Issue: Qualification/overtime leave, FLSA/Overtime; Ruling Date: July 6, 2005; Ruling #2005-1046; Agency: Department of Corrections; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
No. 2005-1046
July 6, 2005

The grievant has requested a ruling on whether his March 30, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant has challenged a recent change to his facility's meal break policy. For the following reasons, this grievance is qualified for a hearing.

FACTS

The grievant is employed by the agency as a Correctional Officer, Senior. In a February 5, 2005 Memorandum, the Warden initiated a new meal break policy, which provides that "two 30-minute meal breaks will be given to all staff working 12-hour shifts."[1] The memorandum further provides that at the discretion of management, the two 30-minute breaks may be combined into a single unpaid 60-minute break, which management has done in the grievant's case. Corrections Officers are required to remain on the premises during meal breaks and the grievant reports that any personal phone calls made or received during the breaks (and all other times) must be directed through the Shift Commander.

Prior to the implementation of the new policy, each Officer took a single 30-minute unpaid break. Under the former scheduling system, Correctional Officers effectively accrued an additional half hour of overtime leave each workday which was combined with either annual leave or compensatory leave to give Officers one day of paid time off each month. By virtue of the additional 12 days off per year, per Officer, the former plan apparently made scheduling more burdensome than the newly adopted system. Increasing the meal break from 30 to 60 minutes allows management to reduce pay by a half hour each day while maintaining the same hours of coverage, which includes a half hour overlap between shifts.[2]

Although the Warden's memorandum states, without exception, that two 30-minute meal breaks will be given to ***all*** staff working 12-hour shifts, management concedes that not all such staff members are required to take the second 30-minute break. Those who work in Building 8, the Isolation/Segregation Unit, are allowed to forgo the

[1] February 10, 2005 memorandum from the Warden. DOC Procedure 5-35.14 states that "[m]eal periods for security staff should normally be 30 minutes."
[2] The two shifts continue to run from 5:45 a.m. to 6:15 p.m. and from 5:45 p.m. to 6:15 a.m.

second meal break. According to the Assistant Warden, allowing Officers to forego the second break is an incentive to induce Officers to work in the building that houses the most difficult offenders. Foregoing the second break is viewed as an incentive because Building 8 Officers receive an additional half hour work credit each work day over that paid to all other Officers, which they can then use for paid time off as explained in the paragraph above.

The grievant claims that the facility's extension of his lunch break by 30 minutes violates DOC Procedure 5-35. Specifically, he cites to Section 5-35.12(A)(3) which states that "[e]mployees' meal breaks will not be extended involuntarily to offset extra hours worked."[3]

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.

As noted above, the grievant objects to the agency's unpaid extension of his meal break by a half hour on the basis of DOC Procedure Number 5-35, the agency's "Overtime and Schedule Adjustments" policy. Procedure 5-35 establishes a comprehensive agency policy on overtime and schedule adjustments, and therefore must be considered in its entirety. While the grievant specifically cites to Section 5-35.12(A)(3), this provision is only one of the relevant Sections of Procedure 5-35 implicated in the instant grievance. As explained below, Sections 5-35.14, "Meal Periods," and 5-35-15, "On-call Time," are particularly relevant to this grievance.

The agency explains that 5-35.12(A)(3) prevents "*supervisors* from extending a *specific* meal break to offset extra hours worked."[4] However, assuming that is the case, other provisions of 5-35 are also pertinent to the question of whether the agency's unpaid extension of the meal break is in accord with Procedure 5-35. For instance, Section 5-35.14 provides that:

> Meal periods of 30 minutes or longer do not count as hours worked and will not be paid time if the employee is completely relieved from duty for the purpose of eating a meal. If the employee must stay at a work station and must perform duties while eating, the entire meal period must be

[3] DOC Procedure Number 5-35.12 (A)(3).

[4] May 12, 2005 Agency Head's qualification decision (emphasis added.) Although an agency's interpretation of its own policies is generally afforded great deference, that deference is not without limitation. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, a hearing officer should give the agency's interpretation of its own policy substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy. *See* Ruling No. 2001-064.

> counted as hours worked. Meal periods for security staff should normally be 30 minutes.

This provision is consistent with Fair Labor Standards Act (FLSA), the federal wage and hour statute to which DOC's policy is expressly linked.[5] Although employers are typically not required under the FLSA to compensate employees for meal breaks,[6] in some cases they must.[7] When deciding whether a meal break is compensable under the FLSA, courts often look to see whether the "predominant benefit" of the break belongs to the employee or employer.[8] If the time spent is predominantly for the benefit of the employer, the break is generally compensable.

In this case there remains a sufficient question as to whether the second half hour is appropriately viewed as a bona fide meal break. First, Section 5-35.14 states that "[m]eal periods for security staff should normally be 30 minutes." Perhaps even more significantly, management seems to have tacitly conceded that 30-minutes is an adequate amount of time for a meal break, given that those who work in Building 8 are allotted a single ½ hour break during their 12 hour shift. Because both management and policy seem to recognize that ½ hour is sufficient for meal consumption, one might reasonably question whether the second ½ hour of the meal break is more properly viewed as on-call time and, if so, whether compensation was required.

Under Section 5-35.15, the "On-Call Time" provision:

> General availability of employees for call back to the work site in the event of an emergency or as backup for absent personnel is not considered on call time and is not compensable. An employee who only must leave a telephone number or a pager number through which he can be reached is on unrestricted call.

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[5] Procedure 5-35.1 states that the purpose of 5-35 is "[t]o establish uniform procedures for the awarding of overtime and compensation for overtime in the Department of Corrections and to comply with the Fair Labor Standards Act."

[6] 29 C.F.R. § 785.19 states that:

> Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.

[7] For example, 29 C.F.R. § 785.19 states that: "[t]he employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating."

[8] "The critical question, the [U.S. Supreme] Court has suggested, is 'whether time is spent predominantly for the employer's benefit or for the employee's.'" Roy v. County of Lexington, 141 F.3d 533, 545 (4th Cir. 1998) quoting Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). "The most appropriate standard for compensability is a 'flexible and realistic' one where we determine whether, on balance, employees use mealtime for their own, or for their employer's benefit. . . . [which is] a question of fact to be resolved by appropriate findings of the trial court." Roy at 545 (internal citations omitted).

This policy reflects the FLSA, which recognizes that "[a]n 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,'" and must be compensated for the on-call time.[9] Courts use the same inquiry to determine whether compensation is required for on-call situations as they do for meal breaks: is the time spent predominantly for the benefit of the employer or the employee?[10] To answer this question, courts look to the following factors to weigh the level of interference with the employee's private life:

> (1) whether the employee may carry a beeper or leave home; (2) the frequency of calls and the nature of the employer's demands; (3) the employee's ability to maintain a flexible "on-call" schedule and switch "on-call" shifts; and (4) whether the employee actually engaged in personal activities during "on-call" time.[11]

During the extended 30-minute period at issue here, Corrections Officers may not leave the facility, all non-business calls are routed through the shift commander, the break occurs generally at the same time each day or night, and opportunities to engage in personal activities are limited.

It should also be noted that management statements could be viewed as supporting the premise that the breaks were extended primarily to benefit management. The Warden, who initiated the policy change, explained that the addition of the meal breaks "provides for more effective service and efficient work scheduling." She explains that "[t]his schedule maximizes the staffing during the 28-day cycle and is a more efficient scheduling tool for supervisors."[12] Perhaps even more significant, as an inducement to work at Building 8, management exempts Officers from having to take the second half hour break, thereby implicitly acknowledging that *not* having to take the additional half hour break is a benefit to Officers.

In sum, the evidence in this case raises a sufficient question as to whether the second half hour of the meal break is a misapplication or unfair application of DOC Procedure 5-35, more specifically, whether that second half hour is most appropriately

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[9] 29 C.F.R. § 785.17.

[10] *See* Whitten v. City of Easley, 2003 U.S. App. LEXIS 6739 (4th Cir. 2003)(unpublished opinion) citing to Roy v. County of Lexington, 141 F.3d 533 (4th Cir. 1998*)*; Pabst v. Oklahoma Gas and Electric Co., 228 F.3d 1128, (10th Cir. 2000). *See also* Birdwell v. City of Gadsden, 970 F.2d 802, 807 (11th Cir. 1992), citing to Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944). (The question of who predominately benefits is "dependent upon all the circumstances of the case.")

[11] Whitten v. City of Easley, 2003 U.S. App. LEXIS 6739 (4th Cir. 2003)(unpublished opinion) citing to Kelly v. Hines-Rinaldi Funeral Home, Inc., 847 F.2d 147, 148 (4th Cir. 1998); Ingram v. County of Bucks, 144 F.3d 265, 268 (3d Cir. 1998).

[12] April 8, 2005, second-step response to grievance. Likewise, the grievant's sergeant noted that the change was an administrative decision enacted to "cover adjusted rest days" and to ensure adequate coverage. March 30, 2005, first-step response to grievance.

viewed as on-call time, thus compensable under DOC policy and the FLSA. Accordingly, this grievance is qualified for hearing.

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's March 30, 2005 grievance for hearing. This qualification ruling in no way determines that the agency's actions were improper, only that further exploration of the facts by a hearing Officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

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