

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

40355

FILE: B-163654

DATE: January 21, 1974

MATTER OF: Request for reconsideration of decision of July 26, 1973, B-163654, denying overtime compensation for time spent in a travel status

DIGEST: Where event necessitating INS inspector's travel was controllable or where inspector's travel could have been scheduled within his regular workweek there is no authority for payment of overtime compensation under 5 U.S.C. 5542(b)(2)(B)(iv) even though employees were administratively required to perform travel on own time. Policy expressed in 5 U.S.C. 6101(b)(2) that to maximum extent practicable travel should be scheduled within employee's regularly scheduled workweek is not itself authority for payment of overtime compensation and leaves to agency discretion when it is impracticable to so schedule travel.

This action is a reconsideration of decision B-163654 dated July 26, 1973, disallowing the claims of Messrs. Louis J. Audet, Linwood C. Bailey, Michael E. Casey, John A. Gibson, William S. Hilyard, Louis J. Pettit, J. Wesley Pyle, Harold J. Scribner, Joseph Tokarz, and Roy M. Tudor, all employees of the Immigration and Naturalization Service (INS), for overtime compensation for time spent traveling between Calais and Lubec or Vanceboro, Maine, for the purpose of providing relief of officers on annual or sick leave.

The claims of the above-named individuals were held not to be covered by 5 U.S.C. 5542(b)(2)(B)(iv) which authorizes overtime compensation for travel resulting from an event which cannot be scheduled or controlled administratively. That disallowance was predicated on the fact that leave taken by other employees which precipitated the temporary assignments and related travel of the claimants as substitutes for the absent employees was, in most instances, within administrative control and where it was not there was such notice of the substitution requirement as would have permitted scheduling of the travel within regular duty hours. It was explained in the prior decision that no authority exists for payment of overtime compensation for travel time when the work is subject to administrative control but the agency fails to schedule related travel within the employee's administrative workweek.

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By letter of November 1, 1973, Mr. George R. Boss, Director, Labor Management Department, American Federation of Government Employees, acting under powers of attorney executed by the above-named claimants, controverts the holding in the prior decision that there is no authority for payment of overtime compensation in the situations there involved. He argues that authority for payment of overtime compensation exists whenever an agency can but fails to schedule travel within the hours of an employee's basic administrative workweek. Such authority is said to be found in the following language of 5 U.S.C. 6101(b)(2):

"(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

In quoting the above provision, Mr. Boss underscored the word "shall" and states that he considers that the holding in the prior decision involving the ten claimants is contrary to the statutory language quoted above. The position of this Office is that the word "shall" appearing in section 6101(b)(2) is not to be viewed as a mandate requiring the scheduling of travel in all cases because it is modified by the words "to the maximum extent practicable" which precede the word "shall" in the quoted provision.

Section 6101(b)(2) relied upon by Mr. Boss as well as other provisions in chapter 61 of title 5, United States Code, relates only to establishing and scheduling of workweeks and actual work requirements. It does not of itself constitute authority for payment of compensation which is the subject of the provisions in chapter 55 of title 5 of the United States Code, including section 5542(b)(2)(B)(iv) referenced above. In enacting section 16 of the Federal Employees Salary Act of 1965, Public Law 89-301, 79 Stat. 1123, now 5 U.S.C. 6101(b)(2), Congress intended that as a general practice travel should not be scheduled at times outside of an employee's regularly scheduled workweek, but at the same time it left to the discretion of the employing agency the determination of when it is impracticable to schedule travel within the regularly scheduled workweek of the employee.

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When an employee is required to perform noncompensable travel outside of his regularly scheduled workweek the provisions of section 610.123 of title 5, Code of Federal Regulations, promulgated by the Civil Service Commission under 5 U.S.C. 6101(b)(2), are to be complied with. That section provides:

"Insofar as practicable travel during nonduty hours shall not be required of an employee. When it is essential that this be required and the employee may not be paid overtime under §550.112(e) of this chapter the official concerned shall record his reasons for ordering travel at those hours and shall, upon request, furnish a copy of his statement to the employee concerned."

The reference therein to section 550.112(e), which implements the authority for payment of overtime compensation for time spent in a travel status contained at 5 U.S.C. 5542(b)(2)(B), is in recognition of the fact that there will be instances in which overtime compensation is not payable for travel time notwithstanding that travel which might be within administrative control is required of an employee outside of his regular duty hours.

The following excerpt from S. Rept. 801, 90th Cong., 1st sess., on H.R. 7977, which became the Postal Revenue and Federal Salary Act of 1967, section 222 of which amended 5 U.S.C. 5542(b)(2)(B), indicates that the overtime travel provision here in question was adopted partially by way of inducement to agencies to comply with the policy expressed in 5 U.S.C. 6101(b)(2), in instances of emergencies or where travel could not be scheduled or controlled administratively:

"The committee has revised the provisions of the House bill in regard to traveltime and overtime pay. The Senate amendment revises present law so that an employee in the classified service, under wage board pay systems, or in the postal field service shall be paid for traveltime outside of his regular work schedule if the travel involves the performance of work while traveling (such as an ambulance attendant taking a patient to a hospital); is incident to travel that involves the performance of work while traveling (such as a postal employee

riding in a truck to a destination to pick up another truck and drive it back to his original duty station); is carried out under arduous conditions; or results from an event which could not be scheduled or controlled administratively.

"The committee believes that regulations to implement these provisions should take into account the provisions of section 16 of Public Law 89-301, which requires agencies to the maximum extent practicable to schedule travel within the regular work schedule. The committee is convinced that the heads of executive departments and agencies can do much more to prevent the abuse of an employee's own time.

"We are not satisfied with the progress agencies have made to comply with the 1965 act. An employee should not be required to travel on his offday in order to be at work at a temporary duty station early Monday morning to attend a meeting. It is an imposition upon his private life that should not be made. Nevertheless, pay for travel status should not be made so attractive that employees would seek to travel on their offdays in order to receive overtime pay. Proper scheduling and administrative planning is the answer to the problems of travel pay in many cases. When emergencies occur or when events cannot be controlled realistically by those in authority, traveltime must be paid for."

The above excerpt clearly indicates that section 6101(b)(2) is not itself authority for payment of overtime compensation, but that overtime pay for travel is allowable only in accordance with the provisions of 5 U.S.C. 5542(b)(2). Simply stated, Congress has not provided a remedy by way of compensation where the circumstances of an employee's travel do not fall within the purview of 5 U.S.C. 5542(b)(2) and where an agency fails to adhere to the policy enunciated in 5 U.S.C. 6101(b)(2). 51 Comp. Gen. 727 (1972).

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Upon reconsideration, the decision of July 26, 1973, denying claims of Messrs. Audet, Bailey, Casey, Gibson, Hilyard, Pettit, Pyle, Scribner, Tokarz and Tudor is affirmed.

Deputy

R. J. Keller
Comptroller General
of the United States