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DECISION

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

Overtime Compensation for Bureau of Land Management Employees

FILE: B-197645

DATE: July 7, 1980

MATTER OF: Hourly overtime versus premium pay for
administratively uncontrollable overtime

DIGEST: Administratively uncontrollable overtime (AUO) annual premium pay may not be paid to criminal investigators solely because they are approaching retirement while other investigators performing identical work receive hourly overtime pay. When agency management is unable to control duty hours and there are substantial amounts of irregular or occasional overtime which the employee, without supervision, generally determines is necessary, AUO premium pay under 5 U.S.C. § 5545(c)(2) is proper. Hourly overtime under 5 U.S.C. § 5542(a) is proper when management can control and verify necessary overtime hours. Employing agency must decide which criteria apply and pay all criminal investigators accordingly.

The issue is whether the Bureau of Land Management (BLM), Department of the Interior, may pay most of its criminal investigators at an hourly rate for each hour of administratively uncontrollable overtime (AUO) worked but pay those investigators nearing retirement AUO annual premium pay. *AGC000008*

Mr. Edward L. Hastey, Associate Director, the BLM, states that since 1977 the BLM has been paying all of its criminal investigators annual premium pay for AUO as authorized by 5 U.S.C. § 5545(c)(2) and chapter 550, S1-7 and 8, of the Federal Personnel Manual Supplement 990-2. Presently, the BLM has 14 criminal investigators who average 3 or more hours of overtime per week and who are eligible for AUO annual premium pay. However, all but three investigators who are approaching retirement prefer the immediate benefit of hourly overtime pay and consider mandatory AUO annual premium pay to be financially detrimental to them. The three who are about to retire would like to continue their AUO annual premium pay, which evidently will increase the average of their highest 3 years of basic pay to provide higher retirement annuities in accordance with 5 U.S.C. §§ 8331(3)(D), 8331(4), and 8339(a).

Mr. Hastey observes that the FPM does not prohibit paying AUO annual premium pay and overtime compensation at an hourly rate to separate groups of employees performing identical work. However, he

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can find no regulation specifically allowing such payments. He requests a ruling outlining the payment options available to the BLM.

Section 201 of the Federal Employees Pay Act of 1945, now codified in 5 U.S.C. § 5542(a) provides that overtime at one and one-half times the basic rate of compensation is payable if the overtime hours are "officially ordered or approved." However, because serious administrative problems had resulted from attempting to pay hourly overtime when agency management could not control overtime hours, the Civil Service Commission proposed AUO annual premium pay of up to 15 percent of basic pay. See S. Rep. No. 1992, 83d Cong., 2d Sess. (1954), 3 U.S. Code Cong. & Adm. News 3834 (1954). The inability of management to supervise and account for all overtime hours was considered particularly acute for criminal investigators, and an attempt to pay them for each overtime hour was said to be inappropriate when no supervisor was present to adequately account for their hours. Hearings on S. 354 before Subcommittee No. 1 on Civil Service, Senate Committee on Post Office and Civil Service, September 6, 1951, statement of the Chairman, U.S. Civil Service Commission, p. 45. The prepared statement of M. L. Harney, Assistant to the Commissioner of Narcotics, Treasury Department, p. 61 of the hearings says:

"Supervisory officers of the Treasury enforcement agencies clearly cannot keep in close touch with the majority of investigations as to order or approve overtime in advance.* * *[I]t is not considered desirable or practicable for an individual employee to exercise the discretion as to how much overtime should be paid for work on particular cases. As to official approval of overtime work, it is believed that the morale and effectiveness of the Treasury enforcement agencies would be adversely affected if supervisory officers were required to exercise discretion in approving overtime after the work has been performed. Such control necessarily involves the exercise of discretion based on hindsight, is not subject to any degree of standardization within or among field offices, and must be arbitrary in large measure."

Such considerations led to the enactment of section 208(a) of the Act of September 1, 1954, 68 Stat. 1111, now codified in 5 U.S.C. § 5545(c)(2), which authorizes annual AUO premium pay. The circumstances pertaining to Treasury agents are common to criminal investigation generally. See 5 C.F.R. § 550.153(a).

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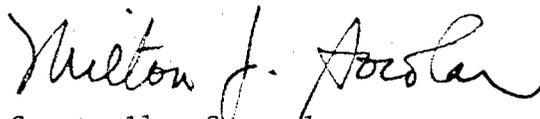
Management's inability to control overtime is a necessary condition justifying AUO annual premium pay. It is payable only to:

"an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty* * *." (Emphasis added.)
5 U.S.C. § 5545(c)(2).

See also 5 C.F.R. § 550.151, et seq. In this connection it is noted that additional amounts may be paid for regularly scheduled overtime and work at night, on Sunday, and on holidays.

Because lack of management control and the employee's discretion to work overtime make hourly overtime under 5 U.S.C. § 5542(a) inappropriate but are requirements for AUO annual premium pay, we believe the two types of compensation are mutually exclusive. Compare Byrnes v. United States, 324 F.2d 966 (Ct. Cl. 1963), 330 F.2d 986 (Ct. Cl. 1964) and Burich v. United States, 366 F.2d 984, 988-989 (Ct. Cl. 1966).

Accordingly, if the requirements of 5 U.S.C. § 5545(c)(2) are satisfied, the BLM should continue to pay AUO annual premium pay to its criminal investigators. However, if management can control and accurately account for overtime hours so that they can reasonably be ordered or approved, hourly overtime should be paid under 5 U.S.C. § 5542(a). Since the criteria above govern the type of pay for AUO allowable, there is no basis for distinguishing between the type of overtime compensation payable to those employees who are approaching retirement and those who are not. Therefore, the BLM must determine which criteria apply and pay all investigators accordingly.



For the Comptroller General
of the United States