Overtime Issues

The Board and the Vermont Supreme Court have addressed various issues concerning entitlement of employees to overtime compensation pursuant to the contracts between the State and the Vermont State Employees' Association. As a threshold issue, the Board has recognized it is management's prerogative to determine when overtime shall be performed.[1] Generally, to be compensated as overtime worked in the employment setting, work must be assigned or approved by the employer, explicitly or implicitly, as work which the employer requires to be done.[2]

The leading overtime cases have concerned whether employees were "on call", whether employees were on "standby status" or "available", whether employees were entitled to overtime compensation for travel time, whether employees were entitled to "call in" pay, or whether there was an equitable distribution of overtime. In the "on call" cases, employees were entitled to overtime compensation outside of normal working hours if they were "on call", but received less compensation if they simply had to be "available." If the employee is so limited in activities that his or her time cannot effectively be used as his or her own, then the employee's availability is more beneficial to the employer than the employee, and the employee is "on call" and should be compensated. The employee is engaged to wait.[3]

On the other hand, if the employee, while making himself or herself available, may still carry out functions of his or her own and is only limited to a telephone number where the employee can be reached and a location from which the employee

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[1] Grievance of VSCSF and Laflin, 16 VLRB 276, 279. (1993). Grievance of Austin, 6 VLRB 150 (1983).
[2] Id.
[3] Grievance of Brady, 139 Vt. 501, 506-507 (1981). Grievance of Bornstein, et al, 4 VLRB 260, 275-276 (1981). Grievance of Duling, 3 VLRB 406, 411-12 (1980).

can respond to the call within a reasonable time, then the employee is not on call. He or she is waiting to be engaged.[4] Whether employees are waiting to be engaged or engaged to wait must be decided upon the facts in each case.[5] Whether the time spent is predominantly for the employer's benefit or for the employee's benefit is a question dependent upon all the circumstances.[6]

In the "standby status" cases, which followed a change in contract language, the issue was whether employees were entitled to compensation for all hours they essentially were required, while on a purported "available" status, to be reachable and to be able to respond as if they were on "standby" status.[7] Such a requirement exists when management leads employees to reasonably believe that they are not free to travel where they cannot be reached and would be unable to respond to an emergency.[8] Such a requirement does not exist where employees, while on "available" status, act as if they are on "standby" status as a result of self-imposed professional responsibility, rather than a requirement imposed on them by management.[9]

In the entitlement to overtime compensation for travel time cases, employees were eligible under the contracts for overtime for travel time between work locations, but the employee's home was not considered a work location for overtime purposes. Thus, employees were not entitled to overtime compensation for travel time between home and assignment.[10]

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[4] Id.
[5] Id.
[6] Id.
[7] Grievance of Vermont State Employees' Association, Perkins, et al, 23 VLRB 67 (2000). Grievance of Vermont State Employees' Association (re: Refusal to Pay Standby Pay), 15 VLRB 71, 89-91 (1992); *Affirmed,* 162 Vt. 277 (1994).
[8] Id.
[9] Id.
[10] Grievance of VSEA on Behalf of the Meat Inspectors, Department of Agriculture, 4 VLRB 144 (1981); *Affirmed* , 141 Vt. 616 (1982).

On the other hand, the overtime provisions of the contracts required that any travel time between official work station and another work location outside of normal working hours should be considered as time worked for purposes of computing overtime.[11] "Official station" is the place where an employee performs the majority of his or her job duties in a given year; a change in "official station" by an employer would require a bonafide change in the site of the majority of the work to be performed by the incumbent of the position being transferred to a different geographical area.[12] Employees were protected from management changing an employee's official station because of temporary work location shifts so as to avoid resulting higher expenses reimbursement, but management was not restricted from making such a change due to a permanent work location shift.[13]

In interpreting contract language providing that an "employee who is called into work at any time other than continuously into his normal scheduled shift" shall be considered as working overtime during all such hours worked, the Board and the Vermont Supreme Court came to different conclusions. The Board concluded that the "call in" provision applied only to situations where an employee has completed his or her regular work shift, and subsequently is called to come in and work before the start of his or her next regular work shift, and does not work continuously into his or her normally scheduled shift.[14] However, the Court reversed the Board's decision. The Court concluded that, given the context in which the contract was reached together with the practical construction placed upon it by the parties after its

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[11] Grievance of McFarland, 10 VLRB 220, 227 (1987). Grievance of Beyor, 5 VLRB 222, 236 (1982).
[12] Beyor, 5 VLRB at 234.
[13] Grievance of Crilly, 7 VLRB 233, 244 (1984).
[14] Grievance of Dickerson, 5 VLRB 249 (1982). Grievance of Cronan, et al, 6 VLRB 347 (1983).

execution, the "call in" provision was to apply even if the employee received advance notice of the off duty work.[15]

Two Board decisions addressed contract language concerning equitable distribution of overtime. The contract language provided that "appointing authorities shall make a reasonable effort to distribute scheduled overtime as equitably as possible among classified employees". In one case, the Board determined that the disparity between the grievant and the other employees in his office resulted in a violation of the requirement to make a reasonable effort to equitably distribute overtime by providing no overtime to Grievant.[16] In the second case, the Board found no contract violation where much of the overtime at issue was for work scheduled by entities outside of the grievants' employing department and the grievants had not demonstrated inequitable distribution of overtime for the remaining overtime distributed by the employing department.[17]

[15] Grievance of Cronan, et al, 151 Vt. 576, 579 (1989).
[16] Grievance of Davidson, 30 VLRB 337 (2009).
[17] Grievance of Davidson, et al, 33 VLRB 153 (2015).