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DECISION

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

[Overtime Compensation for INS Employees]

FILE: B-197533

DATE: July 1, 1980

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MATTER OF: Immigration and Naturalization Service -
Overtime compensation for regular part-time employees

DIGEST: Regular part-time immigration inspectors are not entitled to special rate of pay provisions of 8 U.S.C. § 1353a because that statute applies only to full-time employees with regular tours of duty. 49 Comp. Gen. 577 (1970). Any change broadening the coverage of the statute should be through legislation.

This decision is rendered at the request of the Assistant Attorney General for Administration, United States Department of Justice. The issue is whether part-time immigration inspectors with regular tours of duty can be compensated for overtime at the rate specified in 8 U.S.C. § 1353a (1976), rather than that provided for under the provisions of the Federal Employees Pay Act of 1945, 5 U.S.C. § 5542(a)(1976).

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In 49 Comp. Gen. 577 (1970) we held that part-time immigration inspectors employed on an intermittent basis, having no regular hours of duty, were not entitled to the extra compensation provided for by section 1 of the act of March 2, 1931, 8 U.S.C. § 1353a (1970), for overtime work between 5 p.m. and 8 a.m. We find no basis to reach a different conclusion for regular part-time immigration inspectors.

In United States v. Myers, 320 U.S. 561 (1944), the Supreme Court considered the question of overtime as it relates to the special Customs overtime act provisions of 19 U.S.C. §§ 267 and 1451. The language of the Customs overtime act is similar to that found in 8 U.S.C. § 1353a, and the Courts have routinely applied payment of the special rate of overtime evenly for both statutes. See Bishop v. United States, 174 Ct. Cl. 31, 38 (1966). The Supreme Court said in Myers at page 571 that:

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"The legislative history of the various acts makes clear the intention of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the twenty-four hours when the regular daily tour is performed."

Although the above reference to "regular tour of duty" could be construed as applying to regular part-time employees, we believe that only application to full-time was intended. In this connection the Court also said in Myers at page 573:

"Overtime as we pointed out above was substituted by the 1920 amendment of § 5 for 'nighttime' services. The section requires employees to 'remain' on duty. The usual instance of the payment of extra compensation would be for work after 5 p.m. by an inspector who had previously worked full time.

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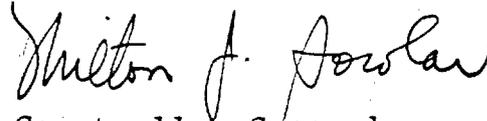
"We are led to the conclusion that overtime as applied to week days, refers to hours longer than the daily limit of 8 A.M. to 5 P.M., nine hours with one hour for food and rest."

Therefore, based on the language in the Myers case, we have held that only full-time employees with regular tours of duty are entitled to the special rate of overtime in 8 U.S.C. § 1353a. 49 Comp. Gen. 577 (1970).

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We believe that any change broadening the coverage of the statute should be through legislation. Compare the overtime provision of the Federal Employees Pay Act of 1945, 5 U.S.C. § 5542(a), which was amended by Public Law No. 92-194, 85 Stat. 648, to substitute "For full-time, part-time and intermittent tours of duty, hours," for "Hours."

In view of the above part-time inspectors with a regularly scheduled administrative workweek should be compensated for overtime on Sundays and holidays under the provisions of the Federal Employees Pay Act of 1945.



Acting Comptroller General
of the United States