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Mr. Agazarian



DECISION

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

FILE: B-201436 **DATE:** April 16, 1981

MATTER OF: Ronald C. Randol - *[Claim For]* Overtime Compensation

DIGEST: Bureau of Alcohol, Tobacco, and Firearms agent claims overtime compensation for overtime during period he states he was scheduled to work 12-hour days. Agency advises that upon completion of 8-hour day employee was "on-call" to report for duty if needed and that he was to indicate where he could be contacted. Employee is not entitled to overtime compensation as his activities and movements were not restricted. Where there is an irreconcilable dispute over facts between individual claimant and agency we are bound to accept agency's statement of facts.

This action concerns *[the appeal by Mr. Ronald C. Randol, from our Claims Group's settlement dated October 24, 1980, which disallowed his claim for regularly scheduled overtime compensation] pursuant to 5 U.S.C. § 5542(a).*

Mr. Randol *[is]* a special agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF), Department of the Treasury, *[claims that in connection with the Republican National Convention in Kansas City, Missouri, he performed regularly scheduled overtime] during the period from August 11 to 20, 1976. Accordingly, [he requests payment for such overtime] under 5 U.S.C. § 5542(a) [in addition to annual premium pay he received] under 5 U.S.C. § 5545(c) for administratively uncontrollable overtime. As evidence of such overtime work he has provided a copy of a letter from [the ATF Special-Agent-in-Charge dated July 29, 1976, to the Secret Service Intelligence Command Center in Kansas City, [which stated that the ATF would provide security assistance to the Secret Service and the local police and that this assistance would be provided in two 12-hour shifts.] The letter advised that ATF personnel would*

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B-201436

be available either at the ATF Office or in radio cars and that such personnel could be contacted on a 24-hour basis through either the Kansas City Police Department dispatcher or at the ATF Office. This letter also included a list of personnel, including the claimant, who were assigned to the 12-hour shifts.)

By letter dated July 31, 1980, the agency advised our Claims Group that the letter of July 29, 1976, did not authorize overtime work but merely advised the Secret Service that a response team would be available should such assistance be necessary. The ATF further stated that the agents were "on call" as their whereabouts could be ascertained through the local police radio or the ATF office and that such employees would otherwise be performing their normal duties unless they were off-duty. This report also explained that the agents were not required to stay in a fixed location awaiting contact from the Secret Service but were to be accessible during a given 12-hour period if and when ATF assistance was needed.)

In view of the record the Claims Group concluded that the claimant had not established that he performed the claimed overtime and, accordingly, disallowed his claim.)

Mr. Randol has appealed the action of our Claims Group on the basis that the July 29 letter written by the Special Agent-in-Charge established that he was regularly scheduled to perform overtime during the period in question. He notes that the letter specifically sets forth the personnel and duties assigned to each shift. In addition he has submitted statements from two other agents who had submitted claims to our Claims Group wherein each stated that he supervised a team of agents and that they all worked 12-hour shifts during the period in question.

We are unable to find that the July 29th letter established that Mr. Randol and his co-workers were in an actual duty status for 12 hours per day for

B-201436

the period from August 11 to 20, 1976. Although the letter does establish that the ATF employees involved were assigned to 12-hour shifts, it does not clearly require them to remain in an actual duty status or at a specific location for the full 12 hours of each shift. The agency's report indicating that the employees were merely "on call" for hours outside their regular tour of duty is as consistent with the content of that letter as is claimant's position. The agency has informally confirmed that at the end of the 8-hour workday the agents were not restricted in their movements in any way and that they were not required to remain at the ATF Office or any designated place. The agency further advised that the agents were to indicate where they could be contacted in the event they were needed.

This Office does not hold adversary hearings in order to resolve disputed issues of fact, but decides them on the basis of the written record presented. 4 C.F.R. § 31.7. (1980). Thus, where the written record before us presents an irreconcilable dispute of fact between a Government agency and an individual claimant, we are bound to accept the agency's statement of the facts. William C. Hughes, Jr. B-192831, April 17, 1979.

In view of the record before us we must accept the agency's statement that Mr. Randol was "on-call" during the hours of his designated 12-hour shift that did not fall within his regular tour of duty in that he was not restricted to his duty station or otherwise scheduled to perform actual work during the period for which overtime compensation is claimed.

Section 5542 of title 5, United States Code, provides in pertinent part as follows:

"(a) For full-time, part-time and intermittent tours of duty, 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, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter at the following rates * * *"

B-201436

In order to qualify for overtime compensation under this provision, the claimant must establish that he performed "hours of work."

The case of Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), involved an employee who was required to remain at home from the end of work until the following morning to answer the telephone for any emergency calls received during that time. He was free to leave his residence whenever necessary provided he notified his superior so that calls could be diverted in his absence. The Court of Claims held that the employee was not entitled to overtime compensation under those circumstances since the time so spent was not predominately for his employer's benefit. To the same effect is Moss v. United States, 173 Ct. Cl. 1169 (1965).

Since the agency has advised that Mr. Randol, as well as the other ATF agents, was not restricted in his movements at the end of his 8-hour workday but was required to do no more than to indicate his whereabouts so that he could be contacted in case he was needed at work, he would not qualify for overtime compensation under the rule set forth in the Rapp and Hawkins and Moss cases. We have consistently followed these decisions. See Glen W. Sellers, B-182207, January 16, 1975, and John T. Teske, B-190369, February 23, 1978.

Accordingly, the disallowance of our Claims Group is sustained.

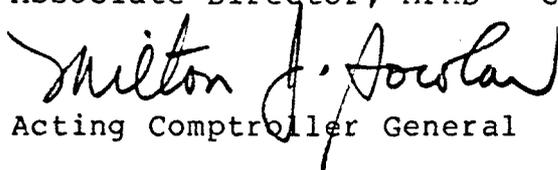
Milton J. Fowler

Acting Comptroller General
of the United States

Memorandum

April 16, 1981

TO : Associate Director, AFMD - Claims Group (Room 5858)

FROM :  Acting Comptroller GeneralSUBJECT: Ronald C. Randol - Claim for Overtime Compensation -
B-201436-O.M.

Returned herewith is file Z-2825204 forwarded here in connection with Mr. Randol's disallowance of his claim for overtime compensation. The disallowance is sustained by our decision of today, B-201436, copy attached.

Attachments