

DECISION

15645
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-198771

DATE: December 10, 1980

MATTER OF: Charles C. Mills - - P, R
[Claim For Overtime compensation]

DIGEST: An employee who traveled by bus on Sunday evenings incident to performance of temporary duty on Monday away from his official station is not entitled to overtime compensation since 5 U.S.C. 6101(b)(2), which provides that an employee's travel should generally be scheduled during regular working hours is not itself authority to pay overtime and the travel involved is not within the overtime provisions of 5 U.S.C. 5542. B-181316, August 23, 1974. Employee is not entitled to overtime for Sunday night and Monday morning hours spent at temporary duty station prior to beginning work.

Mr. Charles C. Mills, an employee of the Department of the Air Force, requests reconsideration of our Claims Division's denial of his claim for 757 hours overtime compensation for the period from September 1975 through May 1978. The denial is sustained.

Mr. Mills, an FLSA exempt employee, was permanently assigned to Nellis Air Force Base (AFB). His normal duty hours were from 7:30 a.m. to 4:30 p.m. (8 hours plus 1 hour lunch), Monday through Friday. During a substantial portion of the period covered by his claim he was assigned to temporary duty (TDY) at Tonopah Electronic Warfare Range, Nevada. In order to comply with the TDY orders and to be available for duty on Monday mornings, he traveled by Air Force bus which departed on Sundays at 4 p.m. and arrived at Tonopah approximately 4 hours later. He worked approximately 10 to 12 hours each day at Tonopah and returned to Nellis AFB by military bus upon the completion of his duties. Ordinarily, he was able to depart Thursday morning and thus to travel

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during his regular duty hours. On occasion, however, he was required to perform return travel after regular duty hours. His claim for overtime compensation covers the time he spent traveling to Tonopah as well as the night and morning hours he spent there before beginning his work assignment and it extends to those instances in which his return travel was performed outside of regular duty hours.

Mr. Mills states that during the period of his claim he was not offered the option of departing for Tonopah on Monday. Since he was directed to travel outside his normal duty hours on his day off, he claims that he is entitled to be paid overtime compensation. Mr. Mills does not dispute the Claims Division's finding that the circumstances of his travel do not meet the conditions of 5 U.S.C. 5542(b)(2)(B) for payment of overtime for time in a travel status. [He states that his claim was not intended to be adjudicated as a travel issue, but on the basis that he was directed to be away from home on his day off contrary to the directive that, to the maximum extent practicable, travel should be scheduled within the employee's regularly scheduled workweek.] In support of his claim he states that a fellow employee, as the result of a grievance, received overtime compensation for similar circumstances of assignment.

In basing his claim on the fact that his travel could have been scheduled within his regular working hours, Mr. Mills relies on 5 U.S.C. 6101(b)(2) which provides:

"(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

When an employee is required to perform noncompensable travel outside of his regularly scheduled workweek the provisions of section 610.123 of title 5, Code of Federal Regulations, promulgated by the Civil Service Commission under 5 U.S.C. 6101(b)(2), are to be complied with. That section provides:

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"Insofar as practicable travel during nonduty hours shall not be required of an employee. When it is essential that this be required and the employee may not be paid overtime under § 550.112(e) of this chapter the official concerned shall record his reasons for ordering travel at those hours and shall, upon request, furnish a copy of his statement to the employee concerned."

The reference therein to section 550.112(e), which implements the authority for payment of overtime compensation for time spent in a travel status contained at 5 U.S.C. 5542(b)(2)(B), is in recognition of the fact that there will be instances in which overtime compensation is not payable for traveltime notwithstanding that travel which might be within administrative control is required of an employee outside of his regular duty hours.

In B-163654, January 21, 1974, we examined the legislative history of 5 U.S.C. 6101(b)(2) and concluded that section 6101(b)(2) is not itself authority for payment of overtime compensation, but that overtime compensation for travel is allowable only in accordance with the provisions of 5 U.S.C. 5542(b)(2). In other words the Congress has not provided compensation as a remedy where the circumstances of an employee's travel do not fall within the purview of 5 U.S.C. 5542(b)(2) and where an agency fails to adhere to the policy of trying to schedule travel during regular duty hours when practicable, enunciated in 5 U.S.C. 6101(b)(2). 51 Comp. Gen. 727 (1972) and Wallace N. Peterman, B-197128, March 31, 1980.

In denying the claims of Navy employees who were directed to perform TDY travel outside duty hours even though the travel resulted from an event scheduled and controlled by the agency, the Court of Claims in Barth et al. v. United States, 215 Ct. Cl. 383 (1978) stated:

"Though we may perhaps sympathize with the plaintiffs in this case, we are bound to

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apply the statute as we find it written. The current statutory scheme does not permit us to compensate the plaintiffs. Though we are aware that Congress has exhorted the agencies to schedule travel time so that it occurs within the work shift, 5 U.S.C. § 6101(b)(2) (1970), sometimes this is impossible. Yet Congress, far from providing a remedy, has affirmatively prohibited an award of overtime pay for travel time unless the peculiar conditions of the statutory exception are met. No doubt it would be a difficult task to draft a provision which is more realistic and yet avoids the Lewis Carrollian result of paying all federal employees to drive to work. But such a task, quite properly, does not lie within the power of the judiciary; it lies with the legislature. To achieve what they desire, plaintiffs must obtain appropriate statutory amendments from the only body so empowered, Congress. In summary, we have held that the time these plaintiffs spent in travel status away from their official duty station does not fit within the language of the statutory exception. As a result, we must apply the general rule that travel time is not considered hours of employment and is not compensable."

The scheduling of Mr. Mills' duties at the Tonopah Range was a matter within the administrative control of the Air Force and, thus, the time he spent traveling to and from the Range does not constitute compensable overtime travel under 5 U.S.C. 5542(b)(2)(B)(iv). B-181316, August 23, 1974. His travel was not performed under arduous conditions within the meaning of subsection 5542(b)(2)(B)(iii). As noted in 40 Comp. Gen. 439 (1961), otherwise nonarduous travel does not become arduous because the aggregate amount of time outside of regular working hours spent traveling is substantial over a period of time. Mr. Mills' travel was not within the hours of his regularly scheduled workweek. For these reasons and because it did not involve the performance

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of work while traveling and was not incident to travel that involved the performance of work while traveling, our Claims Division correctly held that Mr. Mills' travel did not constitute overtime hours of work within the meaning of 5 U.S.C. 5542(b)(2)(B).

The nontravel hours spent by Mr. Mills at the Tonopah Range before the start of his regular duty hours similarly do not qualify as overtime hours of work. In the absence of the performance of work, the fact that an employee is away from home or confined to a Government installation during nonduty hours does not entitle him to compensation. 57 Comp. Gen. 496 (1978); Mossbauer v. United States, 541 F.2d 823 (1976). In holding that time spent waiting to perform duties and in an overnight stay at a hotel or motel is not compensable for overtime purposes, we rejected the argument that such time is compensable as incident to travel. 47 Comp. Gen. 608 (1968); Artis Holcomb, B-194297, August 22, 1979.

We have not been provided a record of the grievance which Mr. Mills indicates was resolved by awarding overtime compensation to an employee whose travel was performed under circumstances similar to his own. Insofar as the grievant may have been subject to the Fair Labor Standards Act, which establishes different standards for compensating employees for traveltime, an award of overtime compensation may have been proper. However, if the grievant, like Mr. Mills, was exempt from that act, and if the travel was performed under identical circumstances, an award of overtime pay would have been improper. See B-193127, May 31, 1979.

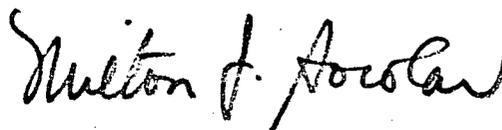
This decision is not intended to sanction the scheduling of an employee's travel contrary to 5 U.S.C. 6101(b)(2). [However, as the applicable law does not provide for payment of overtime in the circumstances there is no basis to allow the claim.]

As to Mr. Mills' request for advice regarding further appeal of his claim, we point out that the decisions of this Office are binding upon the executive departments and agencies of the Government and the law provides no further

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administrative appeal from decisions of the Comptroller General. As to matters cognizable by the United States District Courts and the United States Court of Claims, see 28 U.S.C. 1346 and 1491.

Accordingly, the settlement by our Claims Division is sustained.

A handwritten signature in cursive script, reading "Milton J. Arosler".

For the Comptroller General
of the United States