

DECISION

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

GOOD FILE
PLM1

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FILE: B-209768

DATE: July 15, 1983

MATTER OF: David Ehrich - Overtime Compensation for
Fitness for Duty Examination

DIGEST:

1. Employee was ordered to undergo fitness for duty examination which involved tests in a hospital for a period of 3-1/2 days, and he claims overtime compensation for that period. Under 5 C.F.R. § 551.425(b) time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 et seq. However, when an employee is in a hospital for the examination, only the actual examination time is credited as hours of work and hours during which the employee is eating, sleeping, etc., are not creditable work hours.
2. The General Accounting Office will accord great weight to OPM's administrative determination as to employee's entitlements under the FLSA. We will not disturb OPM's determinations unless clearly erroneous. 60 Comp. Gen. 354 (1981).
3. Absences with pay such as annual leave are not periods of work for the purposes of FLSA entitlement.
4. Although time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under FLSA, such time is not hours of work under 5 U.S.C. § 5542.

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Mr. David G. Ehrich, a Senior Officer Specialist with the Bureau of Prisons, Department of Justice, appeals our Claims Group's denial of his claim for overtime compensation for time spent incident to his taking a fitness for duty medical examination. Mr. Ehrich's claim is denied because we find that he has not performed compensable hours of work under 5 U.S.C. § 5542 and because he has not performed more than 40 hours of work in the relevant workweek under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1976).

Mr. Ehrich claims 60 hours of overtime compensation for time spent in a hospital undergoing a fitness for duty examination, the purpose of which was to determine whether he was physically and mentally able to efficiently perform the essential functions of his position. The administrative report shows that the examination was ordered by the appropriate officials of the Bureau of Prisons.

Mr. Ehrich, who normally works Sunday through Thursday with Friday and Saturday off, claims that he worked or was on leave for the following hours during the workweek of October 25 through October 31, 1981:

Oct. 25	Sunday	Workday	8 hours	annual leave
26	Monday	Workday	8 hours	regular work
27	Tuesday	Workday	8 hours	regular work
28	Wednesday	Workday	24 hours	in hospital
29	Thursday	Workday	24 hours	in hospital
30	Friday	Nonworkday	24 hours	in hospital
31	Saturday	Nonworkday	4 hours	in hospital

Accordingly, Mr. Ehrich claims 60 hours of the 100 hours listed above should be compensated at overtime rates.

The Bureau of Prisons denied Mr. Ehrich's claim on the basis that overtime compensation can only be paid if an employee actually performs required work during a prescribed overtime period. Our Claims Group also denied the claim under 5 U.S.C. § 5542 on the principle that overtime compensation cannot be paid unless work is performed and no work was performed while Mr. Ehrich was in the hospital. Settlement No. Z-2844016, October 6, 1982.

While examining Mr. Ehrich's appeal we were advised by the Bureau of Prisons that Mr. Ehrich is a nonexempt employee under FLSA. In accordance with our general practice in FLSA cases therefore, and since this case

appears to present a novel question, we requested a report on Mr. Ehrich's claim from the Office of Personnel Management (OPM). ^{1/}

The report from OPM stated that Mr. Ehrich is a non-exempt employee and that the fitness for duty examination was required for Mr. Ehrich's continued employment with the Bureau of Prisons. The report also stated that Mr. Ehrich was examined on two regular workdays (Wednesday and Thursday, October 28th and 29th) and on one nonworkday (Friday, October 30th) during the period of hospitalization.

The report from OPM then concluded that under its regulation, 5 C.F.R. § 551.425(b), Mr. Ehrich is entitled to have the time spent in the hospital undergoing examination on regular workdays (Wednesday and Thursday, October 28th and 29th) and on nonworkdays (Friday, October 30th) counted as hours of work under FLSA. Although time spent taking the fitness for duty examination is considered hours of work, OPM found no basis for extending this holding to encompass all time spent by an employee in the hospital as hours of work under the FLSA. In this regard the OPM report states:

"During evening hours and the hours on a weekend while an employee is not actually being examined, he is normally free to relax and enjoy nonwork related activities such as eating, sleeping, reading, and watching television. Although an employee is restricted to the hospital during these periods, it is our opinion that this restriction is not severe enough to warrant such time being considered hours of work under the FLSA."

Accordingly, OPM credited Mr. Ehrich with 8 hours of work each day for Monday and Tuesday (workdays) and Wednesday, Thursday, and Friday (fitness for duty examination) for a total of 40 hours. Thus, OPM concluded that even though Mr. Ehrich is entitled to be credited with 24 hours of work during his period of hospitalization, he has not worked in excess of 40 hours during the workweek for entitlement to overtime pay under FLSA.

^{1/} OPM administers the FLSA for most non-Postal Federal employees. 29 U.S.C. § 204(f) (1976).

Mr. Ehrich was afforded the opportunity to comment on OPM's report, and he has essentially three objections. First, he argues that although he took annual leave on Sunday, his workday, it has no bearing on his overtime entitlement because he was still paid for a 40-hour week. Second, he contends that the hours of the evening were not spent "eating, sleeping, reading and watching television." Mr. Ehrich states that he was interrupted all hours of the evening for injections, blood samples, etc. Finally, he says he should be paid because he was confined to the hospital under orders and he could not leave.

OPINION

We shall discuss Mr. Ehrich's third point first, which is that since he was ordered to undergo the examination, was restricted to the hospital and was not there on his own free will, he is entitled to credit all such time in the hospital as hours of work.

In setting rules as to what is considered hours of work under FLSA, OPM's regulation at 5 C.F.R. § 551.425(b), states:

"Time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work."

We think it quite reasonable for OPM to find that the actual examination time, as opposed to the time during which an employee may be sleeping, eating, etc., within a hospital, is the only time which is to be credited as work time under the above regulation. We are not aware of any decision which would require the Government to credit as work time all time an employee spends in a hospital incident to a fitness for duty examination, regardless of whether it is actual examination time or whether the employee is engaged in other activities. ^{2/} A Department of Labor Wage and Hour opinion dated April 4, 1974, cited by both OPM and

^{2/} We have held that employees may be granted administrative leave for reasonable amounts of time required to undergo such examinations. 44 Comp. Gen. 333 (1964) and B-208855, April 5, 1983, 62 Comp. Gen. _____.

Mr. Ehrich, while not binding on OPM 3/, only states that, " * * * time spent in taking such an examination * * *" is hours of work. This supports OPM's view that actual examination time only need be counted.

Mr. Ehrich's also contends that he suffered discomfort and was interrupted at all hours of the evening for blood samples, etc., thus disputing OPM's statement that during the evening hours and on the weekend an employee in the hospital is normally free to relax and enjoy nonwork related activities. However, Mr. Ehrich has not offered any support or evidence to show that such hours involved actual examination time. As noted above, OPM has determined that only actual examination time is compensable under the FLSA, and we have held that since OPM has been designated by law to administer the FLSA, this Office will accord great weight to OPM's administrative determinations as to entitlements under the FLSA. B-163450.12, September 20, 1978. We will not disturb OPM's determinations on FLSA claims unless clearly erroneous. Paul Spurr, 60 Comp. Gen. 354 (1981). Accordingly, we have no basis to change OPM's determination as to the number of creditable work hours in Mr. Ehrich's case.

As to Mr. Ehrich's first point, that the 8 hours annual leave he took should be creditable hours of work as he was paid for that time, it is well settled that absences with pay, such as annual leave, are not periods of work for the purposes of FLSA entitlement. Dian Estrada, 60 Comp. Gen. 434 (1981); and Louis Pohopek, 60 Comp. Gen. 493 (1981).

In view of the above, we agree with OPM that although Mr. Ehrich is to be credited with some hours of work under FLSA, he has not worked more than 40 hours in the week and is thus not entitled to overtime under FLSA.

Mr. Ehrich's claim for overtime compensation under 5 U.S.C. § 5542, a separate statutory entitlement 4/, must also be denied. The OPM's regulations under 5 U.S.C. § 5542 have no similar provision to that in 5 C.F.R. § 551.425(b)

3/ 29 U.S.C. § 204(f) above.

4/ Footnote appears on page 6.

which allows crediting fitness for duty examination on non-work hours as hours of work. While it is true that Mr. Ehrich was restricted to a hospital, we do not find that time spent in a fitness for duty examination is compensable under 5 U.S.C. § 5542. See generally B-195154, April 23, 1980; and 57 Comp. Gen. 496 (1978). As noted above, agencies must grant administrative leave for such examinations, and the examination must be at no cost to the employee. See Federal Personnel Manual, Chapter 339, Subchapter 1-3(c). However, we find no basis to conclude that the hours required by the examination constitute duty hours under 5 U.S.C. § 5542.

Accordingly, we sustain our Claims Group's denial of Mr. Ehrich's claim.

for *Harry D. Can Cleva*
Comptroller General
of the United States

4/ See 54 Comp. Gen. 371 (1974); Lynch and Drozd, 61 Comp. Gen. 115 (1981); and Civilian Nurses, 61 Comp. Gen. 174 (1981), to the effect that where employees are covered by both FLSA and 5 U.S.C. § 5542, they are entitled to overtime compensation under the law giving the greater benefit.