

<p>IN THE MATTER OF:</p> <p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3721</p> <p style="text-align: center;">GRIEVANTS</p> <p>v.</p> <p>DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT</p> <p style="text-align: center;">AGENCY</p>	<p>DENNIS RUBIN DIRECTOR</p> <p>GRIEVANCE OFFICIAL</p>
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STEP 3 GROUP GRIEVANCE

Comes now, American Federation of Government Employees, Local 3721 (The “Union”), by and through its undersigned representative, to file this grievance.

This grievance is submitted in accordance with Article 31, Sections B(2)(b) and B(3)(c) of the collective bargaining agreement (The “Agreement”) between the Union and the District of Columbia Fire and Emergency Medical Services Department (The “Agency”).

The group, for the purposes of this grievance, is defined as: all employees in the unit represented by the Union, who work a twelve (12) hour rotating shift as their normally scheduled tour of duty.

ISSUE

The issue, out of which this grievance arises, is the Agency’s intentional and willful violation of *29 U.S.C. Ch. 8*, the Fair Labor Standards Act.

STATEMENT OF FACTS

On October 1st, 2006 a new compensation agreement went into effect for the employees that are part of compensation units 1 and 2. Contractual language was included within the compensation agreement, which improperly and illegally limited overtime premium payments to the employees covered by this grievance.

The language was inserted into the compensation agreement in retaliation for this Union filing a grievance on November 23rd 2005, over language in the previous compensation

agreement which entitled the covered employees to overtime premium payments after working just 8 hours of each scheduled day.¹

The aforementioned contractual language also limits the overtime premium pay of employees in the Office of Unified Communications. To date, the Office of Unified Communications has not paid its employees pursuant to the contractual language, but rather, as it had in the past, offering overtime premium pay for all hours worked in excess of forty (40) in one week. Indeed, even the Agency continues to pay the EMS Supervisors overtime premium pay for all hours worked in excess of forty (40) since they are not covered by a collective bargaining agreement.

FAIR LABOR STANDARDS ACT

29 U.S.C. §207(a)(1) provides in relevant part:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce ... or is employed in an enterprise engaged in commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

It is well established that the grievants are not exempt from the provisions of the Fair Labor Standards Act.

CONTRACTUAL LANGUAGE IS INVALID

The language giving rise to this grievance, Article 8, Section B of the compensation agreement for compensation units 1 and 2, states:

1. Compressed schedules may be jointly determined within a specific work area that modifies this overtime provision (as outlined in Section A of this Article) but must be submitted to the parties to this contract prior to implementation. This agreement to jointly determine compressed schedules does not impact on the setting of the tour of duty.
2. When an employee works a compressed schedule, which means (1) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays, and (2) in the case of a part-time employee, a biweekly basic work requirement of less than 80 hours which is scheduled for less than 10 workdays, the employee would receive overtime pay or compensatory time for all hours in a pay status in excess of his/her assigned tour of duty, consistent with the 2004 District of Columbia Omnibus Authorization Act, 118 Stat. 2230, Pub. L. 108-386 Section (October 30, 2004).
3. The purpose of this section is to allow for authorized compressed time schedules which exceed eight (8) hours in a day or forty (40) hours in

¹ Arbitration over the issue is scheduled for November 21st 2008.

a week to be deemed the employee's regular tour of duty, and not be considered overtime within the confines of the specific compressed work schedule and this Article. Bargaining unit members so affected would receive overtime or compensatory time for all hours in a pay status in excess of their assigned tour of duty. This provision also applies to bargaining unit employees in the Fire and Emergency Medical Services Department and the Office of Unified Communications.

There is no collective bargaining exemption to the FLSA. Furthermore, a union cannot bargain away the FLSA rights of the employees. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 740, 745 (1981); *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999); *L-246 Utility Workers v. Southern Cal. Edison Co.*, 83 F.2d 292 (9th Cir. 1996); *Featsent v. City of Younstown*, 70 F.3d 900, 901 (6th Cir. 1995); *Castillo v. Case Farms of Ohio, Inc.*, 96 F.Supp.2d 578 (WD Tx 1999); *Braddock v. Madison County*, 34 F.Supp.2d 1098 (S.D. In. 1998); *Brooks v. Village of Ridgefield Park, NJ*, 978 F.Supp 613 (NJ 1997). Employers and employees may not, in general, make agreements to pay and receive less pay than the FLSA provides for, and such agreements are against public policy and unenforceable. *Roman v. Maietta Construction Co.*, 147 F.3d71 (1st Cir. 1998).

GRIEVANTS DO NOT WORK A COMPRESSED WORK SCHEDULE

Compressed work schedules are governed by §1210 of the District Personnel Manual ("DPM"), which states:

1210.1 Pursuant to D.C. Official Code § 1-510 (2006), section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, (29 U.S.C. § 207) shall not apply to the hours of work of a District government employee that constitute a compressed work schedule.

1210.2 A compressed work schedule shall be the number of hours, excluding overtime hours, an employee is required to work or account for in a biweekly pay period that enable the employee to complete an eighty-hour (80-hour) work schedule in fewer than ten (10) workdays.

1210.3 The tour of duty for each employee under a compressed work schedule program shall be defined by a fixed schedule established by the agency.

1210.4 The established work schedule of an employee working a compressed work schedule may not exceed ten (10) hours for any workday.

1210.5 A compressed work schedule shall not be combined with a flexible work schedule under section 1208 of this chapter, an alternative work schedule under section 1209 of this chapter, or telecommuting under section 1211 of this chapter.

Grievants do not work a compressed schedule as defined by regulation. Grievants schedule derives from a January 21st 1988 Memorandum of Understanding and

subsequent interest arbitration award, and demands that “Emergency Ambulance Bureau personnel shall work twelve (12) hour shifts as their normal scheduled daily tour of duty and which shall continue to constitute for pay and leave purposes, a forty (40) hour workweek in a 24 week cycle.” The workweek hour requirement and 24 week cycle were made moot by the subsequent 1995 settlement to the 1988 FLSA lawsuit filed by this Union at that time. Commencing in 1995, all hours worked in excess of forty (40) in one week were paid at the overtime premium rate.

Nothing has changed with regard to the schedule that the grievants work. It wasn’t a compressed schedule prior to October 1st 2006, and it isn’t now.

Arguing against Agency’s contention that grievants work a compressed work schedule is the plain regulatory language of §§1210.4-5. The grievants work day exceeds ten (10) hours, and grievants do not work a fixed schedule but work a twelve (12) hour rotating shift. They do not work the same days each week.

Further supporting grievants contention that they do not work a compressed schedule, is the language in the compensation agreement itself. The relevant passage states (emphasis added), “... This provision *also* applies to bargaining unit employees in the Fire and Emergency Medical Services Department and the Office of Unified Communications.” The Agency had to include that language, because it recognized that grievants do not work a compressed schedule as defined by the DPM. As previously demonstrated, a union is precluded from bargaining away its employees FLSA rights.

SUMMARY

Agency incorrectly contends that grievants work a compressed schedule. As demonstrated, grievants do not work a compressed schedule as defined by the DPM.

The Union is precluded from bargaining away its employees FLSA rights, and as such, the language in the compensation agreement abrogating those rights is invalid.

The Agency, intentionally and willfully, failed to pay overtime premium pay to the grievants for all hours worked in excess of forty (40) hours each week, commencing the first full pay period in October 2006. Since the Agency’s actions in this case were willful, liquidated damages apply.

RESOLUTION

As resolution to this grievance, it is respectfully demanded:

1. All unpaid overtime compensation be retroactively restored to the grievants, pursuant to 29 U.S.C. §216(b), calculated back to October 1st 2006.
2. An additional amount, equal to the amount calculated in No. 1, as liquidated damages, pursuant to 29 U.S.C. §216(b), calculated back to October 1st 2006.

3. Attorney's fees and costs, pursuant to 29 U.S.C. §216(b)

This grievance is submitted this 31st Day of October 2008.

Respectfully submitted,

 \s\ Steven B. Chasin

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