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DECISION

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

218289

FILE: B-152061 **DATE:** May 4, 1982

MATTER OF: Wade Baker - Annual premium pay - Sick leave pending disability retirement

DIGEST: Retired Employee of Bureau of Alcohol, Tobacco and Firearms is not entitled to continuation of premium pay for administratively uncontrollable overtime while on extended leave prior to applying for disability retirement, where termination of premium pay results from a valid agency determination that there was no reasonable expectation employee would perform administratively uncontrollable overtime service in the future.

By a letter dated February 10, 1982, Senator Ted Stevens forwarded a request from one of his constituents, Mr. Wade Baker, for a clarification of a Comptroller General decision relied upon by our Claims Group to deny Mr. Baker's claim for premium pay for the time he was on sick and then annual leave prior to his disability retirement. We will treat this request as an appeal of our Claims Group's determination which was set forth in Settlement Certificate Z-2816506, dated October 6, 1980. For the reasons explained below, we affirm that settlement.

Mr. Baker informed our Claims Group that from 1959 to 1979 he was continuously in the position of Criminal Investigator with the Bureau of Alcohol, Tobacco and Firearms. During this time he was receiving premium pay for administratively uncontrollable overtime in accordance with 5 U.S.C. § 5545(c)(2). Mr. Baker states that during half of August and all of September 1978, he was on sick leave due to job-related injuries and continued to receive premium pay. As a result of the same injuries he was put on extended sick leave on February 26, 1979, and then began annual leave when his sick leave was exhausted. His disability retirement was approved on February 23, 1980. Unlike his earlier period of sick leave, the Bureau terminated Mr. Baker's premium pay as of March 1, 1979.

The Office of Personnel Management's regulations regarding premium pay are contained in Part 550, Subpart A of title 5, Code of Federal Regulations. Section 550.162(e) provides that an agency shall continue to pay an employee premium pay on an annual basis while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraph (a) (b), and (c) of that section. Section 550.162(a) states that, except as otherwise provided in that section, premium pay for administratively uncontrollable overtime begins on the date that an employee enters on duty in the position concerned for the purposes of basic pay, and ceases on the date that he ceases to be paid basic pay in the position. Paragraphs (b) and (c) are exceptions to paragraph (a). Paragraph (b) provides for the payment of annual premium pay on a seasonal basis. Paragraph (c) limits annual premium pay during temporary assignments to other duties and training.

We have discussed the effect of paragraph (e) on the entitlement of an employee on extended sick leave to premium pay for administratively uncontrollable overtime in 43 Comp. Gen. 376 (1963), and B-175788, June 1, 1972. Those decisions hold, in substance, that when an employee is on extended sick leave, section 550.162(e) of the regulations pertaining to leave with pay status is not conclusive as to entitlement, that this regulation does not contemplate a situation where there is no reasonable expectation that the employee will return to work, and that an employee on leave with pay is no longer entitled to receive premium compensation when it is administratively determined that there is no basis for anticipating that his irregular, unscheduled overtime work will continue.

It is 43 Comp. Gen. 376 (1963), which our Claims Group cited in denying Mr. Baker's claim. Mr. Baker contends that this decision allows for payment of premium pay when an employee is on extended leave if he earned that leave while in a premium pay status.

Mr. Baker apparently bases that interpretation on the following statement which appears near the end of that decision:

> "For example, when an employee is on extended sick leave pending retirement on

> disability, we would have difficulty in establishing that he meets the criteria of the pay regulations for continued entitlement to premium compensation beyond the period for which he already had qualified."

Mr. Baker seems to contend that, because he was entitled to premium pay for administratively uncontrollable overtime when he earned the sick leave, some special identification attaches to that leave requiring payment of the same premium pay when the leave is taken as was paid when the leave was earned. We do not agree with that contention. The amount and types of compensation paid to an employee who is c paid leave are not determined by the employee's status when the leave was earned, but by his status when the leave is taken.

Although the sentence quoted above and relied upon by Mr. Baker is not clear concerning the meaning of "the period for which he already had qualified," the following portion of the same decision clarifies it and succinctly sets forth our holding:

> " * * * if a review of the criteria contained in * * * the regulation leads to an administrative conclusion * * * that an employee--notwithstanding that he may be in a leave with pay status--no longer qualifies for the premium pay, such pay should be discontinued. Therefore, we are of the view that an employee on leave with pay no longer is entitled to receive premium compensation when it is administratively determined that there is no basis for anticipating that his irregular, unscheduled overtime work will continue over an appropriate period." 43 Comp. Gen. at 377.

We would like to point out that we have also denied continued premium pay during extended periods of sick leave to employees who had been receiving premium pay under 5 U.S.C. § 5545(c)(1) and to those receiving night differential. See 59 Comp. Gen. 683 (1980), and Jimmie D. Brewer, B-205452, March 15, 1982.

In light of the above, and since the termination of Mr. Baker's premium pay resulted from a valid determination that there was no reasonable expectation he would perform overtime service in the future, there is no basis for the allowance of his claim.

Milton J. Socolar

Acting Comptroller General
of the United States