

OP. NO. 05-056

**COMMONWEALTH PUBLIC SAFETY: OVERTIME
COMPENSATION FOR LAW ENFORCEMENT, ETC.**

Amendments imposed by Chapter 732 OF 2005 Acts of Assembly do not impact Department of State Police or other state law-enforcement agencies; § 9.1-706 continues to preserve sovereign immunity of Commonwealth and its agencies.

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Superintendent, Virginia Department of State Police
October 19, 2005

Issue Presented

You ask whether the changes imposed by Chapter 732 of the 2005 Acts of Assembly impact the Department of State Police and other law-enforcement agencies of the Commonwealth.

Response

It is my opinion that the amendments imposed by Chapter 732 do not impact the Department of State Police or other state law-enforcement agencies. It is further my opinion that § 9.1-706 continues to preserve the sovereign immunity of the Commonwealth and its agencies.

Applicable Law and Discussion

The 2005 Session of the General Assembly enacted Chapter 732, which amended portions of Chapter 7 of Title 9.1, §§ 9.1-700 through 9.1-706.¹ Chapter 7 governs overtime compensation for law-enforcement employees and firefighters, emergency medical technicians, and other fire protection employees. Specifically, Chapter 732 amended §§ 9.1-700 to 9.1-704² of Chapter 7; however, it did not amend § 9.1-706, which preserves the sovereign immunity of the Commonwealth and its agencies.

The changes by Chapter 732 to § 9.1-700 include an amended definition for "law-enforcement employee,"³ while retaining the definition of "employer."⁴ According to the definitions, a law-enforcement employee would include an officer employed by the Commonwealth or one of its agencies. An employer, however, must be a political subdivision of the Commonwealth. While these definitions appear to be conflicting, they may be harmonized in the entire context of Chapter 7.⁵ Chapter 7 regulates the behavior of the employer.⁶ Before examining whether an individual qualifies as a law-enforcement officer under Chapter 7, the determination should be whether the

employer is bound by the requirements. The statutory construction maxim of *unius est exclusion alterius* provides that where a statute speaks in specific terms, an implication arises that the "omitted terms were not intended to be included within the scope of the statute."⁷ Section 9.1-700 specifically provides that an employer is "any political subdivision of the Commonwealth, including any county, city, town, authority, or special district." The Commonwealth and its agencies are not included in such definition. One may not "add language to the statute the General Assembly has not seen fit to include."⁸ Since the Commonwealth and its agencies, such as the Department of State Police, fall outside of the definition of employer, they cannot be bound by its provisions.

Additionally, § 9.1-706 is not affected by the 2005 amendments, and it continues to provide that the Commonwealth and its agencies are protected by sovereign immunity.⁹ Thus, any claim for money damages brought by individuals against the Commonwealth or its agencies without its consent is barred.¹⁰

Conclusion

Accordingly, it is my opinion that the amendments imposed by Chapter 732 do not impact the Department of State Police or other state law-enforcement agencies. It is further my opinion that § 9.1-706 continues to preserve the sovereign immunity of the Commonwealth and its agencies.

¹ See 2005 Va. Acts. ch. 732, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+CHAP0732+pdf> (amending and reenacting §§ 9.1-700 through 9.1-704).

² *Id.*

³ "Law-enforcement employee" means any person who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth, other than an employee who is exempt from the overtime provisions of the Fair Labor Standards Act, and who is a full time employee of either (i) a police department or (ii) a sheriff's office that is part of or administered by the Commonwealth or any political subdivision thereof." Va. Code Ann. § 9.1-700 (LexisNexis Supp. 2005).

⁴ "Employer" means any political subdivision of the Commonwealth, including any county, city, town, authority, or special district that employs fire protection employees except any locality with five or fewer paid firefighters that is exempt from overtime rules by 29 U.S.C. § 207 (k)." *Id.*

⁵See *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992) (noting that Code is one body of law and statute should be interpreted so it harmonizes with other statutes), *quoted in* 2004 Op. Va. Att'y Gen. 68, 70.

⁶Section 9.1-701(A) provides that "[e]mployers shall," § 9.1-702 provides that "[e]mployers may," and § 9.1-704(A) provides that "an employer who violates the provisions of this chapter shall" perform certain functions.

⁷See *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); *see also* Op. Va. Att'y Gen.: 2004 at 51, 52 n.2; 2002 at 34, 36; 1997 at 35, 35; 1994 at 9, 11 (noting that mention of one thing in statute implies exclusion of another).

⁸*Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003), *cert. denied* 125 S. Ct. 164, 2004 U.S. LEXIS 5746 (U.S. Oct. 4, 2004)), *quoted in* *Couplin v. Payne*, 613 S.E.2d 592, 596, 2005 Va. LEXIS 52, *12 (Va. June 9, 2005).

⁹"The immunity of the Commonwealth and of any 'agency' as defined in § 8.01-195.2 is hereby preserved." Section 9.1-706 (LexisNexis Supp. 2005). Section 8.01-195.2 defines "agency" as "any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth."

¹⁰See *generally* *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000).

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