

PLM-1
Mr. Rister

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DECISION



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

FILE: B-195655

DATE: April 10, 1980

MATTER OF: Eleanor M. Kreis--Overtime Compensation--
Ordered or Approved

DIGEST: Nonexempt employee "suffered or permitted" to begin work 40 minutes early for extended period and paid overtime compensation under FLSA is not entitled to additional overtime compensation under 5 U.S.C. 5542 since supervisor's conduct evidenced no more than "tacit expectation" of employee's early reporting which does not meet "officially ordered or approved" requirement. Moreover, there is no legal authority for compensating employee at basic rates for time in excess of 8 hours a day or 40 hours a week.

Ms. Eleanor M. Kreis has appealed the action of our Claims Division which denied her claim for overtime compensation under 5 U.S.C. 5542. The basis for her claim is that she customarily began working about 40 minutes before the start of her assigned tour of duty from June 7, 1976, to January 11, 1978, while employed by the Social Security Administration as a Secretary GS-6, a nonexempt position subject to the Fair Labor Standards Act (FLSA) of 1938, as amended, 29 U.S.C. 201 et seq.

General Schedule (GS) employees to whom both FLSA and 5 U.S.C. § 5542 apply may be entitled to overtime compensation under whichever of these laws provides the greater benefit. 54 Comp. Gen. 371 (1974); Federal Personnel Manual (FPM) Letter No. 551-1, May 15, 1974. FLSA authorizes overtime compensation for "hours worked" which are "suffered or permitted" in excess of 40 hours per week. Excused absences with pay (leave, holidays) are not "hours worked" under this law. FPM Letter No. 551-1; 29 C.F.R. 778.218. On the other hand, 5 U.S.C. § 5542 authorizes overtime compensation for "hours of work" in excess of 40 hours per week and, with certain exceptions not here applicable, in excess of 8 hours per day which are "officially ordered or approved". Excused absences with pay are "hours of work" under this law.

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Ms. Kreis has claimed and has been awarded overtime compensation under the "suffer or permit" provision of FLSA by the Civil Service Commission (now the Office of Personnel Management). However, she was properly denied such compensation under this law for a substantial number of weeks of the period involved because, due to leave and holidays, her "hours worked" did not exceed 40. Now under 5 U.S.C. § 5542, she claims compensation at overtime rates --or at least at regular (basic) rates--for the extra 40 minutes per day she worked during the weeks excluded under FLSA on the ground that her supervisor "approved" this overtime by his conduct.

In support of this contention she alleges that her supervisor observed her working and taking work from his desk, that he discussed and assisted her with assignments, and that he scheduled and held required performance appraisal interviews with her during the time in question. Additionally he noted on her performance ratings and commented to others that she arrived early and began working immediately.

In response to these arguments the Social Security Administration, while conceding that her supervisor observed and acquiesced in Ms. Kreis' beginning work early, contends that this constituted merely "suffering or permitting" for which she has already been compensated. The supervisor denies that he ordered or approved overtime for her, either overtly or through his actions. It was his understanding that she came to work early to obtain a better parking place and he neither encouraged nor discouraged her early arrivals. He states the performance appraisal interviews were held before regular work hours at her request and that he commended her for beginning work early both on her performance ratings and in conversations with others because it was something she did of her own volition.

It appears that Ms. Kreis' supervisor had authority to order or approve overtime but there is no evidence that she was ever ordered to report early or that she had reason to fear any adverse consequences if she did not do so. Moreover, she states that early in the period involved she asked her supervisor for overtime compensation and he replied: "No, I will not allow it. Even though I know you wouldn't abuse it and I know you are working all the time, if I allow you, the people out there will claim that they should be allowed to do it and they would abuse it."

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The basic requirement for entitlement to overtime compensation under 5 U.S.C. § 5542 is promulgated in the implementing regulation, 5 C.F.R. 550.111(c), which provides that overtime work must be ordered or approved in writing by an official to whom this authority has specifically been delegated. However, it has been held that this requirement is met if an employee is "induced", either by the authorized official or with his knowledge and acquiescence, to perform overtime through a reasonable expectation or fear that some penalty will befall him if he does not do so. Baylor v. United States, 198 Ct. Cl. 331 (1972) and cases cited therein; Robert C. Austin, B-188686, May 11, 1978. But where there is no more than a "tacit expectation" that the employee will report to work earlier than ordered, such expectation, even if indulged in by the authorized official, does not amount to an official order or approval of such overtime. Albright v. United States, 161 Ct. Cl. 356 (1963).

From the foregoing we conclude that, viewed in the light most favorable to Ms. Kreis, her supervisor's conduct did not "induce" her to begin work 40 minutes before the start of her assigned tour and did not evidence more than a "tacit expectation" that this would occur. Since such an expectation does not meet the "officially ordered or approved" requirement, this time is not compensable overtime under 5 U.S.C. § 5542.

Moreover, with certain exceptions not here applicable, the overtime compensation laws discussed above, FLSA and 5 U.S.C. § 5542, are the only authorities for compensating General Schedule employees for time in excess of 40 hours per week or in excess of 8 hours per day. There is no authority for compensating such time at regular rates when it does not meet the requirements of the overtime laws.

Accordingly, the settlement action of our Claims Division denying Ms. Kreis' claim for additional overtime compensation is sustained, and no additional compensation at basic rates may be allowed.



For The Comptroller General
of the United States