BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	
PATRICK M. BURK,	)	
	)	
Appellant,	)	**DOCKET NO. 02-09-279**
	)	
v.	)	
	)	**FINAL**
DEPARTMENT OF PUBLIC SAFETY,	)	**DECISION AND ORDER**
	)	
	)	
Agency.	)	

BEFORE Brenda Phillips, Chairperson; Dallas Green, John F. Schmutz, John W. Pitts, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

APPEARANCES:

For the Appellant:
Patrick M. Burk, Appellant
Michael Hertzfeld, Union Representative

For the Agency:
James Hanley, Deputy Attorney General
Department of Justice
Carvel State Office building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance has proceeded through the steps of the Merit System grievance process culminating in a Step 3 grievance hearing on August 14, 2002 before LaTonya B. Ashley, the designee of the State Personnel Director. On August 30, 2002, the State Personnel Director's designee issued her written decision finding that the grievance by Mr. Burk was not timely filed, but

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opining nevertheless that, without regard to the untimeliness, the grievance should be denied on the merits. This appeal was received by the Merit Employee Relations Board ("MERB" or Board") on September 27, 2002.

This matter originally came before the MERB for hearing on February 6, 2003. The Appellant appeared with assistance from his Union Representative, Michael Hertzfeld. The Agency was represented by Deputy Attorney General James Hanley.

At the conclusion of that hearing, the Board determined, contrary to the determination at Step 3 of the grievance hearing process, that the grievance filed by Patrick Burk was timely filed. Further proceedings before the Board were suspended for at least 60 days to permit discussions among the parties concerning what, if any, entitlement existed for Mr. Burk to receive overtime compensation for his stint at the State Police Training Academy in preparation for his employment as an agent for the Division of Alcoholic Beverage Control and Tobacco Enforcement, ("DABCTE") in the Department of Public Safety.

The Board mailed its Order concerning the timeliness of Mr. Burk's grievance filing (which, by this reference is incorporated herein) on March 26, 2003. By letter dated April 8, 2003, Deputy Attorney General James Hanley advised the Board that he intended to file a memorandum of law and that a further hearing in this matter should be scheduled. The further hearing was scheduled for the next available Board hearing date and conducted on May 28, 2003. This is the final decision and order of the Board which, for the reasons stated, denies the grievance.

RELEVANT MERIT RULE

MERIT RULE 5.1320 - COMPENSATION FOR OVERTIME SERVICE

An employee with a standard work week of 37 ½ hours per week and in a position or a class covered by the Fair Labor Standards Act (FLSA) who is authorized to perform overtime service shall

be compensated in cash at one and one-half times the regular rate of pay or granted one and one-half hours off for each one hour worked after 37 ½ hours per week. An employee with a standard work week of 40 hours and in a position or a class covered by the FLSA who is authorized to perform overtime service shall be compensated in cash at one and one-half times the regular rate of pay or granted one and one-half hours off for each hour worked after 40 hours per week. An employee with a standard work schedule in excess of one week as allowed by the FLSA and who is authorized to perform overtime service shall be compensated pursuant to the FLSA and this rule for hours worked in excess of the standard work schedule. Hours worked is defined for these purposes to include any form of scheduled paid leave used by the employee (e.g. annual leave, sick leave, holiday, etc.) as well as hours actually worked by the employee. The method of compensation shall be agreed to in advance as cash payment is subject to availability of funds and or operational needs of the agency. Only hours worked over 40 hours per work week are covered by the overtime provisions of the FLSA. The regular hourly rate of pay for overtime payment purposes includes shift differential pay, stand-by duty pay and hazardous duty pay.

DISCUSSION

Having previously determined that Mr. Burk's grievance was timely filed, the remaining issue for resolution by the Board is whether or not Mr. Burk has an entitlement as he claims under Merit Rule 5.1320 to overtime pay during the period he attended the State Police Training Academy. The short answer is that in the Board's view, he does not.

Merit Rule 5.1320, by its terms, looks to the FLSA and its operative rules and regulations for the determination of overtime pay entitlements. In this instance, the issue relates specifically to the entitlement of overtime in the police training academy environment.

In order to function as an agent for the DABCTE, Mr. Burk is required by State law to successfully complete the required police training and education course at an approved school such as the State Police Training Academy. 11 *Del. C.* §8405(a). Also by statute, during any such training program, the compensation of any trainee police officer is the responsibility of the employing authority, in this case the Department of Public Safety. All other costs are to be borne by the Council on Police Training. See 11 *Del. C.* §8401 et. seq.

The FLSA requires employers to compensate employees for all "hours worked". 29 U.S.C.§201. While time spent attending training required by an employer is normally considered compensable hours of work, not all time spent in training by an employee is compensable. See *Ballou v. General Electric Company*, 433 F.2d 109 (1st Cir. 1970) (Apprentices in a program run by the employer sought and were denied compensation for time spent attending classes conducted off-site by an independent educational institution). Similarly, in *Bienkowski v. Northeastern University*, 285 F. 3d 138 (1st Cir.2002), the plaintiffs were police officers for the defendant university. As a condition of their employment, the plaintiffs in the Northeastern University case were required to receive and retain certification as State Registered Emergency Medical Technicians (EMT's) within one year of their appointment as probationary police officers. The First Circuit Court of Appeals, reversing the District Court, determined that there was no entitlement to overtime compensation for such training because it was not an integral and indispensable part of the principal activities for which the probationary police officers were hired.

In the present situation, Mr. Burk's principal employment activity is as an agent for the Division of Alcoholic Beverage Control and Tobacco Enforcement, and he is entitled to compensation for his work in such capacity including, where appropriate, overtime.

However, under the Code of Federal Regulations ("C.F.R") relating to the application of the FLSA to employees of state and local governments there are special rules for state and local employees involved in training situations. Such rules address situations, such as the present case, where the training and certification requirements are imposed by a higher level governmental authority. In Mr. Burk's case the requirement for the certification is imposed by the State of Delaware under 11 *Del. C.* §8405. Under the Federal Regulations, in such training situations there

are specific exemptions from the application of the FLSA for time spent outside of regular working hours at specialized or follow-up training which is required for certifications of employees of a governmental jurisdiction by law of a higher level of government (e.g. where a State or county law imposes a training obligation on city employees). Such time does not constitute compensable hours of work under 29 C.F.R. §553.226 (b)(2). Additionally, there is an exemption for attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular government jurisdiction (e.g., certification of public and private emergency rescue workers). This training time also does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions. 29 C.F.R. §553.226 (b)(1).

There is no factual dispute that the normal duty week for Mr. Burk as an agent with DABCTE is 37.5 hours comprised of 5 days of 7.5 normal duty hours. In this proceeding, Mr. Burk has acknowledged that he was fully compensated for his 37.5 hours of regular working time for each week during which he was a trainee at the State Police Training Academy. Also, at the hearing on February 6, 2003, the Board received Appellant's Exhibit No. 6 from Mr. Burk. This Exhibit reflects the type of daily training activity for the Delaware State Police Training Academy class which Mr. Burk attended. The essence of Mr. Burk's grievance claim is that he is entitled to overtime (or compensatory time) for those hours between the 7.5 hours regular duty hours for which he was paid as his normal work day compensation and the entire training day at the Academy. Mr. Burk is not asserting a claim for overtime compensation for the time at the Academy while he was sleeping as was the unsuccessful claim of the Police Academy trainees in the case of *Banks v. City of Springfield*, 959 F. Supp. 972 (C.D, Ill. 1997).

However, Mr. Burk's grievance does seek recognition for compensation purposes, of his training time spent at the Training Academy each day beyond his 7.5 regular duty hours during which he was unable to engage in personal pursuits. As authority for that entitlement Mr. Burk looks to Merit Rule No. 5.1320 and 29 C.F.R.§553.226(c) which provides:

> Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

Mr. Burk claims that he was not free to use time for personal pursuits during the entire Academy training day. Mr. Burk presented examples of the Delaware State Police Training Academy schedule for several days including, as an example, August 8, 2001, where the training day began at 0515 hours with Reveille and ended at 2200 hours with lights out. (Appellant's Exhibit No. 6). For this same date on his time sheet which he submitted to the Department of Public Safety in February of 2002, Mr. Burk claimed 15.75 total hours worked with an entitlement of "FLSA comp time" of 8.25 hours after deducting his normal 7.5 hour work day. (Appellant's Exhibit No. 4).

For purposes of FLSA overtime compensation, and for compensation under Merit Rule No. 5.1320, the time spent by Mr. Burk in training activities at the Delaware State Police Training Academy outside of his regular working hours which were 9:00 a.m. to 5:00 p.m. is simply not eligible for overtime compensation. Likewise, the time before and after his training day during which he was free to use such time for personal pursuits (including sleeping) also does not constitute compensable hours of work as an agent for DABCTE, and he is not eligible for overtime compensation for such time.

Therefore, in the view of the Board, he has not established a valid claim for overtime

compensation for the period he attended the Academy and his grievance appeal is unanimously[1] **DENIED**.

IT IS SO ORDERED.

BY ORDER OF THE BOARD this 25 day of June, 2003.

Brenda Phillips, Chairperson

John F. Schmutz, Member

Dallas Green, Member

John W. Pitts, Member

Mailing Date: June 26, 2003

Distribution:
Original: File
Copies: Appellant
Agency's Representative
Merit Employee Relations Board counsel

[1]Board member Paul R. Houck was unavailable for the hearings on this matter.