

**DECISION**



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

9533

DLG0127

FILE: B-191691

DATE: March 21, 1979

MATTER OF: George W. Porter - National Guard Technician -  
[Claim for Compensatory Time and Temporary Duty Travel]

DIGEST: National Guard Technician who claims compensatory time for temporary duty travel performed outside of regular duty hours appeals GAO Claims Division disallowance of claim. Claims Division determination that traveltime was not hours of work under 5 U.S.C. § 5542(b)(2) since facts did not meet statutory requirements is affirmed. Civil Service Commission advises that while 32 U.S.C. § 709(g)(2) excludes National Guard Technicians from overtime pay provisions of FLSA, Technician who performs travel which is "hours of work" under FLSA is entitled to compensatory time under 32 U.S.C. § 709(g)(2). After May 1, 1974--coverage of Federal employees under FLSA--claimant is entitled to compensatory time for traveltime outside regular work hours which is hours of work under Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (Supp. V, 1975).

By letter of March 3, 1978, Mr. George W. Porter, a National Guard Technician employed by the Department of the Army, New York Army National Guard, appealed the disallowance of his claim for 132-1/2 hours of compensatory time by our Claims Division in its Certificate of Settlement dated February 16, 1978.

Mr. Porter, a National Guard Technician, grade GS-9, claimed entitlement to compensatory time in the amount of 132-1/2 hours for travel performed outside his regular duty hours of 8:30 a. m. to 5 p. m. in connection with temporary duty assignments during the period May 2, 1969, through August 1, 1974. Through most of this period Mr. Porter was employed as an Examiner in the office of the U.S. Property and Fiscal Officer, New York. He was required to travel frequently throughout New York State. He usually traveled by Government-owned automobile; however, he occasionally traveled by privately owned automobile or by common carrier.

Mr. Porter's claim was received in the Claims Division on November 21, 1975. The Act of October 9, 1940, 54 Stat. 1061, as amended, by section 801 of Public Law 93-604, approved January 2, 1975, 88 Stat. 1965, 31 U.S.C. § 71a, provides that every claim or demand cognizable by the General Accounting Office (GAO) shall

~~004183~~

B-191691

be forever barred unless received in this Office within 6 years after the date the claim first occurred. Our Office has held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as the date the services were rendered. 29 Comp. Gen. 517 (1950). That portion of Mr. Porter's claim which accrued prior to November 21, 1969, is barred from consideration. For Mr. Porter's claim to be approved for the period after November 21, 1969, appropriate authority would need to be found.

The statutory authority for overtime compensation (compensatory time is time off in lieu of overtime) for General Schedule employees is 5 U. S. C. § 5542 (1976), which provides in pertinent part that hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day shall be compensable as overtime work. Travel performed outside the regularly scheduled administrative workweek of an employee is compensable as hours of work under 5 U. S. C. § 5542 only if one or more of the conditions set forth in subsection 5542(b)(2)(B) have been met.

The Claims Division disallowed Mr. Porter's claim on the basis that none of his temporary duty travel involved any of the conditions set forth in subsection 5542(b)(2). We find no facts to indicate that any of the travel for which Mr. Porter claims compensatory time met the statutory requirements, i. e., the performance of work or was incident to travel involving performance of work, was carried out under arduous conditions or resulted from an event which could not be scheduled or controlled administratively. Mr. Porter has not alleged that any of his travel involved any of the above-mentioned conditions. The determination of Claims Division with respect to 5 U. S. C. § 5542 is affirmed.

Section 709(g)(2) of title 32, United States Code, which governs in pertinent part the compensation of National Guard Technicians, reads as follows:

"\* \* \* Notwithstanding sections 5542 and 5543 of title 5, United States Code, or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work."

B-191691

Thus, had Mr. Porter's traveltime qualified as hours of work under 5 U.S.C. § 5542, he would, as a National Guard Technician, have been entitled to compensatory time under section 5542.

To the extent set forth below, Mr. Porter's travel is hours of work under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (Supp. V, 1975). On May 1, 1974, the Fair Labor Standards Amendments of 1974, Public Law 93-259, 88 Stat. 56, amended the FLSA to include within its coverage Federal employees. The FLSA requires payment to nonexempt employees of overtime for hours in excess of 40 hours per week for all work performed by an employee. 29 U.S.C. § 207 (Supp. V, 1975). Under the provisions of 29 U.S.C. § 204(f) (Supp. V, 1975), the Civil Service Commission (Commission) is authorized to administer the provisions of the FLSA. In Federal Personnel Manual (FPM) Letter No. 551-4, dated October 31, 1974, the Pay Policy Division of the Commission set forth the opinion of the General Counsel which determined that National Guard technicians are subject to the FLSA, as amended; however, in view of 32 U.S.C. § 709(g)(2), the National Guard Technicians (other than those assigned to perform operational duties at air defense sites) are exempt from the FLSA overtime pay provisions.

Claims Division in its Certificate of Settlement, held that FLSA was not for application in determining Mr. Porter's claim. The Commission has advised us that the concept of "hours of work" under the FLSA is applicable to National Guard Technicians for purposes of determining entitlement to compensatory time under 32 U.S.C. § 709(g)(2).

The following is quoted from the Commission's determination:

"It is important to note the limited scope of the exclusion provided by 32 U.S.C. 709(g)(2). \* \* \* [T he Technicians are excluded from the overtime pay provisions of section 7(a)(1) of the FLSA, but not from any of the other provisions of the Act. Similarly, the Technicians are not entitled to be paid overtime pay under title 5, United States Code, but they are subject to the other pertinent premium pay provisions of title 5. The effect of 32 U.S.C. 709(g)(2) is not to deny Technicians compensation for hours which are compensable under title 5 or

the FLSA, but to provide that they shall receive compensatory time off rather than payment for such work. Thus, a Technician who performs travel that is overtime under 5 U.S.C. 5542 would be granted compensatory time off for such travel. Similarly, an employee who performs travel which is 'hours of work' under the FLSA would be entitled to compensatory time for those hours under 32 U.S.C. 709(g)(2), to the extent that the FLSA travel time is, or results in, 'irregular or overtime work.' We find nothing in 32 U.S.C. 709(g)(2) that would restrict the 'irregular or overtime work' for which the Technicians are entitled to compensatory time to situations which would be considered overtime work under title 5. Instead, since these Technicians are generally subject to both title 5 and the FLSA--except that they must take compensatory time rather than be paid overtime pay as recompense for 'irregular or overtime work'--it is our opinion that work situations which would be regarded as overtime work under either title 5 or the FLSA would properly be considered 'irregular or overtime work' under title 32. \* \* \*"

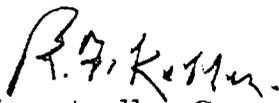
The Commission has issued guidelines in FPM Letter 551-10, dated April 30, 1976, to be used in determining the applicability of the FLSA in instances of nonexempt employee's travel. The record shows that on Friday, June 28, 1974, Mr. Porter returned by Government automobile from his temporary duty station in Buffalo, New York, to his permanent duty station in Albany, New York. He arrived in Albany at 6 p.m., 1 hour after the end of his regular working hour at 5 p.m. If he were the driver of the Government automobile this travel after regular working hours is compensable hours of work under the FLSA. See para. E-1 of FPM Letter 551-10, supra. If the agency record shows that Mr. Porter worked in excess of 40 hours for that week he would be entitled to compensatory time.

The record shows that on August 1, 1974, Mr. Porter performed round-trip travel by commercial air carrier from Albany, New York, to Washington, D. C. He arrived at the Albany Airport at 6:30 a.m. and his flight departed at 7:05 a.m. and arrived in Washington, D. C., at 9:30 a.m. He would not be entitled to credit for travel from his residence in Rensselaer,

B-191691

New York, since table 4 of FPM Letter 551-10, supra, provides that generally traveltime from home to the common carrier terminal is not hours of work, but his waiting time at the terminal would be hours of work to the extent that it represents normal waiting time resulting from the air carrier's requirement that its passengers arrive at the terminal at a designated predeparture time. See FPM Letter 551-10, para. E2 NOTE 3. His flight time from Albany to Washington was hours of work as table 4 of FPM Letter 551-10, provides that traveltime from the scheduled departure time from the terminal to arrival time at the point of destination constitutes compensable hours of work. If the agency's record shows that Mr. Porter worked in excess of 40 hours during the workweek of August 1, 1974, he would be entitled to compensatory time.

Mr. Porter's claim is for processing in accordance with this decision.

  
Deputy Comptroller General  
of the United States