

Issue: Qualification – Compensation: FLSA/Overtime; Ruling Date: June 19, 2007;
Ruling #2007-1632; Agency: Department of Corrections; Outcome: Qualified for
hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1632
June 19, 2007

The grievant has requested a ruling on whether his January 8, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed in an exempt position¹ as a Corrections Lieutenant with DOC. The grievant's normal schedule consists of 160 hours of work in a 28-day cycle. For the work period from October 30, 2006 through November 26, 2006 the grievant worked an additional 26.6 hours. Likewise, for the work period from November 27, 2006 through December 24, 2006 the grievant worked an additional 11.1 hours. The grievant earned the following compensatory leave: 8 hours on November 17th, 4 hours on November 22nd, 8 hours on November 23rd, 8 hours on November 24th and 4 hours on December 22nd.

In this case, the grievant asserts that the agency has misapplied and/or unfairly applied DOC Procedure 5-35 by failing to compensate him for overtime hours worked when he was not afforded an opportunity to adjust this time off during the two pay cycles indicated above. The agency argues that the grievant was not authorized to work overtime during the period in question and as such, he is not entitled to overtime compensation.

DISCUSSION

For a misapplication and/or unfair application of policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management

¹ An exempt employee is an employee that is not subject to the overtime provisions of the Fair Labor Standards Act. See DHRM Policy No. 3.10, (effective 09/16/93, revised 03/04) and DOC Procedure 5-35.5, page 1 of 12.

violated a mandatory policy provision or whether the challenged action, in its totality, is 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 failure to pay him overtime 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 5-35.7(C)(1), this provision is only one of the relevant Sections of Procedure 5-35 implicated in the instant grievance. As explained below, Sections 5-35.6, "Authorization for Overtime," and 5-35.13, "Work Periods for Exempt Personnel," are particularly relevant to this grievance.

Section 5.35.6, "Authorization for Overtime" states:

Overtime shall be worked only when properly authorized and shall be authorized only for bona fide emergencies, peak work loads, or to cover security shifts or if approved by a Regional Director, Regional Administrator, central office administrator, or organizational unit head or designee.....Overtime for exempt personnel shall be in accordance with the procedures outlined below.²

The following section, Section 5-35.7, identifies by category which employees are eligible for overtime. Subsection (C)(1) of 5-35.7, the provision cited to by the grievant as controlling in this case, states:

An authorization, G.O. Form P-14, shall be established for the exempt positions in the following classifications to be paid at straight time rates for overtime to cover staff shortages if a schedule adjustment cannot be made within their work cycle. Time and a half rates will be paid for emergency situations such as escapes and riots:

- a. Corrections Sergeant
- b. Corrections Lieutenant
- c. Institutional Maintenance position (below Grade 10 and not in Category I)\
- d. Registered Nurse Clinician A, B, and Coordinator
- e. Corrections Construction Unit employees³

² DOC Procedure 5-35.6. *See also* DHRM Policy 3.10, *Compensatory Leave*, (effective 9/16/93, revised 03/04) (exempt employees "may be awarded compensatory leave when the employee is required by the agency head or his/her designee to work more hours in a workweek than the agency head or his/her designee believes is reasonably expected for the accomplishment of the position's duties." Further, "[t]he requirement to work additional hours must be specifically authorized by the agency head or his/her designee" and "do not include extra hours that an exempt employee independently determines is necessary to carry out his or her job responsibilities.") (emphasis in original).

³ DOC Procedure 5-35.7(C)(1).

Additionally, Section 5-35.13 “Work Periods for Exempt Personnel,” subsection B states:

[e]xempt personnel are not normally given overtime pay or compensatory time for extra hours worked. However, schedule adjustments may be made at the unit head’s direction and based on work load demands during the 28 day or calendar month cycle but not beyond. Hour for hour adjustment is not required and not encouraged.⁴

Based on the foregoing, it seems clear that an exempt employee is not entitled to overtime pay when the extra hours worked have not been authorized in advance by management. Section 5-35.7(C)(1) merely identifies the grievant, a Corrections Lieutenant, as eligible for overtime compensation if the overtime has been authorized and a schedule adjustment could not be made during the work cycle.

In this case, the agency admits that even if he had permission to do so, the grievant most likely would not have been able to make a schedule adjustment for the extra hours worked prior to the end of the work cycle(s) in question. Per policy, if a schedule adjustment cannot be made prior to the end of the work cycle, a Lieutenant may be eligible for overtime pay for the additional hours worked to cover staff shortages, however, the overtime hours must be approved in advance by management. According to the grievant, his overtime hours were approved in advance by management. More specifically, the grievant claims that on the days in question, there was no other supervisor to relieve him and when he told the Watch Commander this, the Watch Commander on duty required him to stay at work until another supervisor came in to relieve him. The agency admits that there were three days (i.e., November 22nd, 26th and 27th) in which there was no supervisor in the building to provide relief to the grievant and that he did work an additional 8.1 hours on these days. However, the agency further asserts that there is no requirement that the grievant be relieved by another supervisor before he can leave. The grievant, on the other hand, asserts that as evidenced by the Watch Commander’s alleged requirement that the grievant stay at work until another supervisor was present, he was required to have a supervisor relieve him on the housing unit before he could leave.

In light of the above, there remains a question of fact as to whether the grievant’s overtime work was authorized in advance by management and as such, whether policy may have been misapplied by the agency’s refusal to pay the grievant for such work. As such, this issue qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency misapplied policy or otherwise acted improperly. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate.

⁴ DOC Procedure 5-35.13. *See also* DHRM Policy No. 1.25, *Hours of Work* (effective 9/16/93, revised 11/10/04) (“[m]anagement can adjust an employee’s work schedule temporarily within a workweek to avoid overtime liability or to meet operational needs” and may adjust an employees’ schedule “to meet the employees’ personal needs.”).

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's January 8, 2007 grievance is qualified for hearing. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

Claudia T. Farr
Director