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Kirkpatrick

**DECISION**



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

**FILE:** B-198065

**DATE:** October 6, 1981

**MATTER OF:** Guards at Otis Air Force Base -  
Overtime Entitlement

- DIGEST:**
1. Guards assigned to fixed posts who were required to report 30 minutes before beginning of their 8-hour shift and who were not afforded paid 30-minute duty-free meal break are entitled to overtime under title 5 of the United States Code and, after January 1, 1975, 30 minutes per day counts as hours worked under section 7a of the Fair Labor Standards Act (FLSA). They are entitled to the greater of their title 5 or FLSA entitlements. For such duty performed subsequent to their reclassification as police officers, they are entitled to the greater of their title 5 overtime entitlement or their FLSA entitlement applicable to law enforcement personnel under which meal-time, duty free or otherwise, is counted as hours worked.
  
  2. Where agency asserts that 30 minutes of title 5 overtime performed daily is subject to offset for 30-minute paid meal break, burden is on agency to prove that the meal period afforded was a duty-free period within the standards set forth in Baylor v. United States, 198 Ct. Cl. 331 (1972). Where agency has failed to record hours worked as required by Fair Labor Standards Act (FLSA), burden is similarly upon agency to prove that employees were provided duty-free meal break to offset hours worked under FLSA. For law enforcement personnel subject to section 7k of FLSA, all meal breaks, duty free or otherwise, are counted as hours worked.

Mr. Edward J. Lewis and 23 fellow police security officers at Otis Air Force Base, Massachusetts, claim overtime pay for the period January 2, 1974, to August 30, 1977. They are represented by Mr. Edward Murphy, National Association of Government Employees.

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We find that the agency has not sustained its burden of showing that the claimants were regularly afforded a 30-minute duty-free meal break to offset the 30-minute period each was required to report prior to the beginning of his regular 8-hour tour of duty. Claimants are entitled to overtime compensation in accordance with the standards discussed below.

#### Background

The administrative report submitted by the Air Force confirms the claimants' contention that they were required to report early and perform 30 minutes of preliminary duty before the regular 8-hour shift. The report, however, states that a 30-minute meal break offset the preliminary duty period, resulting in an 8-hour shift. The claimants assert that generally the meal break was not a duty-free period, and they dispute the Air Force's position that the meal period may be used to offset the 30-minute period of preliminary duty. Our Claims Group, in settlement certificates Z-2811701 through Z-2811724, October 31, 1979, denied their claims on the basis of the Air Force's report indicating that the claimants were relieved from duty during the period scheduled for a meal break.

In considering the claimants' appeal, we requested a report from the Office of Personnel Management (OPM), the agency charged with administering the overtime provisions governing certain Federal employees under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, et seq. See 29 U.S.C. 204(f). As a result of its on-site investigation, OPM confirmed that the claimants were required to report 30 minutes before their assigned shifts throughout the claim period, although timecards did not so indicate until June 1977. OPM was unable to conclude that claimants were routinely afforded a duty-free lunch break to offset the period of early reporting.

The report furnished by OPM indicates that the security force in January 1974 consisted of approximately 25 guards. In 1976, the claimants' positions were reclassified from the guard to the police series. The individuals were assigned to a three-shift rotation. Each shift had three guards assigned to fixed posts at the three gates on the

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Base, one desk officer located in the police station, and two or three roving patrols in vehicles. The watch supervisor normally performed one of the roving patrols. According to the chief of security police, his unwritten policy was to provide a 30-minute duty-free meal break, and new employees were so informed. Under the policy an individual assigned to vehicle patrol would relieve one assigned to a fixed post who could then drive the vehicle to the police station or elsewhere for his meal and then return to his post. Other than occasionally responding to emergency calls, a guard would not perform duty on the break.

The claimants contend that the above policy did not comport with actual practice. They claim that when assigned to fixed posts they did not generally receive meal breaks off their posts since the watch supervisors responsible for coordinating meal breaks did not routinely arrange the necessary reliefs. The frequency with which employees assigned to fixed posts were relieved and provided duty-free meal periods depended upon the shift and the particular watch supervisor and whether those assigned to vehicle patrols were otherwise occupied in responding to calls. The record indicates that when assigned to roving patrols, the claimants were afforded a 30-minute meal break on post during which they were subject to emergency calls.

In the course of its investigation, OPM found no records to either confirm or refute the claimants' assertions regarding meal breaks. Police blotters maintained by the desk officer, which may have indicated relief for meals, are no longer available for the claim period. Given the absence of agency documentation to the contrary and the consistent and credible interview responses of claimants, OPM concluded that reliefs for meals during the claim period were provided only on an irregular basis.

#### Legal Requirements

The claimants are nonexempt for the purpose of determining their entitlement to overtime compensation under the FLSA. FLSA overtime at one and one-half times the rate of regular pay is ordinarily payable to nonexempt Federal

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employees who work more than 40 hours per week. However, the FLSA did not cover any Federal employees until May 1, 1974, and it exempted Federal employees engaged in law enforcement and fire protection activities, including guards, until January 1, 1975. See sections 6(c)(2)(A) and 29 (a) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, at 61 and 76, and Federal Personnel Manual (FPM) 551-1, Attachment 2, para. B 2.

Section 6(c)(1)(A) of the 1974 Amendments added section 7k to the FLSA in order to provide special maximum hours without overtime for employees engaged in law enforcement and fire protection activities. Beginning January 1, 1975, the maximum hours for aggregate tours of duty within a work period of 28 consecutive days was 240. During the period covered by the claim the aggregate tour of duty was reduced to 232 hours effective January 1, 1976, and 216 hours effective January 1, 1977.

In implementing the special FLSA overtime provisions applicable to law enforcement personnel, OPM included police officers, but excluded guards other than those charged with the custody of inmates in correctional institutions. See FPM Letter 551-5, January 15, 1975, Attachment 1, paras. 2a, 2c, and 3a.

Since the claimants were classified as guards until 1976, they were not subject to the FLSA until January 1, 1975. From that date until their reclassification to the police series they were subject to the regular overtime provisions of section 7a of the FLSA. With their reclassification as police officers in 1976, they became subject to the special FLSA overtime provisions of section 7k.

For purposes of section 7a only those periods during which the employee is completely relieved from duty are excluded from hours worked for the purpose of determining FLSA overtime entitlement. FPM Letter 551-1, May 15, 1974, Attachment 4, paragraph c. In contrast meal breaks, duty free or otherwise, are not excluded from hours worked in determining the overtime entitlement under section 7k of the FLSA of law enforcement and fire protection employees,

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unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4.

"Title 5" overtime under 5 U.S.C. 5542 at one and one-half times the regular rate of compensation is payable to Federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. Guards at Rocky Mountain Arsenal, B-199673, June 15, 1981. The period of a duty-free lunch break may be offset against overtime to which the employee is otherwise entitled under title 5. The standards for determining whether a lunch break is subject to offset are discussed extensively in Baylor v. United States, 198 Ct. Cl. 331 (1972) at pages 334-335 and 361-365.

An employee who meets the requirements for both "title 5" and FLSA overtime is entitled to whichever overtime benefit is greater. FPM Letter 551-1, May 15, 1974, para. 2.

The Court of Claims in the Baylor case held that the employing agency has the burden of proving that a guard's meal break is duty free and offsets preshift or postshift hours of work otherwise compensable as "title 5" overtime. Under Baylor a break is not duty free unless the guard is permitted to leave his individual post. However, he remains in a duty-free status even though he is restricted to a building or the premises in order to be available in emergencies. See Raymond A. Allen, et al., B-188687, September 21, 1977. The more stringent Baylor requirement imposing the burden of proof on the agency is an exception to our general rule that the claimant must clearly substantiate his claim where the agency lacks evidence that he worked overtime hours. Compare Lawrence J. McCarren, B-181632, February 12, 1975.

Essentially the same standards apply to claims for FLSA overtime. Under the FLSA, the employer is responsible for keeping accurate records of hours worked by an employee. Where the employer fails to keep such records it is his burden of proof to show that the claims are not warranted. B-199673, supra. Thus the employing agency has the burden of proving that a duty-free meal break offsets other hours of work for

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purposes of determining FLSA overtime entitlement under section 7a. However, for law enforcement and fire protection employees subject to section 7k of the FLSA, meal breaks are counted as hours of work unless they are on duty more than 24 hours and agree with their employer that breaks are duty free.

### Discussion and Conclusions

The employing office required the claimants to perform 30 minutes of preliminary duties before commencing 8 hours of security protection work. This time counts as hours worked that were "ordered or approved" within the meaning of 5 U.S.C. 5542.

The employing office has not met its burden of proving under the Baylor standards that the 30 minutes early reporting time was ordinarily offset by a duty-free meal break for guards at fixed posts. Without a written policy specifying that the claimants were entitled to be relieved from their individual posts for a meal break, the chief of security police relied on supervisors to grant reliefs. We have no definite evidence of the chief's effort to enforce his informal policy or of records kept to show when claimants were offered relief from their posts. Under these circumstances we rely on OPM's conclusion that relief for meals was provided only on an irregular basis. A fair estimate of the hours involved for each claimant can be determined by examining available payroll documents and questioning the claimants, their supervisors, and other persons having information on the meal break reliefs. It would be inappropriate to allow an extra 30 minutes for every shift the claimants reported for duty, since on occasion supervisors provided reliefs. The Regional Office believes that some watch supervisors may have been more conscientious in providing for meal relief than others.

However, neither our records nor the OPM report presents any evidence to suggest that claimants in roving vehicle patrols were restricted to the extent that they lacked regular duty-free meal breaks. Our claim file for Francis J. Ferreira (Z-2811706) contains his affidavit stating that between January 2, 1974, and August 30, 1977, approximately 10 percent of his work was patrol duty when he was allowed to

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eat at the police station while on call for emergencies. This practice meets the Baylor standard of a duty-free meal break.

During the claim period between January 2, 1974, and August 30, 1977, each claimant satisfied the requirements for "title 5" overtime. It should be computed based upon the approximate number of 8-1/2-hour shifts when the claimant did not receive a 30-minute meal break away from his fixed post.

Because the claimants were not subject to or were exempt from the FLSA until January 1, 1975, they are limited to "title 5" overtime until that date. For the period between January 1, 1975, and their conversion to police officer classification in 1976, the claimants were classified as guards and had the same FLSA coverage as other nonexempt Federal employees receiving overtime for over 40 hours of work per week. For the purpose of meeting ordinary FLSA overtime requirements during this period, the Baylor standards of a duty-free meal break applied, and each claimant should be credited with the approximate number of 8-1/2-hour shifts worked as a result of not being given a meal break away from his fixed post. Either FLSA or "title 5" overtime is payable, whichever is greater.

During the final portion of the claim period from the date the claimants were classified as police officers in 1976 until August 30, 1977, the claimants were engaged in law enforcement activities as provided in FPM Letter 551-5, Attachment 1, para. 2a. Consequently, they were entitled to FLSA overtime only if they exceeded the maximum number of hours for law enforcement and fire protection employees, as specified in section 7k of the FLSA, added by the Fair Labor Standards Amendments of 1974. Since FPM Letter 551-5, Attachment 2, para. 4, did not exclude meal breaks from the worktime of these employees unless their tour of duty exceeded 24 hours, the claimants may be credited with 8-1/2-hour shifts for FLSA overtime during this final portion of the claim period, regardless of whether or not they were relieved from their posts for a meal break. However, our records do not indicate that the claimants worked the required number of hours for FLSA overtime under section 7k, and it would appear that their title 5 overtime entitlement for this period would be greater.

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Overtime should be paid according to the eligibility requirements and limitations discussed above. Any specific question or dispute as to the application of these standards may be addressed to this Office. Our Claims Group's disallowance of October 31, 1979, is reversed.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General  
of the United States