

Issue: Qualification/Misapplication of policy with regard to repaying wages paid in error, grievant requests discipline of those who made payment error; Ruling Date: September 2, 2004; Ruling #2004-759; Agency: Virginia Department of Transportation; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Transportation  
Ruling Number 2004-759  
September 2, 2004

The grievant has requested a ruling on whether his April 15, 2004 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 and procedure by requiring him to repay the agency for wages paid to him in error. In addition, the grievant challenges his rate of pay after the deduction by the agency for wages paid to him in error.

FACTS

The grievant is employed as a Transportation Maintenance Crew Member with VDOT. On September 18 and 19, 2003, the grievant was required to work during official office closings and beyond his normal work schedule in response to Hurricane Isabel. Those who worked during this period were paid triple overtime and a half. However, the Office of the Attorney General subsequently determined that triple overtime and a half was excessive and that any overpayments must be recovered from the employee. On March 17, 2004, the grievant was informed of the payment error and was given the choice of two reimbursement options: (1) a lump sum payment for the full amount; or (2) an apportioned repayment through payroll deduction. In his April 15, 2004 grievance, the grievant seeks to retain the wages he was overpaid and requests that someone be held accountable for the payment error.

DISCUSSION

In this case, the grievant claims the agency misapplied or unfairly applied policies and procedures by requiring that he reimburse the agency for its mistake. 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 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. As to procedure, 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.<sup>1</sup> If by payroll docking, repayment may not occur over a longer period than the overpayment occurred.<sup>2</sup> Although Topic 50510 establishes procedural guidelines, it creates no policy mandate outlining the specific steps agencies must take in obtaining reimbursement from employees.

The grievant further argues that the ultimate pay he received (after the reimbursement of the overpayment) is unfair and he should receive "hazardous duty" pay for his work during Hurricane Isabel. This Department is unaware of any existing state or agency policy that would entitle the grievant to "hazardous duty" pay. Further, it appears the grievant has been properly compensated for his work on September 18 and 19, 2004. 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.<sup>3</sup> In response, VDOT has developed VDOT Policy 1.35 to address compensation for employees that work during an authorized closing of the agency.<sup>4</sup> 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 leave<sup>5</sup> or additional straight-time pay for those hours worked.<sup>6</sup> For example, if an employee normally works an eight hour day, the agency is closed on his scheduled work day due to an inclement weather emergency, but the employee 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

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<sup>1</sup> Topic 50510, page 5.

<sup>2</sup> *Id.*

<sup>3</sup> See DHRM Policy 1.35.

<sup>4</sup> See VDOT Policy 1.35.

<sup>5</sup> Compensatory time "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).

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

overtime for the additional hours worked.<sup>7</sup> 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.<sup>8</sup>

In this case, in accordance with VDOT policy, the agency paid the grievant his regular rate of pay for hours worked during office closure for Hurricane Isabel (closing pay) plus straight-time (rather than compensatory 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 12.5 hours and received for his time 5 hours of regular pay,<sup>9</sup> 3 hours of closing pay plus 3 hours of emergency straight time for those same 3 hours, and 4.5 hours of overtime. On September 19, 2003, the grievant worked a total of 12 hours and for his time received 8 hours of closing pay plus 8 hours of emergency straight time for those same 8 hours, and 4 hours of overtime. As a designated non-exempt employee, it appears that the grievant was appropriately compensated under the state and agency policies and guidelines set forth above.

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 the rate of pay and reimbursement were so unfair as to amount to a disregard of applicable policy.

Additionally, the grievant seeks accountability by those individuals responsible for the payment error. The agency claims that it has taken appropriate disciplinary action to address the error. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>10</sup> Inherent in management's authority is the responsibility and discretion to discipline employees for unacceptable behavior and to determine the appropriate level of such disciplinary action. Accordingly, this issue does not qualify for a hearing.

#### 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

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<sup>7</sup> See VDOT Policy 1.35.

<sup>8</sup> See VDOT Compensation and Overtime Guide, November 1, 2001.

<sup>9</sup> On September 18, 2004, the grievant worked 5 hours of his regularly scheduled work day prior to the official closing of the office.

<sup>10</sup> Va. Code § 2.2-3004(B)

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determination to the circuit court, he 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 notifies the agency that he does not wish to proceed.

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Claudia Farr  
Director

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Jennifer S.C. Alger  
EDR Consultant