Issue: Qualification/Compensation/Leave/FLSA/Overtime and Consolidation of Grievances; Ruling Date: Ruling #2002-002; Agency: Department of Forestry; Outcome: Both grievances qualified and consolidated for purposes of hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULINGS OF DIRECTOR

In the matter of Department of Forestry/No. 2002-002
November 20, 2002

The grievant has requested rulings on whether his grievances, both initiated on November 19, 2001 with the Virginia Department of Forestry (the agency) qualify for hearing. Further, the agency seeks consolidation of the two grievances. The grievant objects to consolidation on the basis of the complexity of the issues.

In his first grievance (Grievance #1), the grievant alleges that he is a non-exempt employee entitled to overtime compensation under the Fair Labor Standards Act (FLSA) at a rate of time and a half. The grievant's second grievance (Grievance #2), asserts that (1) the mandated response time of 30 minutes or less to get to his state truck during a Class 3, 4 or 5 fire day under the agency's Fire Readiness and Mobilization Plan is too restrictive and should be 90 minutes due to the rural location in which he lives; and (2) if the 30 minute response time remains in effect, as a non-exempt employee, he is entitled to compensation for standby time after 5:00 p.m, and on weekends and holidays. For the reasons discussed below, both grievances are qualified for hearing. Further, the grievances are consolidated for purposes of hearing.

FACTS

Grievance #1 challenges the agency's treatment of grievant as an exempt employee under the FLSA. The grievant is employed as an area Forester with the Department of Forestry and has been categorized by the agency as exempt from the overtime provisions of the FLSA under the "professional" exemption. The agency's overtime policy was explicitly drafted "to comply with the Fair Labor Standards Act."[1] Under that policy, during "temporary" emergencies *exempt* employees receive compensatory leave for hours worked beyond a 40 hour work week, at a "straight time" rate of one hour for each hour of overtime worked. During more severe "real" emergencies, *exempt* employees who are Grade 10 and up receive overtime pay at a "straight time" rate of one hour for each hour worked over 40 hours per week.[2]

Conversely, *non-exempt* personnel receive overtime leave at a rate of one and one half hour of leave for each hour worked, up to 120 hours per year, for hours worked beyond

[1] Virginia Department of Forestry Policy No. 84.
[2] *Id.* The grievant's position is currently in Pay Band 4. Prior to September 2000, it was a Grade 11 under the Commonwealth's prior compensation system.

40 hours per designated work week during "temporary emergencies."[3] Once 120 hours is reached, additional overtime hours are compensated with time and one-half pay.[4] During "real emergency"[5] situations, *non-exempt* personnel who are Grade 9 and below receive overtime pay at a rate of time and one-half.[6]

Grievance #2 challenges the time restrictions contained in the agency's Fire Readiness and Mobilization Plan (Fire Plan). The Fire Plan mandates a 30 minute response time for all first response personnel, including the grievant, on fire days designated as Class 3, 4 or 5.[7] Response time is defined as "[t]he amount of time a person has from the initial call from the dispatcher until they are in their vehicle responding to the incident."[8] The grievant's state vehicle remains located at his home while he is "on call" or "standby." The agency considers an employee to be on "standby" and thus "restricted" when he "is required to stay at a certain location to be able to respond to a call according to the Fire Readiness Plan or other Real Emergency situations."[9] Standby time is counted as hours worked and is compensable.[10] Conversely, the agency considers an employee to be "on call" and thus "unrestricted" when he "only has to leave word 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 can be reached "by a per/portable radio or phone."[11] Time spent "on call" is not considered time worked. The grievant's second grievance challenges the content and application of these policies.

DISCUSSION

Qualification

Though raising statutory issues under the FLSA, the grievant's Form As for each of his two grievances also make out claims of misapplication of state and agency policy.[12] For

[3] *Id*. "Temporary emergencies" for which overtime leave is granted include, but are not limited to, the following: aerial spraying; tree planting; prescribed burning; and fire department training. *Id. See also* Department of Human Resource Management (DHRM) Policy 3.10 (which was drafted for consistency with the FSLA)(compensatory leave is granted on an hour-for-hour basis when an employee works (1) additional hours in a workweek in which the employee has taken a holiday or leave, but has worked no more than 40 hours; or (2) on an official closing day if the employee is designated as an "essential employee"; (3) on a holiday; or (4) on a scheduled day off).

[4] *Id.*

[5] "Real emergencies" are defined as "sudden or unexpected occurrences involving clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or danger to life, health, property."

[6] *See* Virginia Department of Forestry Policy No. 84.

[7] *See* Virginia Department of Forestry Policy Manual, *Fire Readiness Procedures*, effective 09/01/2000, page 19.

[8] *Id.* at p. 18.

[9] *See* Virginia Department of Forestry Policy Manual, *Time and Attendance*, effective 09/01/2000, page 21. (Emphasis in original).

[10] *Id.*

[11] *Id*. (Emphasis in original).

[12] Under the grievance statutes, claims based upon the FLSA may advance to hearing as misapplication of policy claims if there are sufficient supporting facts. Here, for example, the agency's overtime policy, Policy No. 84, expressly states that its purpose is "to comply with the Fair Labor Standard Act." Thus, the grievant's

an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

Grievance #1

In his first grievance, the grievant maintains that he is entitled under the FLSA to overtime compensation at a rate of time and one-half. The FLSA requires that employees be paid time and a half for work over forty hours a week.[13] However, the FLSA provides an exemption from the overtime pay requirement for persons employed in a bona fide executive, administrative, or professional capacity.[14] The agency alleges that the grievant qualifies for the professional exemption.

When an employee earns more than $250.00 per week, as is the case here, the Department of Labor's "short" test is used to determine whether the employee meets the requirements of the professional exemption.[15] An employee will be exempt under the professional exemption's short test if: (1) the employee's duties primarily consist of work requiring advanced learning; and (2) the employee's duties include work requiring the consistent exercise of discretion and judgment.[16] Thus, if either one of these elements is not met, the employee is non-exempt from the FLSA and entitled to overtime compensation.

The first element of the short test is whether the grievant's primary duties as a Forester consist of work requiring advanced learning. An employee's primary duty is normally one that comprises more than 50% of the employee's time.[17] However, time alone is not the sole test and a determination of whether an employee's primary duties consist of work requiring an advanced learning must be based on all the facts in a particular case.[18]

In this case, the agency maintains that the grievant's primary duties are forest management and stewardship plans, duties which must be performed by a Forester. According to the agency, a Forester must possess a college degree in forest ecology, forest management, or other related natural resource sciences (with advanced degrees); and, be otherwise qualified, certified, or licensed to practice professional forestry.[19] It also

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allegation that he has been misclassified as "exempt," not only asserts a violation of the FLSA but also violations of Policy No. 84 and DHRM Policies Nos. 3.10 and 3.15, which are also premised on the proper classification of employees as either exempt or non-exempt under the FLSA.

[13] Fair Labor Standards Act, 29 U.S.C.S. § 207(a)(1). *See also*, Virginia Department of Forestry Policy No. 84 and Department of Human Resource Management Policy 3.15 (the Commonwealth's Overtime Leave policy was drafted for consistency with the FLSA).

[14] Fair Labor Standards Act, 29 U.S.C.S. § 213(a)(1).

[15] *See* 29 C.F.R. § 541.315(a).

[16] *Id.*

[17] *See* 29 C.F.R. 541.103.

[18] *Id.*

[19] The grievant possesses a degree in Forest Management.

maintained that the grievant performed on average, 118 stewardship plans and 23 stand plans for the years 1999-2001. The agency did not provide information for 2002.

The grievant maintains, however, that 90% of his time is spent performing the same duties as those of nonexempt employees. The grievant further maintains that the duties that cannot be performed by nonexempt personnel, such as stewardship and stand plans, have recently been de-emphasized by the agency. The grievant asserts that it has been three years since he completed a stewardship plan and has been told by the agency to discontinue stewardship examinations until further notice. Moreover, the grievant alleges that he performed only one stand plan in 2001 and none in 2002.

Based upon these conflicting assertions, there appears to be a sufficient factual question regarding whether the grievant's primary duties consist of work requiring advanced learning, and thus, whether he is exempt from the FLSA. Therefore, this Department qualifies for a hearing the issue of whether the grievant is entitled to overtime compensation at a rate of time and one-half under applicable state or agency policies.[20]

Grievance #2

In Grievance #2, the grievant challenges the 30-minute response time mandated by the agency's Fire Readiness and Mobilization Plan. He asserts that because he lives in a rural area, the 30 minute response time is unduly restrictive. He further asserts that if the 30-minute response time remains in effect, he is entitled to compensation for "standby" or "on call" time, as those terms are applied under agency policy.

Qualification of the grievant's objection to the 30-minute response turns on the question of whether the grievant is properly classified as exempt. As an initial point it should be noted that although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. Under the grievance procedure, "complaints which relate solely" to the "contents of statutes, ordinances, personnel policies, procedures, rules and regulations" do not qualify for hearing.[21] To the extent that the grievant is challenging the contents of the agency's Fire Plan (that is, the plan itself, not the way in which it is applied), this issue does not qualify for hearing. However, as explained below, to the extent that the grievance asserts that the 30-minute response time set forth in the Fire Plan constitutes a violation of the FLSA as applied to the grievant, and, hence, a misapplication/unfair application of agency Policy No. 84 and DHRM Policy Nos. 3.10 and 3.15, the grievance is qualified for hearing.

[20] Because this Department concludes that there is a question as to whether the grievant meets the first prong of the short test, whether the grievant meets the second prong of the short test will be left to the determination of the hearing officer.
[21] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c), pages 10-11.

Under the Code of Federal Regulations, non-exempt employees who are required to remain on call on their employers' premises or so close thereto that they cannot use the time effectively for their own purposes are deemed working while "on call." Conversely, non-exempt employees who are not required to remain on their employers' premises but are merely required to leave word at their homes or with company officials where they may be reached are deemed *not* working while "on call."[22] Whether time is spent predominately for the employer's benefit or for the employee's is a question of fact dependent upon all the circumstances of the case.[23] As previously stated, the agency's Time and Attendance Policy compensates both exempt and non-exempt employees on "standby," as that term is defined by agency policy, but compensates only non-exempt employees while "on call."

In viewing Grievance #2 as a misapplication of policy claim, the threshold question is whether the grievant is an exempt employee. If the grievant is exempt, then his misapplication claim fails, because as an *exempt* employee, he would not be entitled to overtime compensation under the FLSA. His only entitlement to overtime compensation would be that granted by agency policy and, in this case, agency policy states that he is entitled to overtime compensation only when he is on "standby," as defined by the agency policy.[24] The FLSA does not prevent the agency from defining "standby" for its *exempt* employees in any manner it chooses; thus, the agency may impose any sort of response time that it desires for exempt employees. Accordingly, if a hearing officer finds that the grievant is exempt from the FLSA, there can be no finding of misapplication of policy as to the 30-minute response time.

Conversely, if the grievant is found to be non-exempt from the FLSA, then regardless of how the agency defines "standby" or "on call," the grievant would potentially be entitled to overtime under the FLSA and Policy #84, if his movement is so restricted by the agency's 30-minute mandate that his time is spent predominately for the benefit of his employer. The agency maintains that employees such as the grievant have pagers, cell phones and other means of communication such that they are not tied to their residences and, therefore, not entitled to compensation while "on call" as defined by policy. The grievant, however, maintains that he is required to be "on call" or on "standby" twenty-four hours a day, seven days a week during the spring and fall fire seasons and that during these periods almost every day is a Class 3 fire day. Moreover, the grievant asserts that due to the rural location in which he lives, his personal pursuits are severely limited while he is "on call" or on "standby."

Resolution of this issue depends on whether the employee was "engaged to wait," or whether he was "waiting to be engaged."[25] An employee is "engaged to wait," or working,

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[22] *See* 29 C.F.R. § 785.17. *See also* Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F.2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F.Supp. 384 (S.D. Ga. 1945).
[23] Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944).
[24] See Virginia Department of Forestry Policy Manual, *Time and Attendance*, effective 09/01/2000, page 21.
[25] Skidmore v. Swift & Co., 323 U.S. 134, 137; 89 L. Ed. 124; 65 S. Ct. 161 (1944).

only if the standby is "primarily for the benefit" of the employer.[26] The determination is dependent upon all the circumstances of the case.[27] Because the issue of whether the grievant is exempt from the FLSA has been qualified, and because the determination of whether standby time is primarily for the benefit of the employer is dependent upon *all* the circumstances of the case, and finally, because a hearing officer is best situated to develop all the facts and circumstances of this matter," Grievance #2 is also qualified for hearing.[28]

Consolidation

This Department has long held that grievances may be consolidated by mutual agreement of the parties, or absent such an agreement, by this Department whenever the grievances challenge the same action or series of actions or arise out of the same material facts. EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[29] In this case, the events and issues giving rise to these two grievances are closely related; both grievances challenge compensation practices by the agency. As such, this Department concludes that consolidation is warranted.

Please note that while consolidation of the grievances should avoid unnecessary duplication of testimony, consolidation should not prevent the hearing officer from addressing the grievances separately as needed for purposes of establishing procedural aspects of the hearing or in determining the substantive merits of each grievance.

CONCLUSION

For the reasons discussed above, both grievances are qualified for hearing. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Please also note that our qualification ruling is not a determination that

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[26] Armour & Co. v. Wantock, 323 U.S. 126, 132; 89 L. Ed. 118; 65 S. Ct. 165 (1944). One test considers the following factors: (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether the use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time. Owens v. Local No. 169, 971 F.2d 347, 351 (9th Cir. 1992). No one factor is dispositive. *Id.*

[27] Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944).

[28] This Department is mindful of the United States Supreme Court's decision in Alden v. Maine, 527 U.S. 706 (1999), which held that under the doctrine of sovereign immunity, no person may bring a private FLSA lawsuit against a state which has not waived that immunity. We reiterate that qualification of this ruling is premised on the agency's possible violation of state and agency *policies*, not law. However, because both Commonwealth and agency policies expressly incorporate law (the FLSA) into their policies, one must look to that body of law to determine whether policy was properly applied. This Department is also cognizant of Executive Order 27 (2002) which, among other things, requires the Commonwealth to take steps to assure compliance with the FLSA. Executive Order 27 does not, however, appear to preclude an individual from seeking redress of a potential violation of overtime policies via the grievance procedure.

[29] *Grievance Procedure Manual* § 8.5, page 22.

the agency misapplied or unfairly applied overtime policy. Rather, this ruling simply reflects that there are sufficient questions such that further review by a hearing officer is justified. Further, this Department has determined that consolidation is appropriate and warranted under the facts and circumstances surrounding these two grievances. This Department's rulings on matters of compliance are final and nonappealable.[30]

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Claudia T. Farr
Director

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Jennifer S.C. Alger
Employment Relations Consultant

[30] Va. Code § 2.2-1001(5).