



New York State Department of Labor  
David A. Paterson, Governor  
Colleen C. Gardner, Commissioner

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September 27, 2010

[REDACTED]

Re: Request for Opinion  
Mandatory Overtime  
RO-10-0137

Dear [REDACTED]

I have been asked to respond to your letter of August 28, 2010, in which you request an opinion as to the amount of mandatory overtime that is permissible for mental health therapy aides. Your letter states that your employer, Pilgrim State Psychiatric Center, a facility that is operated by the State of New York, requires you to work 28-40 hours of mandatory overtime per week in your position as a mental health therapy aide and inquires as to the amount of mandatory overtime that is permissible under the New York State Labor Law.

Section 168(2) of the Labor Law, which is applicable to several groups of State employees, including mental health therapy aides employed in state facilities such as yours, provides, in relevant part:

No person to whom this section is applicable shall be required to work more than eight hours in any day or more than forty hours or more than six days in any calendar week except in cases of fire, riot, flood, famine, pestilence or other cases of emergency endangering life or property; provided, however, that any such person, upon his own request and with the approval of the head of the institution in which he is employed, may be permitted to work one additional eight-hour day in any calendar week for not more than seven calendar weeks and be allowed continuous days free from duty equivalent to the number of additional days so worked.

While the above language generally prohibits mandatory overtime, that prohibition has two exceptions. The first provides that the prohibition on overtime will not apply in the case of an emergency. Unfortunately, your letter does not indicate whether your overtime was connected to an emergency situation. However, since emergencies are, by definition, short in duration, the

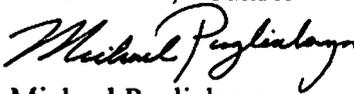
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mandatory overtime you describe is unlikely to fall within this exception since it does not appear to be an isolated, short-term occurrence.

New York courts and the Attorney General's office have also recognized a second exception to the overtime prohibition grounded in either individual voluntary consent or voluntary consent expressed through a collective bargaining agreement providing for mandatory overtime. (See generally, *McMahon v State of New York*, 178 Misc. 865 (Ct. of Claims 1943); *Marriott v. State*, 196 Misc. 454 (Ct. of Claims 1945); *Tully v. State*, 196 Misc. 149 (Ct. of Claims 1949); See also, 1942 N.Y. Op. Att'y Gen. 339; 1978 N.Y. Op. (Inf.) Att'y Gen. 297.) Unfortunately, your letter does not describe the circumstances under which you were mandated to work overtime. However, since your letter alludes to the fact that the imposition of 28-40 hours per week of mandatory overtime is an ongoing occurrence, as opposed to an isolated incident, it is likely that such overtime is being imposed through a procedure set forth in an applicable collective bargaining agreement. If the mandatory overtime procedures are being followed as written, the imposition of overtime does not violate the Labor Law. If the overtime is not in accordance with the agreement, you may contact us again and provide further details as to why you believe that it is not so that we can determine if a violation of § 168(2) of the Labor Law has occurred. I also suggest you consult your union representative regarding your rights under that agreement.

This opinion is based exclusively on the facts and circumstances described in your email request dated August 28, 2010 and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,  
Maria L. Colavito, Counsel

By:   
Michael Paglialonga  
Assistant Attorney I

CC: Carmine Ruberto