

# MAINE STATE LEGISLATURE

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Inter-Departmental Memorandum Date September 2, 1976

To Col. Allan H. Weeks, Commissioner

Dept. Maine State Police

From Joseph E. Brennan, Attorney General

Dept. Attorney General

Subject \_\_\_\_\_

FACTS:

As a result of the enactment of P.L. 1975, c. 369, members of the State Police, and other law enforcement officers, are entitled to compensation for off-duty court appearances. A question has arisen, however, as to whether the right to overtime pay applies to the time spent traveling to and from the court.

QUESTION:

Is a member of the State Police, who is required by a court or a prosecuting official to be in attendance in a proceeding as a complainant or a witness at a time other than his regular working hours, entitled to compensation for time spent traveling to and from court?

ANSWER:

1. Subject to the limitations in answer #2, 25 M.R.S.A. §1504 entitles a member of the State Police to overtime compensation for the time spent traveling to and from a court proceeding at a time other than his regular working hours.

2. For purposes of 25 M.R.S.A. §1504, compensable travel time is the lesser of the following: (1) The actual travel time; or (2) The normal travel time between the individual's principal place of employment and the court.

REASONING:

I. Applicability of Compensation Statutes to Travel Time

The right of a member of the State Police to compensation for off-duty court appearances is contained in the third paragraph of 25 M.R.S.A. §1504, which provides in relevant part:

No inspector or member of the State Police shall receive any fee as a complainant or witness, or for making an arrest, except that whenever members of the State Police are required by any court or prosecuting official to be in attendance

in any proceeding as a complainant or a witness at times other than regular working hours, such members shall receive compensation on an hourly basis equal to their current hourly wage. Such compensation shall be made to members from the salary account of the State Police with reimbursement to the State Police from the General Fund for appearances before the District Court and from the respective county treasurer for appearances before the Superior Court.

Concomitant with the enactment of the above provision, the Legislature amended two other sections to afford a similar right to all law enforcement officers.

4 M.R.S.A. §173

\* \* \*

Notwithstanding any other provision of law, all law enforcement officers appearing in District Court at times other than their regular working hours, at the order of a prosecuting official and whether or not they are called upon to give testimony, shall be compensated out of the General Fund on an hourly basis equal to that established by the State for their range and step level. The District Court judge shall determine and order such payment.

16 M.R.S.A. §252

Notwithstanding any other provisions of law, all law enforcement officers appearing at the order of a prosecuting official before the Superior Court or grand jury, whether or not called upon to give testimony, at times other than their regular working hours shall be compensated on an hourly basis equal to their present rate of employment to be paid by the respective county treasurer.

Despite minor variations in the wording of these statutes, they are clearly part of a common legislative scheme.

The threshold issue is whether the pending question can be resolved solely by reading the above statutes. It might be argued that the references to attendance at a proceeding and appearance in a court mean that the right to compensation exists only during the course of the attendance or appearance. A closer examination of the statutes, however, strongly suggests that the Legislature used that language to designate the types of activities for which pay is required and not to delimit the exact time period for which compensation must be afforded. Thus, the phrase in 25 M.R.S.A.

§1504, "whenever members of the State Police are required. . .to be in attendance at any proceeding." establishes the circumstances which trigger the right to overtime compensation. Similarly, 4 M.R.S.A. §173 and 16 M.R.S.A. §252 make it clear that compensation is not restricted to the actual court appearance, insofar as they specifically eliminate any requirement that the officer be called upon to give testimony.

While the above provisions set out the compensable activities, they do not indicate when these activities are deemed to commence and to terminate. Accordingly, it is relevant to examine the legislative history of these sections, the totality of which is embodied in the Statement of Fact in L.D. 1692.

#### STATEMENT OF FACT

With the advent of full-time prosecutors, officers will not be involved in setting hearing dates or times. The Federal Fair Labor Standards require overtime payments in many cases currently and eventually in all cases. Management would be handicapped in attempts to effectively schedule working hours to avoid budgetary problems with court appearance demands controlled by a 3rd party.

Although the apparent conclusion that the Fair Labor Standards Act would apply to Maine law enforcement officers has been rendered invalid by National League of Cities v. Usery, 44 U.S.L.W. 4974, (U.S. June 24, 1976), the Statement of Fact indicates that the Legislature intended that the State laws parallel the federal standards. For that reason, a resolution of the problem in accordance with federal law should afford guidance on the proper interpretation of the State statutes. In addition, the Fair Labor Standards Act, and the regulations issued pursuant thereto, represent the most closely analogous body of law on the right to overtime compensation.

While the Fair Labor Standards Act creates the right to overtime compensation, see 29 U.S.C. §207 (1970), it is a section of the Portal to Portal Act which bears most directly on the current problem. See 29 U.S.C. §254 (1970). That section limits the applicability of the overtime provisions with respect to employee travel time. Under 29 U.S.C. §254(a), the employee is not entitled to overtime compensation for

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

All other work related travel would fall within the ambit of the Fair Labor Standards Act.

Despite the absence of pertinent case law, the regulations issued by the Wage and Hour Division of the Department of Labor expand on the meaning of the Portal to Portal Act. These regulations provide in relevant part:

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours. For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). 29 C.F.R. §790.7(c) (1975) (emphasis added).

Generally speaking, the travel exception to the overtime pay requirement is directed primarily at the daily commute between the employee's residence and his principal place of employment.

The situation of the member of the State Police, who is required by a court or a prosecutor to appear at a proceeding at a time other than his regular working hours, would seem to be covered by the last sentence in the above quoted regulation. To qualify as compensable travel time in accordance with that provision, the travel must meet three prerequisites: (1) it must be outside the employee's regular working hours; (2) it must be at the direction of the employer; and (3) it must be on the business of the employer. Applying these

prerequisites to the problem at hand, the travel is by definition "at times other than regular working hours." Similarly, it is at the direction of the employer, insofar as 25 M.R.S.A. §1504 expressly states that the appearance must be "required by any court or prosecuting official." Finally, when an officer appears before a court or a grand jury, as contemplated by the statute, there is little doubt that he is on the business of the State.

The only relevant exception to this line of analysis is contained in the proposition that "travel time on holidays and weekends, and other days not usually worked, is to be counted to the same extent as though it had occurred on a regular workday." C. Livengood, The Federal Wage and Hour Law, 161 (1951). In other words, an employee working on what would customarily be his day off might not be entitled to compensation for the normal commute between his residence and his principal place of employment. See Dept. of Labor Interpretative Bulletin, Hours Worked 9-10 (WH Publication 1312 1972). Since the courthouse is not the principal place of employment for most members of the State Police, this exception would not render them ineligible for overtime compensation. On a workday, they would be paid for trips to court, insofar as these trips represent travel from one activity to another. Accordingly, they are equally entitled to such compensation on their days off.<sup>1</sup>

The conclusion that trips to court should be treated as compensable travel time is consistent with State law on the reimbursement of police expenses. Thus, the first two sentences of 16 M.R.S.A. §252 provide as follows:

No police officer or constable paid a salary or paid upon a per diem basis by a municipality shall receive any fee as a complainant or witness, or for making an arrest or for attendance at court, while on duty and being compensated therefor, but shall be reimbursed by such municipality for his actual costs of arrest and actual expenses of travel and attendance. Whenever any fines or penalties are imposed by any court in any proceeding in which such a police officer or constable is a complainant or a witness, said court may tax costs for such complainant or witness in the usual manner to be paid by the Treasurer of State to the municipality employing such police officer or constable; such costs shall not exceed his actual expenses, paid by the municipality for his travel to and attendance at the court. (Emphasis added)

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1. This exception may affect the amount of overtime compensation as will be discussed in a subsequent part of this Opinion.

The reimbursement of police officers for expenses incurred in traveling to and from court reflects the Legislature's view that such travel constitutes an activity performed on behalf of the State.<sup>2</sup> Since the identical activity is involved, logic necessitates that the provisions on overtime pay be interpreted in the same manner. Thus, the conclusion that required trips to court by off-duty members of the State Police should be treated as compensable travel time is compatible with both the federal standards and analogous Maine law.

## II. Computation of Compensable Travel Time

To decide that the right to overtime pay applies to trips to court is not to decide that members of the State Police will invariably be entitled to compensation for the entire time they are in transit. In this context, the principle that travel time on a day not usually worked is to be counted as though it occurred on a workday becomes relevant. Since the employee would not receive payment for his daily commute, it would be anomalous to allow a State Police member compensation for that portion of his trip in excess of the time required to travel between his principal place of employment and the courthouse.

A contrary interpretation could place the State at the mercy of its employees with respect to expenditures for overtime compensation. It would also conflict with the policy that the taxpayer should not have to pay for the employee's choice of residence. For example, §3 of Executive Council Order No. 77 (dated Jan. 17, 1973) provides:

When additional expense is incurred by reason of an employee residing in a city or town other than his official headquarters or additional expense is otherwise caused by an EMPLOYEE'S CHOICE of residence such expense IS NOT REIMBURSABLE.  
(capitals in original).

The correct interpretation of 25 M.R.S.A. §1504 thus requires a formula which reconciles the proposition that trips to court are generally compensable activities with the principle that an employee is not entitled to pay for what would be his daily commute. As a result, compensable travel time should be deemed to be the lesser of:

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2. Although a similar expense provision for the State Police, contained in 25 M.R.S.A. §1504, was eliminated with the enactment of P.L. 1975, c. 369, §4, that change probably resulted from the fact that troopers do not incur such expenses, insofar as they utilize State vehicles.

(1) The actual travel time; or (2) The normal travel time between the individual's principal place of employment and the court.

Given the fact that most members of the State Police patrol the areas in which they live, their residences can be fairly construed as their principal places of employment. For an employee who does not fit into this category, the principal place of employment will depend upon the nature of the individual's job. While this Opinion cannot resolve individual cases, it is submitted that Section 40.3(c) of the State Manual of Financial Procedures could be used to determine the principal place of employment (or "official headquarters").

- c. Each State employee will be assigned an official headquarters by the department head concerned. Every expense account will show an official headquarters which will be established as follows:
- (1) In the case of employees whose duties require their presence in Augusta at least two days each week, or where no other location is indicated as proper, Augusta shall be designated as their official headquarters.
  - (2) In the case of an employee who is in the field virtually all the time and travels to Augusta only on rare occasions, the designated official headquarters may be the place of the employee's residence, but only if such will prove advantageous to the State and without prejudice to the employee.
  - (3) In the case of employees whose official duties require their presence at some location other than Augusta, Maine for such a major portion of their time that it can logically be considered as the headquarters of their work for the State, that location shall be designated as their official headquarters.

JOSEPH E. BRENNAN  
Attorney General

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