	10.2 hours
November 1, 2006	10.5 hours
November 6, 2006	9.5 hours
November 8, 2006	8.7 hours
November 9, 2006	8.4 hours
November 12, 2006	8.6 hours
November 13, 2006	8.7 hours
November 15, 2006	12.7 hours
November 16, 2006	12.7 hours
November 20, 2006	9.4 hours
November 21, 2006	10.2 hours
November 22, 2006	10.8 hours
November 26, 2006	9.8 hours ¹

On each of these dates Grievant called the Watch Commander prior to 2 p.m. and indicated that he wished to leave at 2 p.m. The Watch Commander instructed Grievant to remain in the Housing Unit until another supervisor began working. Grievant complied with the instructions of the Watch Commander. Grievant was not permitted to schedule adjust his hours. This resulted in Grievant working more than 160 hours in the 28 day cycle.

CONCLUSIONS OF POLICY

Department of Corrections Procedures Manual 5-35 establishes uniform procedures for the awarding of overtime and compensation for overtime. Section 5-35.5 defines "straight time rate" as:

hours worked in excess of the scheduled during the work period, due to other compensated time used (sick, annual, comp time, or a holiday), do

¹ Grievant limited his testimony to these dates.

not qualify for premium pay² and thus, would be compensated at the regular hourly rate.

Grievant argues he is entitled to compensation for the additional time he worked because he asked the Watch Commander to leave at 2 p.m. but was instructed to remain at work until another supervisor could be found to replace him.³ He relies upon Section 5-35.7(C)(1) which states:

An authorization, G.O. Form P-14, shall be established for the exempt positions in the following classifications to be paid at straight time rates for overtime to cover staff shortages if a schedule adjustment cannot be made within their work cycle. Time and a half rates will be paid for emergency situations such as escapes and riots:

- a. Corrections Sergeant
- b. Corrections Lieutenant
- c. Institutional Maintenance position (below Grade 10 and not in Category I)\
- d. Registered Nurse Clinician A, B, and Coordinator
- e. Corrections Construction Unit employees

Grievant contends he should be paid at straight time rates for the overtime he worked because he worked additional hours to cover staff shortages and he was not permitted to make a schedule adjustment.

The Agency argues Grievant is not entitled to compensation for the additional hours he worked. The Agency relies upon Section 5-35.13 which addresses Work Periods for Exempt Personnel. Subsection B provides:

Exempt personnel are not normally given overtime pay or compensatory time for extra hours worked. However, schedule adjustments may be made at the unit head's direction and based on work load demands during the 28 day or calendar month cycle but not beyond. Hour for hour adjustment is not required and not encouraged.

The Agency argues that Grievant's position is not like a Corrections Officer's position. For example, a Corrections Officer working in a control booth must remain at that post until another Corrections Officer relieves him or her. This is because a control booth post must be manned 24 hours a day, seven days a week in order to provide essential security at a facility. Grievant's position as a Corrections Lieutenant, is not continuously staffed. There are many occasions when neither a Corrections Lieutenant

² Premium pay means one and one-half times their regular hourly rate for actual hours worked in excess of those listed for each workweek period. DOC Procedure Manual 5-35.5.

³ In other words, Grievant's overtime work was authorized in advance by Agency managers.

nor a Corrections Sergeant is assigned as the supervisor in Housing Unit 3. Thus, Grievant did not need to obtain the permission of the Watch Commander to leave at 2 p.m.

On the surface, Section 5-35.7(C)(1), relied upon by the Grievant, and Section 5-35.13, relied upon by the Agency, appear to conflict. An agency's policy provisions should be interpreted in a manner such that they would not conflict. The key to resolving this conflict is the word "normally". Section 5-35.13 says that exempt personnel are not **normally** paid for extra hours worked. Thus, Section 5-35.7(C)(1), must be construed to authorize payment for extra hours worked under circumstances that are not normal. DOC Procedure Manual 5-35 does not define the word "normally".

The question becomes whether Grievant's additional hours worked were normal or not normal. Based on the evidence presented, the Agency's normal operations included staff shortages, especially for supervisors. Although the Agency would like to have a supervisor in Housing Unit 3 on a regular basis, because the Agency lacked sufficient staff, it often operated Housing Unit 3 without a supervisor assigned to that housing unit. The Agency's normal operations would not require Grievant to obtain permission from the Watch Commander to leave at 2 p.m. on the days he worked. Grievant contacted the Watch Commander and asked for permission to leave based on Grievant's own initiative and not based on the Agency's expectations. Thus, under the Agency's normal operations Grievant would be expected to work extra hours. Under Section 5-35.13, Grievant is not entitled to be paid for the extra hours he worked. Grievant has not met his burden of proof. He has not shown that the extra hours he worked were not normal.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.⁴

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.