

Issue: Compliance/adding new issue to grievance/qualification/overtime wage dispute;
Ruling Date: November 3, 2004; Ruling #2004-732; Virginia Department of
Transportation; Outcome: grievant out of compliance and not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2004-732
November 3, 2004

The grievant has requested a ruling on whether his December 15, 2003 grievance with the Department of Transportation (VDOT or the agency) qualifies for hearing. The grievant claims that the agency has misapplied or unfairly applied policy by determining he is not owed overtime wages for two days in September 2003 and by subsequently docking his pay to collect for the alleged overpayment.

PRELIMINARY COMPLIANCE ISSUE

Adding New Issues

The grievant has presented an additional issue that was not included in his grievance as initiated: namely, that state policies were misapplied, resulting in management's failure to pay him "on-call time" as required by federal law.¹ However, once a grievance has been put in writing and addressed by management, a grievant may not expand the grievance to raise new issues. Because the complaint about payment for "on-call time" was not presented in the written grievance when initiated, the issue cannot be added later to the same grievance.²

FACTS

The grievant is employed by VDOT as a Watercraft – Manager I. On September 18 and 19, 2003, the grievant was required to work during official office closings in response to Hurricane Isabel. The grievant worked 16 hours on the 18th and 12 hours on the 19th. During the workweek beginning September 22, the agency was forced to reconstruct timesheets from various sources because all ferry timesheets were lost.

¹ In a document titled "Notes for meeting of January 20, 2004" (included with his grievance package to this Department), the grievant cites the U.S. Department of Labor's Interpretive Bulletin, Part 785.17 in support of his claim for payment of on-call time. However, the only issues raised by the grievant at the time of the initiation of his grievance were (1) the loss of overtime wages and (2) the deduction of the alleged overpayment from his paychecks.

² See Grievance Procedure Manual § 2.4.

According to VDOT, the overtime hours worked by many employees were improperly recorded. The grievant was credited with the proper number of hours worked, but the first 10 hours of each day (his normal shift) were entered as time and a half overtime instead of straight time overtime. Subsequently, one of VDOT's accounting sections conducted an audit and found the alleged errors. Shortly thereafter, the agency deducted the overpayment from the employees' wages. In the grievant's case, the agency deducted half the overpayment from his December 16th paycheck and half from his December 31st paycheck.

The grievant challenges management's determination of the overtime wages owed to him and claims that VDOT should have provided proof of its error prior to deducting the alleged overpayment from his wages.

DISCUSSION

For 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.

In this case, the grievant claims that the agency has misapplied or unfairly applied policy by determining he is not owed overtime wages for two days in September 2003 and by subsequently docking his pay to collect for the alleged overpayment. Specifically, he asserts that office closings are traditionally paid in overtime. It appears, however, that the grievant has been properly compensated for his work on September 18 and 19, 2003. The applicable policies and standards for determining the adequacy of compensation under the circumstances of this case are DHRM Policy 1.35, *Emergency Closing*, VDOT Policy 1.35, *Emergency Closings*, VDOT's Compensation and Overtime Guide, the Fair Labor Standards Act (FLSA) overtime provisions, and DHRM Policy 3.10, *Compensatory Leave*.

Under DHRM Policy 1.35, agencies are required to develop written procedures on how employees will be compensated if required to work during an authorized closing of the agency.³ In response, VDOT has developed VDOT Policy 1.35 to address compensation for employees that work during an authorized closing of the agency.⁴ Under VDOT Policy 1.35, designated employees who work during an emergency situation receive their regular rate of pay for hours worked during closing plus either compensatory leave⁵ or additional straight-time pay for hours worked.⁶ For example, if

³ See DHRM Policy 1.35.

⁴ See VDOT Policy 1.35.

⁵ Compensatory leave "is paid time off for an eligible employee's having worked additional hours in a workweek; having worked on an official office closing day, a holiday, or a scheduled day off; or when a holiday falls on an employee's scheduled day off." DHRM Policy 3.10(III)(A).

⁶ VDOT Policy 1.35. Whether the employee receives compensatory leave or straight-time pay is left to the discretion of management.

an employee normally works an eight hour day and the agency is closed on his scheduled workday due to an inclement weather emergency, but he is nevertheless required to work eight hours that day, he would receive eight hours of regular pay plus either eight hours of compensatory time or straight-time pay for those same eight hours. Additionally, designated employees who work beyond the number of hours in their normal work schedule may receive overtime for the additional hours worked.⁷ Specifically, non-exempt employees who work overtime when responding to an emergency receive emergency overtime pay at one and one-half times their usual hourly rate.⁸

In this case, management has acted in accordance with VDOT policy. After the deduction of the overpayment, the agency paid the grievant his regular rate of pay for hours worked during office closure for Hurricane Isabel (closing pay) plus straight-time for those same hours worked. In addition, the grievant was paid overtime at a rate of time and a half for hours worked beyond his normal work schedule. Accordingly, after the reimbursement of wages paid in error, the grievant was paid in the following manner: on September 18, 2003, the grievant worked a total of 16 hours and received for his time 10 hours of regular pay and ten hours emergency straight time (equal to his normal shift) and 6 hours of time and a half overtime. On September 19, 2003, the grievant worked a total of 12 hours and for his time received 10 hours of regular pay plus 10 hours of emergency straight time for those same 10 hours, and 2 hours of time and a half overtime. Therefore, it appears that the grievant was appropriately compensated under the state and agency policies and guidelines set forth above.

Furthermore, there is no applicable VDOT or Department of Human Resource Management (DHRM) policy regarding reimbursement of wages dispersed in error. It appears that the only applicable policy in this case is the Department of Accounts' (DOA's) Topic 50510, the Payroll Accounting policy. Under Topic 50510, agencies are required to collect overpayments. Topic 50510 indicates that employees should first be notified of the overpayment and given repayment options to include full repayment by personal check or a mutually agreeable payroll docking schedule.⁹ Significantly, although Topic 50510 establishes guidelines, it creates no policy mandates outlining specific procedures to which agencies must adhere in obtaining reimbursement from employees.

Thus, this grievance cannot be qualified for hearing on the basis of an alleged misapplication or unfair application of policy – there are no facts that raise a sufficient question as to whether a mandatory policy provision was violated or whether management's actions were so unfair as to amount to a disregard of applicable policy.

⁷ See VDOT Policy 1.35.

⁸ See VDOT Compensation and Overtime Guide, November 1, 2001.

⁹ Topic 50510, page 5. In this case, the grievant was notified of the overpayment, but was not given a repayment option. However, as noted by management during the investigation for this ruling, the payments were divided over two pay periods rather than one (as normally would be the case pursuant to the requirements of Topic 50510), which, hopefully, alleviated some of the hardship for the employee.

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APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

Susan L. Curtis
EDR Consultant