

**DECISION**

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

**FILE:** B-193068

**DATE:** April 25, 1984

**MATTER OF:** James Barber, et al. - Night Differential  
and Sunday Premium Pay Entitlement

**DIGEST:**

1. Night differential under 5 U.S.C. § 5545(a) may not be paid to employees who worked occasional overtime at night during a regularly scheduled tour of duty, but not their own, on or after February 28, 1983. Effective that date, regulations implementing 5 U.S.C. § 5545(a) limit the payment of night differential for "regularly scheduled" work to nightwork performed by an employee during his own regularly scheduled administrative workweek. See regulations cited.
2. Night differential under 5 U.S.C. § 5545(a), as interpreted by decisions of this Office, may be paid to employees who worked overtime at night during a regularly scheduled tour of duty, but not their own, prior to February 28, 1983. Implementing regulations effective on that date which limit the payment of night differential for "regularly scheduled" work to nightwork performed during an employee's own regularly scheduled administrative workweek will not be applied retroactively since, in the absence of obvious error, regulations may be amended to increase or decrease rights on only a prospective basis.
3. Employees who performed work on Sundays in addition to their basic 40-hour workweeks and who were paid overtime compensation for the additional hours are not entitled to premium pay under 5 U.S.C. § 5546(a), which authorizes such pay only for nonovertime hours worked on Sundays.

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The National Treasury Employees Unions (NTEU), on behalf of 11 employees of the Internal Revenue Service (IRS), National Computer Center, appeals our Claims Group settlements disallowing the employees' claims for night differential and Sunday premium pay. For the reasons stated below, night differential may be paid for the period prior to February 28, 1983.

#### FACTS

The claimants, employed as Resident Programming Analysts at the National Computer Center (NCC) in Martinsburg, West Virginia, create computer programs which analyze data on taxpayers. The analysts' regular tours of duty are 8:15 a.m. to 4:45 p.m., Monday through Friday.

Computer operators in the Martinsburg office are responsible for transferring programs created by the analysts onto computer tapes. Since the computers operate continuously, operators are regularly scheduled to work 8-hour shifts which continue around-the-clock, 7 days a week. Occasionally, an operator encounters a problem transferring a program onto computer tape outside of an analyst's regular duty hours, and the analyst is called in to provide assistance. Analysts are paid overtime compensation for additional hours worked at night and on weekends, but do not receive night differential or Sunday premium pay. Apparently, IRS has concluded that the analysts are not entitled to premium pay for night and Sunday work since such work is not included in their regular tours of duty.

On February 21, 1980, NTEU submitted the employees' claims to our Claims Group requesting night differential and Sunday premium pay for overtime worked prior to January 1, 1978.<sup>1/</sup> By settlements dated May 22, 1980, our Claims Group disallowed that portion of the claims arising prior to

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<sup>1/</sup> On January 1, 1978, NCC began to schedule analysts to work 8-hour shifts continuing around-the-clock, 7 days a week, and to pay them night differential and Sunday premium pay. Three months later, the analysts were returned to their former tours of duty (8:15 a.m. to 4:45 p.m., Monday through Friday), and denied premium pay for night and Sunday work.

February 21, 1974, based on the statute of limitations which precludes our Office from considering claims received more than 6 years after the date they first accrued. 31 U.S.C. § 3702(b), as codified by Public Law 97-258, 96 Stat. 877, September 13, 1982 (formerly contained in 31 U.S.C. § 71a). With respect to the period February 21, 1974, to January 1, 1978, our Claims Group found that the employees failed to provide evidence demonstrating that they performed work which would entitle them to night differential or Sunday premium pay. Our Claims Group indicated that this Office would reconsider the employees' claims when they submitted records showing the frequency and amount of work performed at night and on Sundays.

The NTEU has submitted copies of time and attendance records showing overtime hours the employees worked at night and on Sundays between January 1977 and August 1983. The union argues that the employees are entitled to night differential on the basis of 5 U.S.C. § 5545(a), which authorizes a differential of 10 percent of an employee's basic compensation to be paid in addition to basic pay for any "regularly scheduled" work between 6 p.m. and 6 a.m. Specifically, NTEU maintains that the employees performed "regularly scheduled" nightwork within the meaning of 5 U.S.C. § 5545(a), since they were called in to work during regularly scheduled night shifts established for the computer operators. In support of this position, the union cites our decisions in 36 Comp. Gen. 657 (1957), and 34 Comp. Gen. 621 (1955), which state that any occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m., which falls within a regularly scheduled tour of duty, but not necessarily his own scheduled tour, qualifies for the payment of night differential.

The union further points out that provisions of the Federal Personnel Manual and the Internal Revenue Manual authorize payment of night differential to an employee who is temporarily assigned to a tour of duty which includes regularly scheduled nightwork. Additionally, the union cites several Court of Claims decisions holding that an employee who works overtime between 6 p.m. and 6 a.m. is entitled to both night differential and overtime compensation.

The NTEU next argues that the employees are entitled to Sunday premium pay (25 percent of basic pay) under 5 U.S.C.

§ 5546(a), which authorizes such pay for employees who perform nonovertime work during a regularly scheduled 8-hour period of service, any part of which falls on Sunday. The union maintains that, under the provisions of 5 U.S.C. §§ 5546(d) and (e), Sunday premium pay is payable in addition to overtime compensation and night differential. Additionally, citing our decisions in 36 Comp. Gen. 657, and 34 Comp. Gen. 621, pertaining to night differential, the union contends that the employees are entitled to premium pay for Sunday work which is included in the operators', but not their own, scheduled tours of duty.

#### DISCUSSION

As indicated by the union, 5 U.S.C. § 5545(a) authorizes the payment of night differential for "regularly scheduled" work performed between the hours of 6 p.m. and 6 a.m. The term "regularly scheduled" is not defined in the statute, and, until recently, the Office of Personnel Management's (OPM) implementing regulations contained in 5 C.F.R. Part 550 did not address the subject. See the discussion of OPM's revised regulations, below. In the absence of statutory or regulatory guidance, we consistently held that any occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m., which falls within a regularly scheduled tour of duty, but not necessarily his own, results in the payment of night differential. 59 Comp. Gen. 101 (1979); 41 Comp. Gen. 8 (1961); and 34 Comp. Gen. 621, cited previously. In 59 Comp. Gen. 101, we stated that the scheduled tour of duty must be in the same office or unit in order to qualify for night differential.

Effective February 28, 1983, OPM revised several provisions of the regulations in 5 C.F.R. Parts 550 and 610, governing pay administration and hours of duty. The stated purpose of the revised regulations, published in 48 Fed. Reg. 3931, January 28, 1983, is to clarify the relationship between an agency's responsibility to establish regularly scheduled administrative workweeks for its employees, and an employee's entitlement to premium pay for regularly scheduled night, Sunday, and holiday work, and for overtime outside of his regularly scheduled administrative workweek. The relevant provisions define the concept of a

"regularly scheduled administrative workweek" as an administrative workweek scheduled in advance and corresponding to the employee's actual work requirements. 5 C.F.R. §§ 550.103(n), and 610.121(b)(1). The payment of night differential for "regularly scheduled" work is limited to work the employee performs during his regularly scheduled administrative workweek. 5 C.F.R. § 550.103(e).

Commenting on the revised regulations when they were first proposed, we advised OPM that the changes would have an impact on our decisions interpreting 5 U.S.C. § 5545(a), to allow payment of night differential to an employee who is not scheduled to perform nightwork but works overtime during a regularly scheduled night shift. See 59 Comp. Gen. 101, cited above. We pointed out that, under the revised regulations, an employee would be entitled to night differential only for nightwork performed during his own regularly scheduled administrative workweek. Work at night outside the employee's scheduled workweek would be considered irregular or occasional, with no entitlement to night differential. 5 C.F.R. §§ 550.103(e) and (f). We noted that the only exception to this limitation would be provided by 5 C.F.R. § 550.122(d), which authorizes night differential for an employee who is temporarily assigned to a different tour of duty that includes nightwork.

The OPM concurred with our analysis in commentary accompanying the final regulations, stating that:

"GAO commented that OPM's definition of the term 'regularly scheduled' would impact on prior decisions \* \* \* holding that a General Schedule employee who works occasional overtime at night during a regularly scheduled tour of duty, but not his tour of duty, is entitled to night differential (See 59 Comp. Gen. 101 (1979)); \* \* \*

"OPM agrees. Under OPM's definition of the term 'regularly scheduled,' it is the employee who must be scheduled to perform the work, including nightwork, and the work must be scheduled in advance of the administrative workweek as part of the employee's regularly scheduled administrative workweek

to be considered 'regularly scheduled.' Accordingly, these prior decisions would no longer be controlling." 48 Fed. Reg. 3931.

ENTITLEMENT TO NIGHT DIFFERENTIAL ON OR  
AFTER FEBRUARY 28, 1983

Applying the revised regulations as interpreted by OPM and our Office, it is clear that the claimants are not entitled to a 10 percent differential for nightwork performed on or after February 28, 1983, the effective date of the regulations, since such work was not scheduled as part of their own administrative workweeks. Further, although the union maintains that payment of night differential is warranted because the employees were temporarily assigned to the operators' tours of duty which include nightwork, the revised provisions of 5 C.F.R. § 550.122(d) narrowly define the term "temporary assignment" for night differential purposes as follows:

"(d) Temporary assignment to a different daily tour of duty. An employee is entitled to a night pay differential when he or she is temporarily assigned during the administrative workweek to a daily tour of duty that includes nightwork. This temporary change in a daily tour of duty within the employee's regularly scheduled administrative workweek is distinguished from a period of irregular or occasional overtime work in addition to the employee's regularly scheduled administrative workweek." (Emphasis added.)

Since the agency did not change the analysts' daily tours of duty to include nightwork during the relevant period, but required them to work night hours in addition to their regularly scheduled administrative workweeks, the employees were not "temporarily assigned" to a different tour of duty within the meaning of 5 C.F.R. § 550.122(d). Accordingly, we hold that the employees are entitled only to overtime pay, with no night differential, for nightwork performed on or after February 28, 1983.

RETROACTIVE APPLICATION OF REVISED REGULATIONS

The next question for our determination is whether the revised regulations should be applied retroactively, so as to preclude payment of night differential for work the employees performed prior to February 28, 1983. In commentary accompanying the final regulations, OPM states that the regulations serve only to clarify terms, such as "regularly scheduled," which appear in the Federal Employees Pay Act of 1945, as amended. The OPM further states that the Court of Claims in Bennett v. United States, No. 565-78 (Ct. Cl. September 30, 1982), adopted OPM's interpretation of the term "regularly scheduled." On this basis, OPM concludes that, "all claims for the payment of premium pay for 'regularly scheduled' work (including work performed during prior periods) should be settled based on the definition of this term as clarified in these regulations." 48 Fed. Reg. 3933.

We note that Bennett v. United States, No. 565-78 (Ct. Cl. September 30, 1982), cited by OPM, was an interlocutory order in which the Court of Claims adopted its Trial Division's recommendations concerning overtime claims filed by Deputy United States Marshals, and remanded the case for further proceedings. For an outline of the procedural history, see Bennett v. United States, No. 565-78C (Ct. Cl. January 20, 1984), a memorandum decision in which the Court of Claims finally dismissed the plaintiffs' complaints for failure to demonstrate damages. The deputy marshals, who had been paid for overtime worked between 1972 and 1978 at rates prescribed for administratively uncontrollable overtime, claimed that they should have been paid at the higher rates applicable to regularly scheduled overtime.

As part of its determination that overtime worked by the deputy marshals did not qualify as regularly scheduled overtime, the Trial Division reviewed our decisions and various court cases defining the term "regularly scheduled" for overtime purposes. Bennett v. United States, No. 565-78 (Ct. Cl. August 4, 1982). The Trial Division noted that our decisions, as well as Court of Claims cases including Aviles v. United States, 151 Ct. Cl. 1 (1960), interpreted the term "regularly scheduled" as referring to overtime work which is authorized in advance and recurs on a regular or

habitual basis. On the other hand, the Trial Division noted that the Court of Claims decision in Anderson v. United States, 201 Ct. Cl. 660 (1973), defined "regularly scheduled" overtime as overtime which is regularly prescribed in accordance with the applicable statutes and regulations. The Trial Division chose to apply the Anderson definition of the term "regularly scheduled" with respect to the deputy marshals' overtime claims. While the Trial Division recognized that OPM had adopted the Anderson definition in amendments to 5 C.F.R. Parts 550 and 610, its determination turned on the Anderson decision itself and not on a retroactive application of the amended regulations.

Furthermore, we have consistently held that regulations may be amended prospectively to increase or decrease rights under them, but, in the absence of an obvious error, they may not be amended retroactively. B-205237, March 15, 1982; 32 Comp. Gen. 527 (1953). The OPM's regulations amending 5 C.F.R. Parts 550 and 610 do not correct any error in the prior regulations; rather, the revised regulations represent a changed interpretation of the statutes governing overtime and night differential pay which tend to decrease entitlements to this premium pay. Accordingly, we hold that the revised regulations may not be applied to defeat claims for night differential which accrued before February 28, 1983, the effective date of the regulations.

ENTITLEMENT TO NIGHT DIFFERENTIAL  
PRIOR TO FEBRUARY 28, 1983

Since the revised regulations may not be applied retroactively, the principles stated in our decision 59 Comp. Gen. 101 govern the employees' entitlement to night differential for work performed between January 1977 and February 28, 1983. As discussed above, we held in 59 Comp. Gen. 101 that occasional overtime performed by an employee between the hours of 6 p.m. and 6 a.m. which falls within a regularly scheduled tour of duty, but not necessarily the employee's own, results in the payment of night differential. Additionally, we stated that the scheduled tours of duty must be in the same office or unit in order to qualify for night differential.



As indicated previously, analysts employed in the Martinsburg office have been called in at night to assist computer operators working in the same office. Since shifts established for the operators continue around-the-clock, 7 days a week, any work performed by the analysts between the hours of 6 p.m. and 6 a.m. necessarily must have fallen within a regularly scheduled tour of duty. Accordingly, we hold that the employees are entitled to be paid a 10 percent differential for nightwork performed between January 1977 and February 28, 1983.

ENTITLEMENT TO SUNDAY PREMIUM PAY

The union also contends that the employees are entitled to Sunday premium pay under 5 U.S.C. § 5546, even though the work they performed on Sundays did not fall within their own scheduled administrative workweeks. As a fundamental basis for this contention, the union interprets 5 U.S.C. § 5546(d) as authorizing Sunday premium pay in addition to overtime compensation.

The entitlement of an employee to Sunday premium pay is governed by 5 U.S.C. § 5546(a) (1982), which provides:

"An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay."

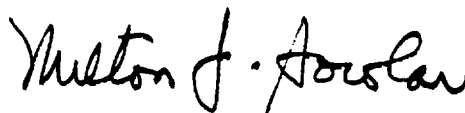
As the language of section 5546(a) plainly states, Sunday premium pay is payable only for that time which is not overtime. See Civilian Nurses, B-200354, December 31, 1981, 61 Comp. Gen. 174. Section 5546(d), cited by the union, does not prescribe a conflicting rule, but simply states that an employee who performs overtime on a Sunday is entitled to overtime compensation under 5 U.S.C. § 5542. The provisions of section 5542 authorize overtime pay at one and one-half an employee's basic rate of

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compensation for authorized or approved hours of work which exceed 40 hours in an administrative workweek, or 8 hours in a day.

The record shows that the claimants have performed Sunday work in addition to their basic 40-hour workweeks and that they have been paid overtime compensation for the additional work. Accordingly, under the provisions of 5 U.S.C. § 5546(a), the employees are not entitled to Sunday premium pay.

Payment of night differential should be made in accordance with the above.



Acting Comptroller General  
of the United States