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DECISION



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

10,211

FILE: B-189197

DATE: May 16, 1979

MATTER OF: James E. Sommerhauser - *personal name*
[Sunday premium pay]

DIGEST: Employee's normal 40-hour basic workweek is Monday through Friday, midnight to 8 a.m., in an administrative workweek of Sunday through Saturday. His regularly scheduled administrative workweek includes daily overtime from 11 p.m., to midnight. Working this hour on Sundays does not entitle him to premium pay for the entire shift under 5 U.S.C. 5546(a), since that hour is considered overtime under 5 U.S.C. 5542(a) and 6101 and is thereby excluded. The fact that the employee is entitled to overtime for hours worked over 40 hours under the Fair Labor Standards Act does not operate to change the employee's normal basic workweek as established under 5 U.S.C. 6101 and implementing regulations.

This action is the result of an appeal of a settlement of our Claims Division dated July 27, 1978, which disallowed the claim of Mr. James E. Sommerhauser for Sunday premium pay incident to his employment at the Puget Sound Naval Shipyard. *ALC 00682*

Mr. Sommerhauser's contention is that, because he is covered by the Fair Labor Standards Act (FLSA) (29 U.S.C. 207), his overtime hours must be the last hours of his workweek. He believes that the first part of a workday and workweek which falls on Sunday may not be designated as overtime so as to preclude entitlement to Sunday premium pay. For the reasons given below we hold that an agency may designate hours or work other than the last hours of the workweek or workday as overtime hours for a computation of pay entitlement under title 5, United States Code.

The regular third shift at the Shipyard is midnight to 8 a.m. However, when Mr. Sommerhauser and some other employees in his unit are assigned to that shift they are subject to the duty hours prescribed in a memorandum of the Head, Test Engineering Division, Code 2340, dated February 17, 1977. That memorandum designates the "Standard shift hours" for Shift Test Engineers (STE's) as 11 p.m., to 8 a.m., and for Assistant Shift Test Engineers (ASTE's)

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as 11:24 p.m., to 8 a.m. The records before us do not contain all the details relating to the work schedules of these individuals, but it is stated that STE's and ASTE's assigned to the regular mid-night to 8 a.m., shift must report one hour and six-tenths of one hour early, respectively, in order to receive turnover information from the outgoing shift. The Shipyard pays overtime for this hour (and 36-minute) period of work and counts the hours between midnight and 8 a.m., as the employees nonovertime shift. Overtime which the claimant and other third shift STE's and ASTE's work is either computed under 5 U.S.C. 5542(a) or the FLSA, 29 U.S.C. 207 (1976), whichever provides the most favorable benefit. It is Mr. Sommerhauser's contention that the hour (or 36 minutes) which he works on Sunday night is not overtime but is the first hour of his regular scheduled tour and that as a result he is entitled to Sunday premium for the whole shift under 5 U.S.C. 5546(a). In support of this view, he notes that overtime payable under the FLSA and implementing regulations is not payable until 40 hours in a week have been worked. As a result he contends that the hour he works on Sunday is paid as regular time. He also urges that overtime under 5 U.S.C. 5542, which is payable for hours worked in excess of 40 hours in a week and 8 hours in a day, must be computed the same way. This would result in the hour worked on Sunday being considered regular time or part of his regular tour of duty thereby entitling him to Sunday premium pay for a shift commencing at 11 p.m., Sunday and ending at 7 a.m., Monday, with overtime payable for 7 a.m., to 8 a.m., on Monday or at the time he completes 40 hours of work.

Sunday premium pay of 25 percent is paid under 5 U.S.C. 5546(a). That provision gives Sunday premium pay to employees who work a regular 8-hour nonovertime shift, any pay of which falls on Sunday. Overtime compensation is paid under 5 U.S.C. 5542(a) for "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."

Thus the basic question to be resolved is whether the hour worked on Sunday from 11 to 12 may be considered overtime even though it is performed before the 8 hours of the regular tour of duty.

Section 6101 of title 5, United States Code, provides in pertinent part as follows:

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"(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall—

"(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

"(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

"(3) Except when the head of an Executive agency * * * he shall provide, with respect to each employee in his organization, that—

* * * * *

"(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;"

Civil Service regulations issued pursuant to 5 U.S.C. 6101(c), generally reiterate that which is provided in the statute. See 5 C.F.R. 610.111(a). However, 5 C.F.R. 610.111(a)(2), provides as follows:

"(2) A regularly scheduled administrative workweek which consists of the 40-hour basic workweek established in accordance with paragraph (a)(1) of this section, plus the period of overtime work, if any, regularly required of each group of employees. * * *"

In this regard the pertinent local regulation, NAVSHIPYDPUGETINST 7410.4C, 12 April 1974, provides the administrative workweek of graded and ungraded employees consists of 7 consecutive calendar days, Sunday through Saturday, and that the normal basic workweek (within the administrative workweek) consists of 40 hours on 5 days, Monday through Friday. That regulation also provides that the hours for third shift are midnight to 8 a.m.

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Thus it appears that the Shipyard instructions are in accord with the Civil Service Commission regulations. The instruction clearly spells out the administrative workweek and the normal basic workweek. Regularly scheduled overtime for the specific group of employees here in question is not included in that regulation but is established in the memorandum of February 17, 1977, mentioned above.

The law and regulations require that a normal 40-hour basic workweek be established and that hours worked outside of this 40-hour basic workweek are overtime hours. Employees may be assigned to "regularly scheduled administrative workweeks" of more than 40 hours. However, the requirement that the agency designate the 40-hour basic workweek is still applicable in that situation. Hours outside the basic workweek are the designated regular overtime hours. The Court of Claims in Acuna v. United States, 202 Ct. Cl. 206 (1973), cert. denied, 416 U.S. 905 construed these regulations at page 218 as follows:

"* * * There is no requirement in the Civil Service Commission's regulation that work regularly scheduled beyond the 40-hour basic workweek be scheduled at the end of the administrative workweek, after the basic workweek has been completed. The requirement is simply that, once the agency has selected such period, its regulations specify the period by calendar day, etc., regardless of where in the administrative workweek it occurs. * * *"

In Mr. Sommerhauser's case it appears that there has been no misunderstanding of what has been designated as the normal 40-hour basic workweek at the Shipyard. Furthermore, the record indicates that both management and the employees have recognized that midnight to 8 a.m., is the regular shift period and that the first hour (or 36 minutes) of work in each workday of third shift STE's and ASTE's is overtime. Thus, the period worked on Sunday is overtime. This is evidenced particularly by leave practices in effect at the Shipyard.

The FLSA, 29 U.S.C. 207, merely provides that overtime will be paid following the completion of 40 hours of work in a week. While, it is established that an individual entitled to overtime under both title 5, and the FLSA is to be allowed the computation

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most favorable to him, we find no merit to the view that the FLSA operates to change the regularly scheduled administrative workweek and the 40-hour basic workweek as determined under the provisions of title 5, United States Code.

Accordingly, the action of our Claims Division in disallowing Mr. Sommerhauser's claim must be sustained.


Deputy Comptroller General
of the United States