Issue: Qualification/meal break policy – consolidation/combine with another grievant because of same issue; Ruling Date: July 12, 2005; Ruling #2005-1074; Agency: Department of Corrections: Outcome: qualified and consolidated with #2005-1046

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

In the matter of Department of Corrections
No. 2005-1074
July 12, 2005

The grievant has requested a ruling on whether her 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 her 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. Corrections Officers are required to remain on the premises during meal breaks and it is reported 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 second meal break. According to the Assistant Warden, allowing Officers to forego 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 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 challenges the facility's addition of the second unpaid lunch break. She asserts that all Officers should continue to have the single meal break taken by those who work in Building 8.

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 addition of a second unpaid meal break. The relevant policy at issue is 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 thus must be considered in its entirety. As explained below, several provisions of Procedure 5-35 are implicated in the instant grievance, particularly, Sections 5-35.14, "Meal Periods," and 5-35-15, "On-call Time.

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 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.[3] Although employers are typically not required under the FLSA to compensate employees for meal breaks,[4] in

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[3] 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."

[4] 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

some cases they must.[5] 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.[6] 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.

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.[7] 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?[8] To answer this

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> more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.

[5] 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."

[6] "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).

[7] 29 C.F.R. § 785.17.

[8] *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.")

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.[9]

During the second 30-minute meal break 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, has 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." 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 meal break is a misapplication or unfair application of DOC Procedure 5-35, more specifically, whether that second meal break is most appropriately viewed as on-call time, thus compensable under DOC policy and the FLSA. Accordingly, this grievance is qualified for hearing.

Consolidation

This grievance is substantially similar to one discussed in EDR Ruling No. 2005-1046, which also challenged the facility's new meal break policy. As discussed below, this grievance is hereby consolidated with the March 30, 2005 grievance qualified in EDR Ruling No. 2005-1046.

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or

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[9] 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).

factual background, unless there is a persuasive reason to process the grievances individually.[10]

In this case, both grievances involve the same policy, factual background and legal issues and, most importantly, consolidation is not impracticable. For these reasons, the two grievances are consolidated for a single hearing. This Department's rulings on compliance are final and nonappealable.[11]

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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William G. Anderson, Jr.
EDR Consultant, Sr.

[10] *Grievance Procedure Manual* § 8.5.
[11] Va. Code § 2.2-1001 (5).