

Issue: Qualification/compensation/FLSA/overtime; Ruling Date: January 24, 2007;
Ruling #2007-1471; Agency: George Mason University; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of George Mason University
Ruling Number 2007-1471
January 24, 2007

The grievant requests a qualification ruling in his August 15, 2006 grievance with George Mason University (GMU or the agency). In his grievance, the grievant claims that GMU has violated Virginia Code § 9.1-701 et seq.¹ by not providing him with compensation for overtime hours worked during a two-week period in July 2006. In addition, the August 15th grievance raises a claim of misapplication or unfair application of state and agency overtime compensation policies. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed in a non-exempt position² as a Law Enforcement Officer I with GMU. On July 28, 2006, the grievant was compensated at his regular rate of pay for the 96 hours he logged during the designated work period (i.e., July 9 – July 22). During this designated work period, the grievant was on annual leave from July 10th through July 14th and worked 56 hours during the week of July 17th through July 22nd.

¹ Va. Code § 9.1-701(A) states:

Employers shall pay fire protection or law-enforcement employees overtime compensation or leave, as under the Fair Labor Standards Act, 29 U.S.C. § 207 (o), at a rate of not less than one and one-half times the employee's regular rate of pay for all hours of work between the statutory maximum permitted under 29 U.S.C. § 207 (k) and the hours for which an employee receives his salary, or if paid on an hourly basis, the hours for which the employee receives hourly compensation. A fire protection or law-enforcement employee who is paid on an hourly basis shall have paid leave counted as hours of work in an amount no greater than the numbers of hours counted for other fire protection or law-enforcement employees working the same schedule who are paid on a salaried basis in that jurisdiction.

² A non-exempt employee is one that is "subject to the overtime provisions of the Fair Labor Standards Act." See Department of Human Resource Management (DHRM) Policy 3.10, *Compensatory Leave*.

The grievant asserts that he should have been compensated at a rate of “one and a half times the hourly rate for those hours worked outside my schedule” (i.e., 16 hours).³

DISCUSSION

Violation of Virginia Code § 9.1-701 et seq.

The grievant claims that under Virginia Code §§ 9.1-701 et seq., he is entitled to receive overtime compensation at a rate of one and one-half times his regular rate of pay. This Department has no authority to assess the applicability of Virginia Code §§ 9.1-701 et seq. to this case, nor enforce those provisions. Rather, this is a matter for the Circuit Court to decide.⁴ Thus, while this issue appropriately proceeded through the management resolution steps for a possible resolution,⁵ it does not qualify for a hearing.

Misapplication/Unfair Application of Policy

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. The applicable policies in this case are DHRM Policies 1.25, *Hours of Work* and 3.15, *Overtime Leave*. In addition, GMU has adopted a policy entitled *Compensatory Leave and Overtime Guidelines* for determining overtime pay for its non-exempt law enforcement employees. Furthermore, the grievant’s misapplication of policy claim implicates the Fair Labor Standards Act (FLSA)⁶ since both state and agency policy specifically reference the FLSA and are premised on the proper application of the FLSA to non-exempt employees.

DHRM Policy 1.25 states that “[t]he [FLSA] requires that a workweek be established in order to determine overtime pay for non-exempt employees. Agency management has the discretion to establish the workweek. Where no other workweek has been established the workweek will begin at 12:01 a.m. Sunday, and end at midnight Saturday.”⁷ Further, “[i]f an alternate workweek or work period has been established for...law enforcement...employees, in accordance with the provisions of the [FLSA], overtime work will be compensated after the requisite workweek or work period has been

³ The grievant’s normal working hours are from 9:00 a.m. to 5:00 p.m. Monday through Friday.

⁴ It should be noted that the Virginia Attorney General has issued an official opinion on whether Virginia Code §§ 9.1-701 et seq. apply to law enforcement agencies of the Commonwealth of Virginia. In OP NO. 05-056 issued October 19, 2005, the Virginia Attorney General opined that Virginia statutory provisions 9.1-700 through 9.1-704 do not apply to law enforcement employees and agencies of the Commonwealth because this statute specifically defines “employers” as “political subdivisions of the Commonwealth,” which state agencies are not. GMU specifically relies upon this opinion in denying the grievant’s request for overtime compensation.

⁵ Va. Code § 2.2-3004 (A).

⁶ See 29 U.S.C. §§ 201 et seq.

⁷ DHRM Policy 1.25, *Hours of Work*, page 5 of 5.

actually worked.”⁸ Similarly, DHRM Policy 3.15 states that “[a]n employee covered by the [FLSA] who works more than 40 hours in any workweek may elect to receive overtime leave instead of overtime compensation” at a rate of “one and one-half hours of leave for every hour worked over 40 in a workweek.”⁹ However, like DHRM Policy 1.25, Policy 3.15 goes on to state that “[a]n alternate workweek or work period may be established for...law enforcement...employees, in accordance with the provisions of the [FLSA]. For these employees, overtime work will be compensated after the requisite workweek or work period has been actually worked.”¹⁰

Likewise, GMU’s *Compensatory Leave and Overtime Guidelines* state that “[n]on-exempt employees must be paid time and one-half for all hours worked more than 40 in a workweek (from 12:01 a.m. Sunday through midnight on the following Saturday). Each workweek stands alone in calculating regular and overtime hours worked.”¹¹ However, GMU’s policy goes on to state that “[n]on-exempt law enforcement employees are paid time and one-half for all hours worked more than 80 in a two week period.”¹² As such, in accordance with DHRM policy and the FLSA, GMU has specifically designated an alternate work period (i.e., two weeks or 14 days) for its non-exempt law enforcement personnel. Further, GMU has declared that non-exempt law enforcement employees are provided overtime compensation only if the hours *actually worked* exceed 80 during the designated work period¹³ and has specifically exempted time spent on annual leave from inclusion in the 80 hours.¹⁴ Similarly, although not specifically stated, both DHRM policy and the FLSA seem to indicate that time spent on annual leave during a designated work period is not normally counted for purposes of determining the number of hours worked during the work period.¹⁵

⁸ *Id.* Under the FLSA, for “employees engaged in law enforcement activities....who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.” 29 C.F.R. 553.230(b). *See also* 29 U.S.C. § 207(k). For purposes of this ruling, we will assume that the grievant is an employee “engaged in law enforcement activities” as defined under the FLSA.

⁹ DHRM Policy 3.15, *Overtime Leave*, page 1 of 3.

¹⁰ *Id.*

¹¹ George Mason University *Compensatory Leave and Overtime Guidelines*, page 2.

¹² It appears that the normal work period for non-exempt GMU employees that are not law enforcement employees is 7 days.

¹³ In other words, a GMU non-exempt law enforcement employee must *actually work* more than 80 hours in a 14-day period before he will be entitled to overtime.

¹⁴ More specifically, GMU’s *Compensatory Leave and Overtime Guidelines* state “[l]eave time and holidays do not count as physical hours worked.”

¹⁵ In particular, the applicable provision of the FLSA in this case states that “[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.” 29 C.F.R. § 785.16. *Cf.* FLSA2005-3NA, May 16, 2005 (when an employee’s time is spent predominately for his employer’s benefit, it constitutes “hours worked.” Paid sick leave is not predominately for the employer’s benefit and thus, not considered “hours worked” under the FLSA, unless the employer places restrictions on the employee’s sick leave-related activities that prevent the employee from normal, everyday pursuits.) Likewise, as noted above, DHRM Policies 1.25 and 3.15 require that the hours be *actually worked* during the designated work period before overtime compensation or overtime leave will be required.

In this case, the grievant's time sheet shows a total of 96 hours for the designated two-week work period in question which started at 12:01 a.m. on July 9th and ended at midnight on July 22nd. However, 40 of the total 96 hours were charged as unrestricted¹⁶ annual leave and thus, were not hours actually worked. Accordingly, the total number of hours actually worked by the grievant during the designated work period was only 56, which is less than the 80 hours required under GMU policy for implication of the overtime compensation provisions. As such, this Department concludes that the grievant has failed to raise a sufficient question that there has been a misapplication or unfair application of state or agency policy. 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 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

¹⁶ During this Department's investigation, the agency stated that the grievant was not restricted in any way while on annual leave. This Department attempted to contact the grievant regarding the agency's contention; however, the grievant did not respond. Accordingly, this Department will assume that the grievant was not restricted while on annual leave the week of July 10th through July 14th.