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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 8, 1996

The Honorable Donald H. Holland
Senator, District No. 27
Post Office Drawer 39
Camden, South Carolina 29020

RE: Informal Opinion

Dear Senator Holland:

By your letter of June 4, 1996, to Attorney General Condon, you have sought an opinion as to the proper determination of the amount of time an employee of the South Carolina Department of Corrections may be allowed for military leave.

You have advised that the Department of Corrections currently schedules its employees in twelve hour work shifts, with fourteen days on duty and fourteen days off. The federal Fair Labor Standards Act[1] requires that security employees work in twenty-eight day work cycles for computation of overtime payments. One of your constituents is currently working the twelve hour shift, which shift is composed of two thirty-six hour work weeks and two forty-eight hour work weeks with the employee forced to take eight hours off scheduled work sometime in the twenty-eight day cycle in order to maintain an overall average of forty hours. Your inquiry is whether it is appropriate under state law for the Department of Corrections to schedule two thirty-six hour work weeks, and further whether a twelve hour work day currently scheduled by the Department of Corrections constitute a "regularly scheduled work day" under the requirements of S.C. Code Ann. §8-7-90.

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[1]No comment is offered herein on provisions of the federal Fair Labor Standards Act; questions concerning that federal law would be appropriately addressed by the Wage and Hour Division of the United States Department of Labor.

Statutory Considerations

Leave of absence is authorized for public officers and employees in the National Guard or reserve military forces by S.C. Code Ann. §8-7-90, which provides in pertinent part:

> All officers and employees of this State or a political subdivision of this State who are either enlisted or commissioned members of the South Carolina National Guard, the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, or the United States Coast Guard Reserve are entitled to leaves of absence from their respective duties without loss of pay, time, or efficiency rating for one or more periods not exceeding an aggregate of fifteen regularly scheduled work days in any one year during which they may engage in training or any other duties ordered by the Governor, the Department of Defense, the Department of the Army, the Department of the Air Force, the Department of the Navy, the Department of the Treasury, or any other department or agency of the government of the United States having authority to issue lawful orders requiring military service. Saturdays, Sundays, and state holidays may not be included in the fifteen-day aggregate unless the particular Saturday, Sunday, or holiday to be included is a regularly scheduled work day for the officer or employee involved. ...

The statute further states that the provisions of §8-7-90 are to be "construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States" and further to allow state officers and employees in such programs to take advantage of career-enhancing assignments and training opportunities and to excel in military preparedness and service.

The minimum work week for state employees is specified in §8-11-15:

> The minimum full-time workweek for employees of state agencies and institutions is thirty-seven and one-half hours. The agency or institution may vary an employee's work schedule through the use of alternative scheduling strategies to meet the needs and service delivery requirements of the agency or institution.

Statutory Construction

Several principles of statutory construction are relevant here. The primary objective of both the courts and this Office in construing statutes is to determine and effectuate legislative intent if it is at all possible to do so. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Words used in a statute are to be given their plain and ordinary meanings, unless there is something in the statute requiring a different interpretation. Laird v. Nationwide Insurance Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Resort should not be had to a subtle or forced construction to either limit or extend the operation of the statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). Where the terms of a statute are clear and unambiguous, the courts and this Office must apply them according to their literal meaning. Mitchell v. Mitchell, 266 S.C. 196, 222 S.E.2d 499 (1976).

Discussion

Accordingly, a plain and ordinary reading of §8-7-90 entitles an employee of the State or its political subdivisions to an aggregate of fifteen regularly scheduled work days in any one year for military leave. The statute does not attempt to define the phrase "regularly scheduled work day" by reference to a specific number of working hours. In other words, the number of regularly scheduled work hours that compose a work day is not a consideration in interpreting this statute. Therefore, those state employees who are regularly working twelve hour days are statutorily authorized to take up to fifteen such regularly scheduled work days (i.e., fifteen twelve-hour days) in any one year for military leave.

As to your inquiry concerning the appropriateness of the Department of Corrections scheduling two thirty-six hour work weeks within a twenty-eight day work cycle, in light of §8-11-15, I would point out that the second sentence of that statute offers a state agency or institution some flexibility: "The agency or institution may vary an employee's work schedule through the use of alternative scheduling strategies to meet the needs and service delivery requirements of the agency or institution." One such example of alternative scheduling strategies is the concept known popularly as "flex time." The Budget and Control Board had recognized in regulations previously published in Volume 23A of the Code of Laws that under special circumstances a twenty-eight day work period might be required, relative to calculation of overtime compensation for employees in certain classifications; employees in fire protection or law enforcement activities (including security personnel in correctional institutions) were among those potentially affected by former R 19-703.04 (F).

In addition to state law, state employees are governed by the federal Fair Labor Standards Act; the extent to which a particular employee is so governed depends upon the nature of his or her position of employment. See, for example, §8-11-55, which statute provides for compensatory time for working overtime, in accordance with provisions of the Fair Labor Standards Act, 29 U.S.C. §§201 et seq. It is very likely that the federal law must be read in conjunction with §8-11-15 to arrive at a means of accommodating the needs of the agency or institution and the meeting of all applicable laws.[2]

If the Fair Labor Standards Act requirements are being observed relative to covered state employees, then I am of the opinion that §8-11-15 provides some flexibility for an agency or institution in scheduling its employees' work hours. If the scheduled work hours for a given employee averages a minimum of thirty-seven and one-half hours per week, I am of the opinion that the requirements of §8-11-15 would be substantially met. Further inquiry with the Wage and Hour Division of the federal Department of Labor might be in order, to determine that the requirements of the federal regulations outlined in footnote 2 are being complied with.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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[2]Security personnel in correctional institutions are considered to be employees engaged in law enforcement activities for purposes of the Fair Labor Standards Act. See 29 C.F.R. §553.200 et seq. The phrase "work period" is defined in 29 C.F.R. §553.224; the work period cannot be less than 7 consecutive days nor more than 28 consecutive days. For purposes of overtime compensation, 29 C.F.R.§553.230 establishes maximum hours standards for work periods of specified durations, from 7 to 28 days; then, 29 C.F.R. §553.231 provides for compensatory time off, and 29 C.F.R. §553.232, for overtime pay. Our state laws (which, as observed, provide for flexibility) must be read in conjunction with these regulations.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General