

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

25425

FILE: B-207694

DATE: June 9, 1983

MATTER OF: Edward L. Jackson, et al. - Setoff for
Meal Periods Under Title 5 and Fair Labor
Standards Act

DIGEST:

1. Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. Baylor v. United States, 198 Ct. Cl. 331 (1972).
2. Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et. seq. The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are bona fide-- although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are bona fide.

025857

Mr. Donald C. Curran, Acting Deputy Librarian of Congress, requests a decision as to whether 81 former and current officers of the Library of Congress Special Police Force are entitled to overtime compensation for preshift and postshift duties under the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (1976), and the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542 (1976).

Specifically, the issue for determination is whether the officers regularly have been afforded duty-free lunch breaks which would serve to offset allegedly compensable periods of preshift and postshift work. For the reasons stated below, we hold that lunch breaks provided the officers do not constitute compensable hours of work within the meaning of either overtime law, and, therefore, such breaks may offset compensable periods of preshift and postshift duty.

At the outset, the Library acknowledges that members of the Special Police Force are covered by FLSA. Generally, in cases involving claims for overtime compensation under FLSA, we request a report from the agency responsible for administering FLSA with respect to the affected Federal employees. See, for example, Guards at Rocky Mountain Arsenal, 60 Comp. Gen. 523 (1981). Under the provisions of 29 U.S.C. § 204(f), the Secretary of Labor is authorized to enter into an agreement with the Librarian of Congress for enforcement of FLSA with respect to employees of the Library. Section 10d.01 of the Department of Labor Field Operations Handbook (August 30, 1976) states that an agreement is now in effect which provides that the Library will investigate its employees' complaints under FLSA. Thus, the Library is placed in the dual position of defending its interests as an employing agency, and, at the same time, providing our Office with an objective statement of the facts and circumstances surrounding the officers' claims. We have held that we will not disturb the findings of fact issued by the agency responsible for administering FLSA with respect to the affected employees unless the findings are clearly erroneous; the burden of proof lies with the party challenging the findings. Paul Spurr, 60 Comp. Gen. 354 (1981).

BACKGROUND

The claimants, represented by Officers Edward L. Jackson and Banks T. Johnson, are employed by the Library as uniformed guards and are required to work three 8-hour shifts, commencing at 7 a.m., 3 p.m., and 11 p.m. As the basis for their claims for overtime compensation under Title 5 and FLSA, they allege that they are required to report at least 15 minutes before their scheduled shifts to perform required preliminary activities, which include changing into uniform, receiving assignments, attending an informal roll call and inspection, and proceeding from the control room to their designated duty posts. Postshift activities allegedly constitute the reverse of the preshift routine, taking approximately the same amount of time to perform.

The administrative report sets forth findings of fact which conflict with the officers' allegations regarding the duties they are required to perform before and after their shifts, and the amount of time that is required to perform those duties. For example, the Library states that officers are not required to change into and out of their uniforms on Library premises, and that the average time spent performing preshift duties is 10 minutes. The Library, however, has chosen not to contest the officers' assertion that they perform 30 minutes of compensable preshift and postshift work per day. Rather, the Library contends that the officers have been provided duty-free lunch breaks which should offset periods of preshift and postshift work. The question, therefore, is whether the officers have been afforded duty-free meal periods which are not compensable hours of work and which would serve to offset periods of preliminary and postliminary duty.

The Library reports that members of the Special Police Force regularly are afforded a 30-minute lunch break, and, in this regard, refers to provisions of the collective bargaining agreement between the Library and the American Federation of State, County and Municipal Employees, Local 2477, the bargaining representative of the Special Police Force. Article XXI of the agreement, effective in 1981, provides as follows:

"During the daily tour of duty, insofar as possible, consistent with operational

requirements, the employee will receive two rest breaks of twenty (20) minutes duration and a lunch period of thirty (30) minutes. The times of the rest breaks and lunch period are to be determined by the watch supervisor, so as to least interfere with building physical protection requirements. During the rest break and lunch period, the employee is officially on duty and subject to call, unless otherwise scheduled."

The Library states that officers are relieved from their posts of duty during lunch breaks, and that they are provided 10 minutes in addition to the 30-minute lunch period to permit them to walk between their posts and the Library's dining facilities.

Further, the Library reports that, although officers are officially on duty and subject to call during their lunch breaks, interruptions of breaks have been "so infrequent as to be nonexistent." In support of this statement, the Library has submitted affidavits from six watch supervisors, stating that they "never" or "very rarely" have had to interrupt an officer's lunch period for an emergency or non-emergency incident, and, when such an interruption has occurred, the break has been rescheduled. The Library also has provided us with the results of a survey performed by its Buildings Management Division during the period October 17 to December 30, 1982, showing that eight of 7,500 lunch breaks scheduled during that period were interrupted; in each of the eight instances, the break was rescheduled. A separate survey conducted during the period January 1 to February 28, 1983, showed that five of the 13,500 lunches scheduled during that period were interrupted and consequently rescheduled.

LIBRARY OF CONGRESS POSITION

Based on the information it has furnished to us, the Library contends that lunch breaks provided the officers are substantially duty-free and therefore may be offset against compensable preshift and postshift work. In this regard, the Library cites portions of the Court of Claims' opinions in Baylor v. United States, 198 Ct. Cl. 331 (1972) and

Albright v. United States, 161 Ct. Cl. 356 (1963), and our decisions in Lorenzo G. Baca, et al., B-167602, August 4, 1976; B-179412, February 28, 1974; and 47 Comp. Gen. 311 (1967). Those cases express the general principle that lunch breaks during which an employee is restricted to the employment premises and subject to call may be offset against overtime which is compensable under 5 U.S.C. § 5542 if the employee is not required to perform substantial duty during the breaktime.

SPECIAL POLICE FORCE POSITION

The officers challenge the Library's finding that they have been afforded duty-free lunch breaks, contending that, during the period of the Library's survey, the agency took "special care" not to recall an officer during his lunch break and to reschedule any breaks which were interrupted. In support of their position that, contrary to the Library's finding, they have been required to perform substantial duty during lunch breaks, the officers have submitted sworn statements to the effect that they "occasionally" have been called back from breaks to respond to emergency and non-emergency incidents. In this regard, they have furnished us with copies of Library of Congress incident reports for 1982, indicating that the Special Police Force handled 28 emergency incidents and 16 borderline emergency incidents during that year, together with the District of Columbia Fire Department's listing of fire alarms reported by the Library in 1982. Additional documentation submitted by the officers includes: (1) a memorandum issued by the Captain of the Special Police Force instructing officers to remain on Library premises during their lunch periods; (2) a memorandum from the Head of the Protective Services Section directing officers to respond to incidents, including those involving disorderly conduct, which are brought to their attention during lunch breaks; and (3) the report of a grievance filed by an officer who was required to respond to a non-emergency incident during his lunch break.

The officers further argue that regulations in the Library of Congress Handbook for Special Police pertaining to lunch breaks are substantially similar to regulations which the Court of Claims in Baylor v. United States, cited above, construed as failing to prescribe a duty-free lunch period. Section 42 of the Handbook provides as follows:

"LUNCH PERIODS. An officer works a straight 8-hour tour of duty. He is authorized to eat his lunch during his tour of duty for a period not in excess of 30 minutes at a time to be determined by his supervisor. Lunch periods will be scheduled so as to least interfere with building protection requirements. During the lunch break, the officer is officially on duty and subject to call."

In addition to the Court of Claims decision in Baylor, the officers rely generally on Albright v. United States, cited above, and our decisions in John L. Svercek, B-205348, November 23, 1982, and B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195 (1964).

Finally, the officers contend that Library of Congress Regulation 2014-7 supports their position that lunch breaks may not be offset against compensable preshift and postshift work. That regulation provides that "[r]est periods will not be considered as leave, and they are not to be accumulated, used to extend the luncheon period or to offset tardiness or early departure from work."

OPINION

"Title 5" overtime under 5 U.S.C. § 5542 at one and one-half times the basic 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, cited above.

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to Federal employees. The FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1976).

An employee who meets the requirements for both Title 5 and FLSA overtime is entitled to overtime compensation under

whichever one of the laws provides the greater benefit. 54 Comp. Gen. 371 (1974). Since we are unable to ascertain from the record which computation would be more beneficial to the officers, the question whether their lunch breaks are subject to offset will be addressed under both Title 5 and FLSA standards.

Setoff for Lunch Breaks under Title 5

The standards for determining whether a lunch break is subject to offset under Title 5 are discussed extensively in Baylor, cited above, wherein the Court of Claims addressed the question whether the General Services Administration (GSA) afforded its uniformed guards a duty-free lunch break which would offset compensable preshift and postshift work. As indicated by the officers, the court in Baylor stated that provisions of the GSA Handbook for Building Guards, requiring guards to remain on duty and subject to call during lunch periods, did not "prescribe" a duty-free lunch break. Nevertheless, the court applied the following standard to determine whether, in actual practice, guards were provided a duty-free break:

"* * * [w]hen the employer makes lunch break time available, and the employee actually takes advantage of such privilege, such time may offset otherwise compensable preshift or postshift hours of work. This is true even when such breaktime is not regularly scheduled so long as it is regularly taken; and it applies when the employee is nevertheless subject to emergency call unless he has shown that responding to such calls substantially reduced his duty free time.

"Where applicable, such away-from-post lunch breaks will offset an equal amount of compensable overtime. Such offset will operate only in cases where the employee was actually permitted to leave his post for his lunch break. * * *" 198 Ct. Cl. 331, 365.

Applying the above-quoted standards, we have consistently held that the mere fact that an employee is on call and not permitted to leave the employment premises

will not defeat a setoff for lunch breaks unless the employee demonstrates that his breacktime was substantially reduced by responding to calls. Frank E. McGuffin, B-198387, June 10, 1980; Raymond A. Allen, B-188687, September 21, 1977.

The officers have not demonstrated under the Baylor standards that they have been restricted to the extent that they lacked duty-free meal breaks. Although the collective bargaining agreement and regulations in the Special Police Handbook require officers to remain on duty and subject to call during lunch breaks, the Library states, and the officers do not dispute, that they regularly have been relieved from their posts during breacktime and are free to eat lunch elsewhere on Library premises.

While the officers challenge the Library's finding that lunch breaks have been interrupted infrequently, they have not produced evidence to support a contrary determination. Specifically, the officers' sworn statements to the effect that they "occasionally" have been interrupted during lunch breaks are general in nature, and do not indicate the number of times that officers were required to work during meal periods. Furthermore, although the Library's incident reports and the District of Columbia Fire Department's listing of fire alarms show the dates of various emergency and non-emergency incidents, there is nothing to indicate that any of the incidents occurred during an officer's meal period. In fact, the Library has advised us that most of the incidents reported by the Library were handled routinely by patrol units. Finally, while the report of a grievance filed by an officer and a memorandum issued by a supervisor of the Special Police Force refer to several specific instances in which an officer has been expected to respond to a non-emergency incident, they do not provide any indication of the frequency with which such incidents have caused officers' lunch breaks to be interrupted.

Under these circumstances, we have no basis for questioning the Library's determination that lunch breaks afforded the officers are substantially duty-free. Accordingly, we hold that the lunch breaks may be offset against periods of preshift and postshift work which would be compensable under 5 U.S.C. § 5542.

The Court of Claims' decision in Albright v. United States, cited above, and our decision in B-56940, May 1, 1946, sustained in 44 Comp. Gen. 195, relied upon by the officers, involve facts which are substantially different from those presented by the officers' claims. In Albright, the court found that civilian guards employed by the Department of the Navy did not have duty-free lunch periods since no definite time for meals was provided, and, when lunch breaks were allowed, the guards generally were restricted to their assigned posts. See 161 Ct. Cl. 356 at pages 361-362, and 368-369. In our decision B-56940, above, we concurred with the determination of the Bureau of Engraving and Printing that, in view of the unique conditions to which employees of the Bureau were subjected, the lunch periods of all of its employees (including guards), which for many years had been regarded administratively as duty time, properly could continue to be considered as work time. That decision was not intended to constitute authority for treating lunch periods as duty or work time for other guards employed by the Government solely because of the fact that the guards--or other employees--are required to remain in the building and subject to call. See 47 Comp. Gen. 311, cited above.

The officers additionally contend that Library of Congress Regulation 2014-7, pertaining to rest breaks, supports their position that lunch breaks are not offsettable. We find that the cited regulation has no bearing on the question before us since it refers only to rest periods, and the Library has not claimed an offset against such breacktime.

Setoff for Lunch Breaks under FLSA

The standards for determining whether a lunch break is bona fide and thus subject to offset against preshift and postshift work otherwise compensable as FLSA overtime are essentially the same as the Title 5 standards delineated in Baylor, above. See Guards at Otis Air Force Base, B-198065, October 6, 1981. The courts have held that, under FLSA, the essential consideration as to whether a meal period is bona fide is whether the employee is in fact completely relieved from work for the purpose of eating regularly scheduled meals. Blain v. General Electric Co., 371 F. Supp. 857

(W. D. Ky. 1971). Explaining this criterion, instructions contained in Federal Personnel Manual Letter 551-1, May 15, 1974, Attachment 4, para. C, state in relevant part:

"Bona fide meal periods are not considered as 'hours worked.' The employee must be completely relieved from duty for the purpose of eating regular meals. When an employee's meal periods are uninterrupted except for rare and infrequent emergency calls, the meal periods can be excluded from working time. On the other hand, if the meal periods are frequently interrupted by calls to duty, the employee would not be considered relieved of all duties and all the meal periods must be counted as 'hours worked.' If an employee is completely freed from duties during his meal periods it is not necessary that he be permitted to leave the premises for the time to be excluded from work time."

With regard to the standard of proof necessary to substantiate a claim under FLSA, the Act requires employers to "make, keep, and preserve such records of persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." See 29 U.S.C. § 211(c). On this basis, our decisions impose a special burden of proof on Federal agencies. See Jon Clifford, et al., B-208268, November 16, 1982. Initially, however, the employee must prove that he has performed work for which overtime compensation is payable with sufficient evidence to show the amount and extent of the work as a matter of just and reasonable inference. Guards at Rocky Mountain Arsenal, cited above. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. Civilian Nurses, B-200354, December 31, 1981, 61 Comp. Gen. 174. Accordingly, the employing agency does not have the burden of proving that a meal period is bona fide and thus excludable from "hours worked" within the meaning of FLSA unless the employee provides some evidence of the amount and extent of work performed during breaktime.)

(Since, in this case, the employing agency is also the agency responsible for objectively reporting the

facts surrounding the FLSA claims, a more stringent standard of proof must be applied to evidence submitted by the officers. That is, the officers not only must present evidence of the amount and extent of work performed during breaktime, but must establish by such evidence that the Library's findings of fact are clearly erroneous. Paul Spurr, above.

As noted previously, the officers do not dispute that they regularly have been relieved from their posts of duty during lunch breaks and are free to eat lunch elsewhere on Library premises. Although they challenge the Library's finding that lunch breaks have been interrupted infrequently, the officers have not produced evidence indicating the number of times that they have been required to work during meal periods, or that any record was made thereof. Since the officers have not shown that their lunch breaks were interrupted on other than an infrequent basis, we have no reason to question the Library's finding that such breaks are substantially duty-free. Accordingly, we hold that the breaks are bona fide and may be offset against periods of preshift and postshift activity which otherwise would be compensable under FLSA.

Our decision in John L. Svercek, above, relied upon by the officers, does not provide a basis for any different determination by us. In that case, we addressed the question whether, under FLSA, lunch breaks afforded Federal Aviation Administration (FAA) Air Traffic Control Specialists were bona fide and therefore subject to offset against compensable preshift work. Our determination that the employees did not have bona fide lunch breaks was based on findings issued by the Office of Personnel Management (OPM), the agency authorized to administer FLSA with respect to individuals employed by FAA.

The officers imply that the findings upon which our decision in Svercek was based were those set forth in a compliance order issued by OPM to FAA. The order, quoted in Svercek, included OPM's conclusion that lunch breaks afforded the FAA employees were not bona fide because the breaks did not have a fixed length, "and since the employees remained subject to recall." While we accepted OPM's conclusion that the lunch breaks were not bona fide, our determination was not based solely on the fact that the employees were on call during breaktime. Instead, our

decision to disallow a setoff for lunch breaks was grounded on OPM's further explanation that the employees either could not leave their work sites for lunch or that they were frequently interrupted if they did leave their work sites.

Thus, the facts presented by the officers' claims clearly are distinguishable from those basing our determination in Svercek. As noted above, the officers do not dispute that they are relieved from their posts during lunch breaks, and they have not shown that interruption of breaks occurred on other than an infrequent basis.

For the reasons stated, we hold that lunch breaks provided the officers may be offset against periods of preshift and postshift work which allegedly would be compensable under the overtime provisions of Title 5 and FLSA.

Milton J. Fowler
for Comptroller General
of the United States