



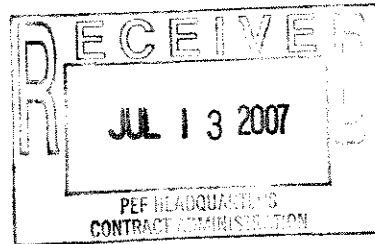
State of New York  
**Governor's Office of Employee Relations**  
Contract Negotiations and Administration Unit  
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**Eliot Spitzer**  
Governor

**Gary Johnson**  
Director

July 12, 2007

Mr. Roger L. Scales  
Director of Labor Relations  
Public Employees Federation, AFL-CIO  
1168-70 Troy-Schenectady Road  
PO Box 12414  
Albany, New York 12212-2414



**Re: Step 3 Decision**  
**Class Action**  
**OTDA – Buffalo**  
**SUBJ.: Article 7 - Compensation**  
**Article 32 - Workweek and Workday**  
**Article 45 - Benefits Guaranteed**  
**OER File No. 2007-05-0122**

Dear Mr. Scales:

This is the Step 3 decision in the above-entitled grievance. A thorough review of the grievance file was conducted at Step 3.

The grievants allege a violation of Article 7, Compensation, Article 32, Workweek and Workday, and Article 45, Benefits Guaranteed, of the 2003-2007 Professional, Scientific, and Technical Services Unit Agreement when they were required to work on a Saturday. As a remedy, the grievants seek compensation or a work schedule adjustment.

The grievants are Disability Analysts 4s, Grade 25, at the Office of Temporary and Disability Assistance (OTDA) assigned to the Buffalo Office. In early 2006, OTDA obtained funding to pay overtime at the Division of Disability Determinations. Thus,

Disability Analysts 2s in every region of the State were offered voluntary overtime on Saturdays to work on their caseloads. Disability Analysts 4s, Disability Analyst 5s and Regional Administrators were required to supervise the Disability Analyst 2s on one, two, and in some cases, three, Saturdays. Each was asked to choose the Saturday they would work; those who did not make a selection were assigned to a Saturday. In all, each employee only worked about two or three Saturdays. The five Disability Analyst 4s who work in the Buffalo Office filed the instant grievance.

I must deny the alleged violation of Article 7, presumably Article 7.17, Overtime Compensation, which states:

Compensation for overtime work will continue to be subject to all applicable statutes, rules and regulations, except that on and after October 1, 1990, all positions in the PS&T Unit allocated or equated to grades 22 and below shall be deemed to be eligible to receive overtime compensation.

The grievants are Grade 25, overtime ineligible employees, and thus are not eligible for overtime compensation.

I must also deny the alleged violation of Article 32 which states in pertinent part:

32.2(b) A work schedule established pursuant to Section 32.1 above or subsection 32.2(a) above may be changed with the consent of the employee(s) affected or in an emergency or as described below:

*(1) For full-time employees except those employed on a seasonal basis — After reasonable advance notice and consultation and a minimum of 30 days' advance notice, in writing, to the affected employee(s).*

In the instant grievance, the grievants' work schedules were not changed. Rather, they were required to work some additional hours over a limited period for operational reasons. Therefore, there can be no violation of Article 32.

I must also deny the alleged violation of Article 45 where the grievants claim violations of "the Agency Manual, not limited to Chapter 1, Section 31, the agency time and attendance directives related to time, attendance, leave and working hours, New York State Attendance and Leave Manual not limited to Section 20.1 and sections related to time, attendance, leave and working hours, Civil Service Law Sections 134.5 and 134.6."

It is well settled that the source of the benefit "guaranteed" must be a law, rule or regulation. The "rule or regulation" refers to the rules and regulations filed with the Secretary of State and published in the New York Code of Rules and Regulations (NYCRR), also known as the "Green Books." Agency rules and regulations, such as the Agency Manual and the New York State Attendance and Leave Manual cannot be grieved under Article 45 and any claimed violations of such are denied. However, alleged violations of the Civil Service Law are grievable under Article 45.

I must deny the alleged violation of Article 45 as it relates to Section 134.5 of the Civil Service Law. Section 134.5 provides as follows:

134.5 Notwithstanding any other provisions of law to the contrary, employees in any title or individual position or positions ineligible to accrue overtime credits under the rules and regulations promulgated by the director of the budget pursuant to the provisions of this section who are required to work beyond a normal work week may be granted additional compensation. Such compensation shall be paid upon approval by the director of the budget and at a rate established by the director of the budget, provided however, that such additional compensation shall not exceed twelve percent of the employee's basic salary. Such compensation shall be paid in addition to and shall not be a part of the employee's basic annual salary, and shall not affect or impair any performance advances or other rights or benefits to which the employee may be entitled under the provisions of this chapter, provided however, that any differential payable pursuant to this subdivision shall be included as compensation for retirement purposes.

Section 134.5 does not compel the waiver of overtime ineligibility. Rather, Section 134.5 gives the agency the authority to, in its discretion, seek approval from the Director of the Budget to waive overtime ineligibility. The agency considered many factors when deciding whether or not to invoke their discretion in this matter: Grade 25-level employees are expected to work additional hours, as required, without additional compensation, except in the most exceptional circumstances; the grievants were involved in a prescheduled, intermittent projects of a limited duration and doing work that was not performed under emergency conditions; the number of hours worked was clearly not in excess of the hours that the position should reasonably require.

In OER File No. 1987-05-0934 (Walter Addicks, et al v. DOT) Arbitrator Normal Brand decided, "I cannot conclude that Article 45 provides for either "discretion on demand," or arbitral review whenever an Agency declines to ask DOB to waive overtime ineligibility. Consequently, I have no basis upon which to find that Article 45 was violated." The benefit provided by Section 134.5 is potential, not actual. It only becomes

actual if management chooses, in his discretion, to make it available. Therefore, there can be no violation of Article 45 as it relates to Section 134.5.

I must also deny the alleged violation of Article 45 as it relates to Section 134.6 of the Civil Service Law. Section 134.6 provides as follows:

134.6 Notwithstanding any other provisions of law to the contrary, any employee in any title or individual position ineligible to accrue overtime credits under the rules and regulations promulgated by the director of the budget pursuant to the provisions of this section who is required to work beyond a normal workweek **during a period deemed by the director of the budget to be an extreme emergency**, may be granted additional compensation upon the approval of and at a rate established by the director of the budget; provided, however, that such additional compensation shall not exceed one and one-half times the hourly rate of pay received by such employee in his regular position. Such compensation shall be in addition to, and not be a part of, the employee's basic annual salary and shall not affect or impair any increment or other rights or benefits to which the employee may be entitled under the provisions of this chapter; provided, however, that any differential payable pursuant to this subdivision shall be included as compensation for retirement purposes. (emphasis added)

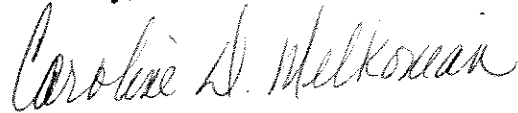
I find that the grievant has no contractual entitlement to have any emergency designated as an "extreme emergency." Rather, this designation is made by the Director of the Budget in accordance with established standards and procedure. In the instant grievance, the work performed did not constitute and was not designated as an "extreme" emergency by the Director of the Budget. Therefore, the grievant is not entitled to be paid overtime pursuant to Section 134.6.

With respect to the greivants' complaint that they were not offered work schedule adjustments, work schedule adjustments for overtime ineligible employees are not required since these employees are expected to work until the job is completed. The agency, in its discretion, decided not to offer the greivants a work schedule adjustment. The agency considered the same factors stated above when deciding whether or not to invoke their discretion in this matter: Grade 25-level employees are expected to work additional hours, as required, without additional compensation, except in the most exceptional circumstances; the grievants were involved in a prescheduled, intermittent projects of a limited duration and doing work that was not performed under emergency

conditions; the number of hours worked was clearly not in excess of the hours that the position should reasonably require. The agency was within its rights to make such a determination.

Based on the foregoing, the grievance is denied.

Sincerely,



Caroline D. Melkonian  
Assistant Director

CDM/jpc

cc: Lee M. Ryan (Agency File Nos. 409/411/413/414)  
Frederick M. Becker

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