

1997

Joseph W. O'Keefe v. Utah State Retirement Board : Amicus Brief

Utah Court of Appeals

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Brianne Florence, Esq.; Florence and Hutchison; Attorney for Plaintiff/Petitioner; Kevin Howard, Esq.; Howard and Associates; Attorney for Defendant/Respondent.

Phillip W. Dyer, Esq.; Attorney for Utah Public Employee's Association.

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UTAH SUPREME COURT
BRIEF

DOCKET NO. 9710052

BEFORE THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPH W. O'KEEFE, JR.,
Plaintiff/Petitioner,
vs.
UTAH STATE RETIREMENT BOARD,
Defendants/Respondent.

Case No. 970052
Priority No. 13
Court of Appeals 95-0742 CA

AMICUS CURIAE BRIEF OF THE UTAH PUBLIC
EMPLOYEES' ASSOCIATION IN SUPPORT OF
PETITIONER/PUBLIC EMPLOYEE.

Phillip W. Dyer, Esq.
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
(801) 363-5000
Attorney for Utah Public
Employees' Association

Brian Florence, Esq.
FLORENCE & HUTCHISON
818 26th Street
Ogden, Utah 84401
Attorney for Plaintiff/Petitioner

Kevin Howard, Esq.
HOWARD & ASSOCIATES
560 East 200 South
Suite 230
Salt Lake City, Utah 84102
Attorney for Defendant/Respondent

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CLERK SUPREME COURT
UTAH

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Phillip W. Dyer, Esq.
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
(801) 363-5000
Attorney for Utah Public
Employees' Association

Kevin Howard, Esq.
HOWARD & ASSOCIATES
560 East 200 South
Suite 230
Salt Lake City, Utah 84102
Attorney for Defendant/Respondent

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AMICUS CURIAE BRIEF OF THE UTAH PUBLIC
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PETITIONER/PUBLIC EMPLOYEE.

I.

INTRODUCTION

The Utah Public Employees' Association (herein UPEA) is an association of employees who work and toil for the State of Utah and its' political subdivisions. UPEA's members number over 6,700 and all of our members are participants in one of the five (5) retirement plans administered by the Utah State Retirement Board (herein USRB) for public employees, peace officers and firefighters.

While Petitioner O'Keefe (herein O'Keefe) is not a member of UPEA, UPEA has over 950 peace officers in our membership. The

issues in this case profoundly affect the retirement benefits of many, if not all, of our peace officer members and will turn on this Court's interpretation of the term "overtime" as used in the Public Safety Retirement Act (herein PSRA). Given the pivotal and critical role that peace officers perform in maintaining societal order and public safety, UPEA believes that peace officers (as a class) deserve to receive the "maximum benefits and protections" accorded to them by the PSRA.

In behalf of our members, UPEA sincerely thanks this Court for the opportunity and privilege to be heard on the issues at bar. We are hopeful that our input will be of assistance to the Court in rendering a decision.

II.

STATEMENT OF ISSUES

In his Brief to this Court, O'Keefe has framed the issues as involving statutory interpretation of the term "overtime" and the application thereof to certain Ogden City Police Officers. Inasmuch as UPEA represents peace officers employed by cities, counties, and the State of Utah, UPEA views the issue at bar as having a broader impact. From UPEA's view, this Court must ultimately decide the following issue:

1. Whether a public entity can require a peace officer to work 171 hours per "month" (without payment of overtime

compensation) while only paying retirement contributions to the USRB for 160 hours of work per "month"?

STANDARD OF REVIEW: This issue involves a review of the legal conclusions rendered by the Court of Appeals and is reviewed under a correction of error standard with no deference being granted to the decision below. England v. Horbach, 318 Utah Adv. Rep. 14, 15 (Utah Sup. Ct. May 30, 1997).

III.

DETERMINATIVE STATUTORY PROVISIONS

This Court must interpret certain statutory definitions contained in the PSRA at U.C.A. 49-4-103(1)(a) & (c) (1993). The statutory definitions in question are set forth below with the emphasized language denoting the disputed terms:

"(1)(a) "Compensation," "salary," or "wages" means the total amount of payments which are currently includable in gross income made by an employer to an employee covered under the retirement system for services rendered to the employer as base income. Base income shall be determined prior to any salary deductions or reductions for any salary deferral or pretax benefit programs authorized by federal law.

(c) "Compensation" does not include:

(i) overtime..." (Emphasis supplied).

IV.

STATEMENT OF THE CASE

A. CASE NATURE, COURSE OF PROCEEDINGS AND DISPOSITION

O'Keefe's Brief to this Court contains a detailed recitation of the nature of the case, the course of the proceedings below and the disposition thereof. UPEA therefore respectfully refers this Court to O'Keefe's Brief concerning the same.

B. STATEMENT OF FACTS

In his Brief, O'Keefe has set forth the facts involving his circumstances and has included a copy of the Stipulated Facts as an Addendum to his Brief. For purposes of analyzing the legal issues in this case, UPEA would like to bring to this Court's attention that the Department of Natural Resources and the Division of Wildlife Resources for the State of Utah have formally adopted policies that peace officers so employed must work 171 hours in a 28 day work period before being entitled to overtime compensation. Copies of said policies are set forth in the Addendum to this Brief and highlighted for the convenience of the Court. Unfortunately, those same officers will only be entitled to retirement benefits calculated on 160 hours per 28 day work period if the Court of Appeals' decision is affirmed.

V.

SUMMARY OF ARGUMENT

The PSRA includes peace officers employed by cities, counties and the State of Utah. In defining statutory terms, the Courts should consider the effect of a statutory definition as it applies to all levels of government so that a uniform, consistent and fundamentally fair application of the term can be applied across the board as to all members.

The Legislature intended the PSRA to be liberally construed for the benefit of peace officers unless that construction would negatively impact the actuarial soundness of the PSRA. The actuarial soundness of the PSRA is not in question in this case and the Court should therefore liberally construe statutory terms for the benefit of O'Keefe.

Finally, by defining overtime as 2,080 hours, the Court of Appeals penalizes state peace officers who are required to work a total of 2,229 straight hours annually (i.e., 171 hours per 28 days) but only receive retirement benefits for 2,080 hours worked annually.

ARGUMENT

THE COURT OF APPEALS INCORRECTLY DEFINED
OVERTIME WITHIN THE MEANING OF THE PSRA.

A. MEMBERS OF THE PSRA ARE COMPRISED OF PEACE OFFICERS
WORKING FOR THE STATE OF UTAH AND ALL POLITICAL SUBDIVISIONS

In order to become a member of the PSRA, peace officers must perform "public safety service" for an "employing unit." See U.C.A. 49-4-203 (1995). "Public safety service" is defined as "full-time paid service rendered by: (i) peace officers..." See U.C.A. 49-4-103(6)(a)(i) (1996). Moreover, an employing unit includes:

"any department, educational institution,
political subdivision, organization or agency
financed in whole or in part by public funds
for which any employee or member performs
services subject to this title." U.C.A. 49-
1-103(14) (1995).

It is plainly evident that the members of the PSRA are comprised of peace officers employed on both the local and state level. Since one of the Legislative purposes of the PSRA is to provide for "a uniform system of membership," U.C.A. 49-4-102(1) (1987), UPEA submits that this Court should interpret the term "overtime" with all members (both local and state) in mind.

B. UNLESS AWARDING A PARTICULAR BENEFIT WILL AFFECT THE
ACTUARIAL SOUNDNESS OF THE PSRA, THE USRB AND THE COURTS
SHOULD LIBERALLY CONSTRUE THE PSRA SO AS TO GRANT BENEFITS
TO PEACE OFFICERS.

At the time the underlying matter was heard at the USRB, the

Legislature had stated that the Utah State Retirement Act was required to "be liberally construed to provide maximum benefits and protections." U.C.A. 49-1-102 (1994). In 1996, the Legislature clarified its intent by adding language requiring a balancing of benefits against fiduciary and actuarial principles. See U.C.A. 49-1-102(2) (1996). UPEA believes the 1996 "amendment" simply clarified the Legislature's avowed intent: the Utah State Retirement Act (in its entirety and including the Public Safety Retirement Act) should be liberally construed unless that construction would affect the actuarial soundness of a particular retirement system.

In the case at bar, however, this Court need not balance actuarial soundness against liberal construction because the USRB did not present any evidence that O'Keefe's claims would affect the actuarial soundness of the system. Furthermore, the Court of Appeals correctly held the USRB had not presented such evidence. See, O'Keefe v. Utah State Retirement Board, 929 P.2d 1112, 1116 (Ut. App. 1996) (Ft.Note 6).

In accordance with prior decisions of this Tribunal, O'Keefe is entitled to a liberal construction of the PSRA so that the Legislature's intent will be implemented. See, Baritault v. Salt Lake City Corp., 913 P.2d 743, 746 (Utah 1994) ("primary rule of statutory interpretation is to give effect to the intent of the

Legislature in light of the purposes the statute was meant to achieve") (citations omitted). The Legislature intended the PSRA to be liberally interpreted in favor of the peace officers unless there exists an actuarial basis to the contrary. Since actuarial soundness of the PSRA is not in issue, this Court should therefore adopt this position in analyzing the meaning of the term "overtime."

C. THE TERM OVERTIME IS AN EXCLUSION FROM COMPENSATION AND WAS THEREFORE INTENDED TO APPLY TO OVERTIME COMPENSATION.

The majority opinion from the Court of Appeals opined that the "only reasonable" interpretation of the term "overtime" was to interpret the term "full-time service" as constituting a limitation on compensation:

"We agree with the Board, that the only reasonable construction of the definitions of compensation and full-time service, looking at the PSRA in its entirety, is that work in excess of forty hours per week exceeds full-time and is therefore overtime and cannot be included in compensation in determining retirement benefits. In other words, by clearly defining what is full-time, the PSRA has set a boundary which also defines overtime." O'Keefe, supra., at 1116 (Emphasis supplied).

This analysis fails for several reasons. First, this reasoning results in the PSRA being interpreted in a confused, inoperable and totally contradictory manner. As this Court has previously stated:

"'This Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent.' West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982); see also Utah Code Ann. 68-3-2 ("The statutes ... of this state ... are to be liberally construed with a view to effect the objects of the statutes and to promote justice."). Generally, the best indication of that intent is the statute's plain language. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989). Thus, we will interpret a statute according to its plain language, unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute. West Jordan, 656 P.2d at 446. In addition, "statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd." Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980); see Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 602 P.2d 689, 693 (Utah 1979); Curtis v. Harmon Elecs., Inc., 575 P.2d 1044, 1046 (Utah 1978)." Perrine v. Kennecott Mining Corp., 911 P.2d 1290, 1292 (Utah 1996).

Peace officers employed with the Utah Department of Natural Resources and the Utah Division of Wildlife Resources are governed by the Utah State Personnel Management Act (herein USPMA), U.C.A. 67-19-1, et seq. (1979, as amended). Under the USPMA, peace officers have a "work period" that is defined by the Fair Labor Standards Act (FLSA), U.C.A. 67-19-6.7(1)(n) (1992), and overtime is defined as "actual time worked in excess of the employees' defined work period." U.C.A. 67-19-6.7(1)(j) (1992).

Thus, the Department of Natural Resources and the Division of Wildlife Resources are statutorily authorized to require peace officers to work 171 hours (the FLSA standard) before payment of overtime compensation. See the highlighted portions of policies for the Department of Natural Resources and the Division of Wildlife Resources set forth in the Addendum submitted with this Brief.

Thus, if the Court of Appeals' decision in this case is permitted to stand, peace officers employed with the Department of Natural Resources and the Division of Wildlife Resources are faced with this unfair result: Public entities can compel a peace officer to work 171 hours per work period; the entities can pay that officer at straight time, not overtime pay; and the entity only has to pay retirement benefits on 160 hours that were worked during that same officer's work period. The Court of Appeals' decision thus results in a windfall to the public entity because it is not required to pay either overtime compensation nor full benefits.

In contrast, the peace officers experience a loss of compensation because it cannot be disputed that payment of full retirement benefits is part of a peace officer's salary. See U.C.A. 49-4-301(4) (1996) ("the payment of compensation less retirement payroll deductions is considered full payment of the

employee's salary.") (Emphasis supplied). The Court of Appeals' decision, however, results in peace officers not receiving their full and complete salary as mandated in the PSRA. This Court should rectify this injustice and remand with instructions to the Utah State Retirement Board to adopt the FLSA standard for determining overtime under the Public Safety Retirement Act.

CONCLUSION


The Court of Appeals failed to consider the uniform application of the term overtime with respect to all members of the PSRA. Having determined that the USBR did not present evidence that the actuarial soundness of the PSRA would be affected by ruling in favor of O'Keefe, the Court of Appeals compounded its error by failing to liberally construe the PSRA to O'Keefe's benefit. Finally, the Court of Appeals failed to recognize that members of the PSRA include state law officers who are clearly governed by FLSA standards on overtime. Had the Court of Appeals considered the foregoing arguments, UPEA is confident the Court of Appeals would have unanimously adopted the dissenting opinion written by Justice Wilkins.

This Court should reverse and remand with instructions to the Utah State Retirement Board to adopt the Fair Labor Standards Act definition of overtime for use in determining benefits under

the Public Safety Retirement Act.

Dated this 28th day of July, 1997.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Phillip W. Dyer", written over a horizontal line.

Phillip W. Dyer
Attorney for Utah Public Employees'
Association

ADDENDUM

ADDENDUM

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EXHIBIT I - DEPARTMENT OF NATURAL RESOURCES OVERTIME POLICY

EXHIBIT II - DIVISION OF WILDLIFE RESOURCES OVERTIME POLICY

Exhibit 1

State of Utah	REF. NR-95-B-1	PAGE 1 of 6
DEPARTMENT OF NATURAL RESOURCES	EFFECTIVE DATE 5/30/95	
POLICIES AND PROCEDURES	REVISION DATE	
SUBJECT: Fair Labor Standards Act Policy		
Ted Stewart, Executive Director		

I. PURPOSE

To implement the Department of Labor's Fair Labor Standards Act, and to ensure that the policy is followed in accordance with these guidelines.

II. DEFINITIONS

- A. FLSA = Fair Labor Standards Act
- B. DHRM = Department of Human Resource Management
- C. DOL = Department of Labor
- D. Workweek = Forty (40) hours within a seven day period
- E. Work Period = Twenty-eight (28) consecutive work days

III. POLICY

A. Management Control of Overtime

1. Management may request an employee to accept extra work on an overtime basis. Each Division shall develop internal rules and procedures to control the use of overtime to ensure maximum productive power and financial prudence.

2. These controls will include procedures to ensure management's approval and authorization for all overtime hours worked for Non-exempt and Exempt employees (with the exception of Deputy/Assistant Directors, Division Directors and other appointed positions).

B. Overtime Compensation

- 1. Non-exempt Employees.

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POLICIES AND PROCEDURES	REVISION DATE	
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Ted Stewart, Executive Director		

- (i) Any Non-exempt employee who works over forty (40) hours per week is to be paid at one and one-half times his/her regular hourly rate for each hour worked over 40 in a work-week, OR is to be given compensatory time off at one and one-half times his/her regularly hourly rate for each hour worked over 40 for that week.
 - (ii) Any Non-exempt employee may flex his/her time within the forty hours in that same workweek with approval from the immediate supervisor. (This should be controlled.)
 - (iii) Any Non-exempt employee who accumulates more than 80 hours of overtime shall be paid for those extra hours on the same pay period for which the 80-Plus overtime hours are worked.
 - (iv) At the end of June 30, all non-exempt employees may carry over 80 hours to the new fiscal year. A division may opt to pay down to zero hours.
2. Law Enforcement Employees.
- (i) All law enforcement employees who are employed in law enforcement for a work period of twenty-eight (28) consecutive days, will be compensated at time and a half for overtime for hours in excess of 171 hours in a pay period.
 - (ii) Law enforcement employees may flex their time, with supervisory approval within the work period.
3. Exempt Employees.
- (i) Any exempt employee working past 80 hours in a two-week pay period shall be compensated at straight time with compensatory time off. Any overtime earned by exempt employees is not an entitlement, a

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benefit, nor a vested right. All exempt employees must have written approval for any overtime hours worked.

- (ii) Each Division shall establish in written policy an annual uniform overtime year that will define the time when a Division's accrued overtime lapses for the exempt employee. The uniform overtime year shall only be established on specified pay periods. These pay periods will be as follows: 5th, 10th, 15th, 20th, and 25th pay periods. Each Division may opt for the regular fiscal year as their Uniform Annual Date. **Exempt employees cannot carry compensatory time past the uniform annual date as established by the division.**
- (iii) Any overtime earned by an exempt employee who transfers to another agency, terminates, retires, or otherwise will not return to work before the end of the overtime year, shall lapse.
- (iv) Deputy/Assistant Directors and Division Directors are not required to maintain overtime records unless authorized by the Department Director. The Department Director has discretionary authority to approve such overtime for Division and Deputy/Assistant Directors, but overtime shall not be compensated with actual payment.
- (v) An exempt employee may flex his/her time within 80 hours in a pay period with supervisory approval.

C. Overtime Provisions

1. Because FLSA provides compensatory time off in lieu of monetary overtime compensation at a rate of not less than one and one-half hours for each hour of overtime worked for non-exempt employees, each department employee, whose position

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Ted Stewart, Executive Director		

is non-exempt, shall be required to sign an Overtime Compensation Election/Agreement Form. See Appendix I.

2. All anticipated hours to be worked as overtime shall be undertaken only when approved by the Division Director or a designee made by the Division Director. All employees anticipating or expecting to work overtime shall make a request in writing for authorization to work that overtime. The procedure for the request shall be outlined by each Division Director.

3. Any employee working overtime without written authorization shall be compensated for that overtime. However the employee will be issued a letter of warning or a letter of intent to impose disciplinary action for failure to request permission prior to working any overtime hours.

4. All employee shall be encouraged to use compensatory time within thirty (30) days following the pay period in which it was accrued, providing this does not unduly disrupt agency operations.

5. Any Non-exempt employee who works overtime over 80 hours or currently carrying more than eighty hours of compensation time must be paid for that overtime on the pay day for the period in which it was earned.

D. TIME-RECORD KEEPING

1. With the exception of Deputy/Assistant Directors and Division Directors, all FLSA exempt and non-exempt employees are required to complete and sign the state biweekly time sheet, or agency developed and approved time sheet.

2. Division developed time sheets shall be approved, through DNR, Human Resources, by the Executive Director, DHRM, and shall contain those data elements identified on the state approved time sheet.

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E. Other FLSA Provisions

1. On-Call Time:

- (i) An employee's time may or may not be counted as compensable time depending on the employee's freedom while on-call. The time is considered on-call time when the employee is able to move freely on personal matters, but is required to be available for call to duty.
- (ii) If an employee is required to be on-call, this type of compensation shall accrue at a rate of one hour for every twelve hours at straight time, and shall be recorded as time eligible for compensation but will not be recorded as hours worked.
- (iii) Any time actually worked during the on-call period shall be recorded as hours worked in addition to the on-call time.

2. Travel Time:

- (i) Travel by an employee from one job site to another job site during the workday is compensable work. Travel from home to work is not compensable time.
- (ii) If the employee is called to come back to work after going home, the employee need not be compensated for the travel time, but will require compensation for the actual time worked.
- (iii) An employee must be compensated for time spent traveling to and from another city or work site to start work and return home, if that travel time exceeds the employee's normal home-to-work commuting time.

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- (iv) Although passengers in an automobile may not be compensated for the time traveled while the driver is performing under compensable time, both the driver and the passenger shall be compensated for the travel time.

Exhibit 2

STATE OF UTAH	NO. W1AG-1	NO. PAGES 7
DIVISION OF WILDLIFE RESOURCES	EFFECTIVE DATE December 1, 1995	
ADMINISTRATION	APPROVED <i>[Signature]</i>	
SUBJECT: OVERTIME		
DISTRIBUTION: ALL DIVISION EMPLOYEES		

I. PURPOSE

The purpose of this policy is to provide guidelines for the efficient and economical authorization and use of overtime.

II. POLICY

The division recognizes that there is a need to authorize or require employees to work beyond normal work hours in appropriate circumstances and employees should be compensated for such work.

Overtime should be authorized for projects or tasks that are specific in nature, unanticipated or require immediate action and that are of short duration. Overtime should not be granted for long-term projects or for completing normal work loads.

III. DEFINITIONS

- A. "Excess hours" means hours that accrue when an employee's hours actually worked and additional hours paid but not worked (excluding sick leave) exceed an employee's normal work period.

Example A: Employee with 40 hour workweek using annual/holiday leave/other paid leave:

Monday	8	Annual/Holiday Leave/Other Paid Leave
Tuesday	8	Hours Worked
Wednesday	8	Hours Worked
Thursday	8	Hours Worked
Friday	10	Hours Worked

42 Total Hours for Workweek

The time and attendance system will calculate:

32	Hours Worked
8	Annual/Holiday Leave/Other Leave
2	Excess Hours Earned

Example B: Employee with 40 hour workweek with holiday hours worked:

Monday	16	Holiday Leave + Holiday Hours Worked
Tuesday	8	Hours Worked
Wednesday	8	Hours Worked
Thursday	8	Hours Worked
Friday	10	Hours Worked

50 Total Hours for Workweek

The time and attendance system will calculate:

32	Hours Worked
8	Holiday Leave
2	Compensatory Hours Worked (nonexempt employee @ time and a half = 3 hours)
8	Excess Hours Earned

- B.** "Exempt employee" means an employee who is exempt from the Fair Labor and Standards Act.
- C.** "FLSA" means the Fair Labor and Standards Act, 29 U.S.C. 201, *et seq.*
- D.** "Law enforcement employee" means all FLSA nonexempt peace officers.
- E.** "Nonexempt employee" means an employee who is not exempt from the Fair Labor and Standards Act.

- F. "Overtime"** means actual work in excess of 40 hours per week for nonexempt employees, actual work in excess of 80 hours per two weeks for exempt employees, and actual work in excess of 171 hours in 28 days for law enforcement employees. Overtime may be accrued as compensatory time, excess time or paid time.

IV. PROCEDURES

A. Overtime Compensation Standards

1. Overtime may be authorized only for projects that are specific in nature, unanticipated or that require immediate action and that are of short duration. These include:
 - a. Performing tasks or special projects when requested by the director's office, section chiefs, and regional supervisors. Examples of such tasks include preparation for Wildlife Board or legislative presentations, and other unanticipated projects requiring immediate action;
 - b. Temporary, unanticipated assignments by a supervisor that are outside an employee's job responsibilities;
 - c. Emergency needs such as law enforcement assignments, toxic spills, wildlife removal or die-offs, or fast-breaking news stories;
 - d. Short-term activities within an employee's regular job assignments that are incapable of completion during normal working hours. Examples of such tasks include: the opening of major hunts, preparation for permit drawings, Wildlife Board meetings, year-end closing, legislative sessions, fish stocking, etc.; or
 - e. Circumstances when an employee is required to perform the work load of a vacant position as well as his or her own job responsibilities.
2. Overtime will not be granted for general projects that should have been anticipated and afford supervisors sufficient time to adjust work plans to accomplish them. Supervisors are encouraged to assist employees in the prioritization of realistic work loads and job

performance goals. Work loads consisting of long-term tasks and responsibilities that an employee is not reasonably able to perform during normal work periods should be eliminated or reassigned.

B. Prior Approval

1. Before an employee may accrue and be compensated for overtime, the employee's immediate supervisor must:
 - a. Give prior written approval for all overtime worked (except in an emergency);
 - b. Maintain access to records of all overtime worked; and
 - c. Make sure there are sufficient funds in the budget to compensate for overtime worked.
2. Employees who elect to receive monetary compensation for overtime or exceed their maximum allowable accrued compensatory or excess time, each which require payment, must obtain prior written authorization from the director and respective regional supervisor or section chief in addition to the employee's supervisor.
3. The signed approval form must be submitted by the employee with the time sheet for the period in which the overtime was recorded.
4. Any nonexempt employee who has indicated an intent to resign will not be approved for overtime.
5. Failure to obtain written approval may lead to disciplinary action.

C. Nonexempt and Exempt FLSA Designations

1. FLSA Nonexempt Employees
 - a. Employees are eligible for overtime when they actually work more than 40 hours during one week. Leave and holiday time taken and not worked within a workweek shall not count as hours worked justifying overtime compensation. They are counted as hours worked to justify excess hours.

- b. Each employee must sign a form authorizing the division to pay either monetary compensation at the rate of time and one-half or compensatory time at the rate of time and one-half.
- c. Employees may receive compensatory time for overtime up to a maximum of 80 hours.
- d. Employees who elect to accept payment for overtime worked will receive payment at the rate of one and one-half times their regular rate of pay for each hour actually worked in a workweek. Payment will be made on the paycheck for the period in which the employee worked the overtime.

2. FLSA Exempt Employees

- a. FLSA exempt employees are eligible for overtime when they actually work more than 80 hours in a work period. Leave and holiday time taken and not actually worked within a workweek or work period are not counted as hours worked to justify overtime accruing. They are counted as hours worked to justify excess hours. FLSA exempt employees shall not be paid for hours worked in excess of 80 hours in a pay period; however, employees shall receive compensatory time on an hour-for-hour basis. Any overtime earned by an exempt employee is not an entitlement, benefit, nor a vested right.
- b. Overtime accrued above the maximum of 80 hours must have prior written approval of the director and respective regional supervisor or section chief. Once the employee reaches the maximum number of hours allowable, the employee shall be paid for additional overtime on the payday for the period in which it was earned.
- c. On rare occasions, where work circumstances dictate, the director of the Department of Human Resource Management (DHRM) may authorize the division to pay exempt employees for overtime worked at the rate per hour that the employee receives for nonovertime work, if there are available funds. The request must go through the director's office to the department director's and Human Resources Office before going to DHRM.

- d. Any compensatory overtime earned shall lapse when an employee transfers to another agency, is terminated, retires, or otherwise does not return to work before the end of the overtime year.

- 3. FLSA designations are identified in the Federal Class Code Book. Designations may be appealed to the department's Human Resources Office and DHRM.

D. Law Enforcement Employees

Law enforcement employees are subject to all of the provisions of this policy with the exception that overtime is accrued only after the employee has worked 171 hours in 28 consecutive days.

E. Temporary Employees

Temporary employees shall be hired as either an exempt or nonexempt employee and are subject to all of the provisions of this policy.

F. Overtime Year

The overtime year shall be the end of pay period 16.

G. Recording Overtime

All overtime must be reported on the employee's time sheet for the pay period in which it was accrued.

H. Commuting and Travel Time

Time spent commuting to and from an employee's usual work station shall not be counted toward the number of hours worked. Time spent traveling to and from meetings or job sites in the performance of an employee's duties shall be counted as hours worked.

I. Use of Overtime

The division encourages employees to use accrued compensatory time within 30 days following the pay period for which it was accrued.

J. Excess Hours

Employees may use excess hours the same way as compensatory time, but at straight time only. Overtime accrued above the maximum of 80 hours must have prior written approval of the director and respective regional supervisor or section chief. Once the employee reaches the maximum number of hours allowable, the employee shall be paid for additional overtime on the payday for the period in which it was earned.

K. Collateral References

This policy incorporates the provisions of DHRM Rule R477-8-6, the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.*, and 29 CFR Parts 500-899, 1995 edition, by reference.

V. REVISION DATE

This policy shall be reviewed on or before December 1, 1998.

W1AG-1.pol

CERTIFICATE OF MAILING

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

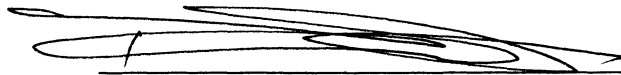
Phillip W. Dyer, being duly sworn, deposes and says:

That he served **AMICUS CURIAE BRIEF OF THE UTAH PUBLIC
EMPLOYEES' ASSOCIATION IN SUPPORT OF PETITIONER/PUBLIC EMPLOYEE**
upon the following parties by placing two (2) true and correct
copies thereof in an envelope addressed to:

Brian Florence, Esq.
FLORENCE & HUTCHISON
818 26th Street
Ogden, Utah 84401
Attorney for Plaintiff/Petitioner

Kevin Howard, Esq.
HOWARD & ASSOCIATES
560 East 200 South
Suite 230
Salt Lake City, Utah 84102
Attorney for Defendant/Respondent

and depositing the same, sealed, with first class postage prepaid
thereon, in the United States Mail Service, at Salt Lake City,
Utah, on the 28th day of July, 1997.

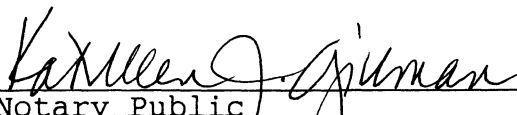


SUBSCRIBED AND SWORN to before me this 28 day of
July, 1997.

My Commission expires:

12/23/99




Notary Public
Residing at:
Kathleen J. Gillman
136 So. Main St., No. 318
Salt Lake City, Utah 84101
My Commission Expires
December 23, 1999
STATE OF UTAH

Salt Lake County, Utah