

DECISION

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

FILE: B-216640**DATE:** September 18, 1985**MATTER OF:** Reconsideration of Frederick Evans, Jr. -
Pay for Firefighters**DIGEST:**

1. Union of federal firefighters requests reconsideration of prior decision holding they are entitled to basic pay for 80 hours biweekly plus premium pay for the remainder of their 144-hour tour of duty. Under the applicable statutes and regulations, firefighters are not entitled to basic pay for their entire 144-hour tour of duty.
2. Union of federal firefighters requests reconsideration of prior decision concerning reduction of overtime under Fair Labor Standards Act (FLSA) for periods of annual or sick leave. Regulations cited by union concerning overtime for periods of annual or sick leave apply to overtime under title 5, United States Code, not to overtime under the FLSA, a separate statutory authority.

ISSUES

The first issue in this decision involves the computation of basic pay for federal firefighters who work a 144-hour tour of duty during a 2-week period. We sustain our prior decision holding that firefighters are compensated for 80 hours times their basic wage plus overtime or premium pay for hours in excess of 80 hours.

The second issue involves whether annual and sick leave may reduce the employee's entitlement to overtime. We hold that although such absences do not affect overtime entitlement under title 5, United States Code, such absences are not considered "hours of work" under the Fair Labor Standards Act.

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BACKGROUND

This decision is in response to a request from Frederick Evans, Jr., President, Local F-100, International Association of Fire Fighters, Newport Naval Base, Newport, Rhode Island. Mr. Evans requests reconsideration of our decision in Frederick Evans, Jr., B-216640, March 13, 1985, concerning the computation of pay for Federal firefighters.

In our prior decision, we held that under the applicable statutes and regulations, federal firefighters are entitled to basic pay for 80 hours biweekly plus premium pay for standby duty under title 5, United States Code. We denied the union's claim that the basic pay of firefighters should be computed on the basis of their 144-hour tour of duty times their hourly wage. In addition, we held that absences for annual leave or sick leave do not constitute "hours of work" under the Fair Labor Standards Act (FLSA) and, therefore, such absence will reduce an employee's overtime entitlement under the FLSA.

In the request for reconsideration, the union again argues that their regularly scheduled administrative workweek is 144 hours but that they are paid for only 80 hours, citing provisions of the Federal Personnel Manual (FPM). The union also argues that the "two-thirds rule" which permits deduction of eating and sleeping time is not applicable to firefighters who receive premium pay for stand-by duty under 5 U.S.C. § 5545(c)(1). Finally, the union cites various provisions of the FPM stating that overtime shall not be reduced by absences for annual leave or sick leave.

DISCUSSION

As we stated in our prior decision, we know of no basis to allow the union's claim that these employees be compensated on the basis of their 144-hour tour of duty times their hourly wage.

Title 5 of the United States Code provides that when an employee works more than 40 hours in an administrative workweek or more than 8 hours in a day, the employee shall be compensated by overtime or premium pay. See 5 U.S.C. §§ 5542, 5544, and 5545 (1982). We are unaware of any statute which authorizes the payment of basic pay in excess of 40 hours in an administrative workweek.

As we cited in our prior decision, section 5545(c)(1) of title 5, United States Code, provides premium pay up to 25 percent to an employee " * * * in a position requiring him regularly to remain at, or within the confines of his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *." We also stated that this method of compensating Federal firefighters has long been recognized in decisions of this Office and the courts.

The union cites provisions of the FPM which state that when an employee is paid additional pay under section 5545(c)(1), the employee's regularly scheduled administrative workweek is the total number of regularly scheduled hours of duty a week. But the length of the administrative workweek does not allow the employee to receive basic pay for hours of work in excess of 40 hours per week. As we stated above, basic pay for purposes of title 5, United States Code, is payable for up to 40 hours of work per week, and hours in excess of 40 are compensable by means of overtime or premium pay. Simply put, the hours in excess of 80 hours every two weeks are being compensated, not by means of basic pay but rather through premium pay. See 5 C.F.R. §§ 550.141-550.144. The purpose for establishing the regularly scheduled administrative workweek is to determine whether there is irregular, unscheduled overtime duty in excess of the employee's regularly scheduled weekly tour which will be compensated at overtime rates. See 5 U.S.C. § 5545(c)(1), and House Report No. 1870, 85th Cong. 2d Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 3047, 3048.

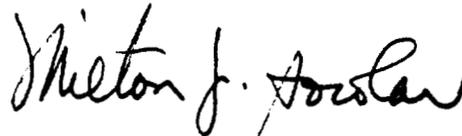
With regard to the union's statement that the two-thirds rule is not applicable to an employee receiving premium pay under 5545(c)(1), we agree with respect to the employee's regularly scheduled workweek. The provisions of section 5545(c)(1) were adopted in 1954 with the intention of replacing the two-thirds rule. See the discussion in Bean v. United States, 175 F. Supp. 166 (Ct. Cl. 1959). However, the two-thirds rule may still be applied to a firefighter in determining entitlement to compensation for irregular overtime in excess of the regularly scheduled workweek. See Thomas A. Donohue, B-213886, October 2, 1984, 64 Comp. Gen. 1.

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Finally, we note that the union cites various provisions of the FPM concerning the payment of overtime during periods of annual leave or sick leave. We agree with the union that for purposes of title 5, United States Code, leave with pay such as annual leave or sick leave is deemed employment and does not reduce the amount of overtime pay to which an employee is entitled during an administrative work-week. See 5 C.F.R. § 550.112(c).

However, these regulations do not govern overtime computed under different statutory authority, the FLSA. See 29 U.S.C. §§ 201-219 (1982). Such absences for leave or holidays do not constitute "hours of work" under the FLSA. See 5 C.F.R. § 551.401(b). See also Louis Pohopek, 60 Comp. Gen. 493 (1981); and R. Elizabeth Rew, 55 Comp. Gen. 1035 (1976). Therefore, we sustain our prior decision that annual or sick leave does not constitute "hours of work" for the purposes of FLSA overtime.

Accordingly, for the reasons stated above, we sustain our prior decision.



Acting Comptroller General
of the United States