

DECISION

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

FILE: B-212699

DATE: February 10, 1986

MATTER OF: John Nyberg, et al. - Computation of Overtime
Under Title 5, United States Code - Comparison
With FLSA Overtime

DIGEST:

1. Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. § 5542 and the implementing regulation, 5 C.F.R. § 550.111(a).
2. An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code.

This decision responds to a request by Ms. Margaret Rhine, Authorized Certifying Officer, Bonneville Power Administration (BPA), that we resolve a disagreement between BPA and the Office of Personnel Management (OPM) concerning the overtime pay entitlements of certain General Schedule employees. The issues are: (1) the proper method for calculating "title 5" overtime for the employees under 5 U.S.C. § 5542 (1982); and (2) the basis for comparing title 5 overtime to the employees' entitlements under the Fair Labor Standards Act, 29 U.S. §§ 201 et seq. (1982), in order to determine which of these two overtime authorities should be applied.

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For the reasons set forth herein, we hold that:

(1) For purposes of calculating title 5 overtime for General Schedule employees, hours worked in excess of 8 hours in a day may not be counted in determining whether an employee worked in excess of 40 hours in an administrative workweek. See 5 U.S.C. § 5542(a) and 5 C.F.R. § 550.111(a) (1985).

(2) These "nonexempt" employees are entitled to be paid for overtime work under the method which gives them the greater total compensation; that is, under either title 5, United States Code, or the Fair Labor Standards Act. Since the Fair Labor Standards Act (FLSA) yields the greater total compensation under the facts of this case, the BPA employees are entitled to payment under that Act.

BACKGROUND

On November 17, 1981, Mr. John Nyberg, a BPA control systems monitor, filed an FLSA complaint with OPM's Northwest Region on behalf of himself and other "nonexempt" (i.e., subject to FLSA) control systems monitors. These employees questioned the method used by BPA to compare their overtime entitlements under title 5 and the FLSA, as well as the resulting determination that title 5 rather than FLSA applied to them. Additionally, the employees questioned whether the comparisons should be made on a pay period or on an administrative workweek basis.

Mr. Nyberg and the other control systems monitors are General Schedule employees who were assigned a 40-hour basic workweek consisting of four 10-hour shifts to be worked within 3 days (Sunday through Tuesday), plus a scheduled 8-hour overtime shift on the fourth day (Wednesday), for a total of 48 hours of work each week. The employees' work schedules looked like this:

| <u>Sunday</u> | <u>Monday</u> | <u>Tuesday</u> | <u>Wednesday</u> |
|---|--------------------------|---|------------------|
| 12M ¹ / - 10 a.m. (10 hrs.) | 12M - 6 a.m. (6 hrs.) | 12M - 2 a.m. (2 hrs.) | 8 hrs. |
| 8 p.m. - 12M (4 hrs.) | 4 p.m. - 12M (8 hrs.) | 12N ¹ / - 10 p.m. (10 hrs.) | |
| ----- | ----- | ----- | ----- |
| 14 hours | 14 hours | 12 hours | 8 hours |

¹/ "M" means midnight; "N" means noon.

There is no dispute in the present case as to the proper FLSA calculations for the employees. At the time in question, these weekly amounts were \$174.40 in FLSA overtime compensation and \$804.44 in total remuneration. The computation of title 5 overtime is disputed.

For purposes of title 5, BPA calculated the employees' entitlements as follows:

| | | |
|--|---|---------------|
| 32 hours of basic pay x \$14.06 | = | \$449.92 |
| 28 hours of night differential pay x \$1.41 | = | 39.48 |
| 8 hours of Sunday differential pay x \$3.52 | = | 28.16 |
| 16 hours of title 5 overtime pay x \$14.76 ^{2/} | = | <u>236.16</u> |

Total weekly remuneration: \$753.72

Based on the above calculations, BPA determined that the employees' weekly overtime compensation under title 5 (\$236.16) was more than it would be under FLSA (\$174.40). While the employees' total weekly remuneration was more if FLSA applied (\$804.44) than if title 5 applied (\$753.72), BPA concluded that the comparison between title 5 and FLSA should be based only on overtime compensation, not total remuneration. Therefore, BPA applied title 5 to fix the employees' overtime entitlements.

The Northwest Region of OPM issued its FLSA decision on May 31, 1983. The OPM agreed with BPA that, contrary to the employees' assertion, overtime comparisons should be based on the workweek, not the pay period. However, OPM rejected BPA's method of calculating title 5 overtime. As discussed in detail hereafter, OPM arrived at an alternate method that resulted in a greater overtime entitlement for the employees under FLSA than under title 5. In any event, OPM also opined that the title 5-FLSA comparison should be

^{2/} The employees' basic rate of pay exceeded the rate for GS-10, step 1. Therefore, under the applicable title 5 formulas (discussed in more detail hereafter), their title 5 overtime rate was 1-1/2 times the hourly rate for GS-10, step 1, or \$14.76 at the time.

B-212699

based on total remuneration, not just overtime pay. Since total remuneration was greater by application of FLSA, OPM concluded that the employees in question should be compensated under FLSA.

The OPM directed BPA to identify all current and former employees affected by its decision and to compute their backpay entitlements in accordance with its decision. The BPA disagreed with the OPM decision and submitted the matter to us for resolution.

ARGUMENTS OF BPA AND OPM

As noted above, BPA and OPM agree on the proper FLSA computations in this case. They also agree that all computations are to be made on a workweek basis. The two agencies disagree on the method to be used in calculating title 5 overtime and on the basis for comparing title 5 and FLSA entitlements.

BPA's Position

With reference to the calculation of title 5 overtime, BPA contends that under the governing statutory provisions and implementing regulations, as well as Comptroller General decisions, title 5 overtime consists of hours of work which are either in excess of 8 in a day or 40 in a week--not both. Work hours that already have been counted as overtime since they exceeded 8 hours in a day are not counted again toward hours worked in excess of 40 for the week. Accordingly, BPA treated the 16 hours worked by the employees which were in excess of 8 hours on the 3 days of their basic workweek--i.e., 6 on Sunday, 6 on Monday and 4 on Tuesday--as overtime hours payable at the employees' full title 5 overtime rate. Since under BPA's approach these 16 hours do not count toward hours worked in excess of 40 in a week, BPA did not allow the employees any title 5 overtime for the 8-hour shift on Wednesday.

In sum, BPA calculated the employees' title 5 entitlements for their 48-hour workweek based on 32 hours of basic pay and 16 hours of overtime, plus the applicable night and Sunday premium payments which remain constant in all the comparisons. The BPA recognizes that this method yields weekly overtime compensation that is greater under title 5 than FLSA but total weekly remuneration that is

greater under FLSA. However, it contends that title 5 must prevail over FLSA because the applicable OPM regulations specifically require the comparison to be made on the basis of the greater overtime entitlement.

OPM's Position

The OPM disputes two fundamental aspects of BPA's approach. First, OPM argues that the general rule against counting title 5 overtime hours in excess of 8 in a day toward hours in excess of 40 in a week should not apply where the hours over 8 in a day make up part of the employees' basic 40-hour workweek. The OPM points out that 5 U.S.C. § 6101 (1982) requires agencies to schedule a basic 40-hour workweek. It follows, according to OPM, that employees are entitled to at least 40 hours of basic pay for each week.^{3/} The BPA's approach grants employees only 24 hours of basic pay for their basic 40-hour workweek; the remaining 16 hours are treated as overtime. In OPM's view, this approach incorrectly understates the employees' basic pay and overstates their title 5 overtime compensation.

OPM's alternative method of calculating title 5 overtime in this case consists of the following three steps:

1. Allow the employees basic pay (\$14.06 per hour) for all 40 hours that make up their basic workweek.
2. Allow the employees an additional amount (\$.70 per hour) over their basic pay for the 16 hours of their basic workweek that constitute hours in excess of 8 in a day. This additional amount represents the difference between the employees' basic rate of pay and their full title 5 overtime rate.
3. Pay the employees the full title 5 overtime rate (\$14.76) for the 8 hours worked on Wednesday, which represents 8 hours worked in excess of 40 in the week.

This method of calculation yields the following results:

^{3/} See also, in this regard, Appendix H to Book 550, FPM Supp. 990-2 (Inst. 68, March 7, 1983) at para. b(1)(a), which states that "[a]n employee is entitled to basic pay for work performed during his or her 40-hour basic workweek."

B-212699

| | | |
|--------------------------|----------------|----------|
| Basic pay: | 40 x \$14.06 = | \$562.40 |
| Night differential pay: | 28 x \$1.41 = | 39.48 |
| Sunday differential pay: | 8 x \$3.52 = | 28.16 |

Overtime pay:

| | | |
|---------------|---------------|-----------------|
| 16 x \$.70 = | \$ 11.20 | |
| 8 x \$14.76 = | <u>118.08</u> | |
| | \$129.28 | <u>\$129.28</u> |

Total weekly remuneration: \$759.32

Under the OPM method, title 5 overtime (\$129.28) now is less than FLSA overtime (\$174.40) and total remuneration using title 5 (\$759.32) still remains less than FLSA (\$804.44). Thus, FLSA would apply regardless of whether the comparison is made between overtime compensation or total remuneration. However, OPM does assert that total remuneration is the proper basis for comparison, citing as support for this approach examples 3 and 4 in Attachment 5 to FPM Letter 551-1 (May 15, 1974).

ANALYSIS AND CONCLUSIONS

1. Computation of Overtime Pay under Title 5

The statutory basis for the title 5 calculation of overtime for General Schedule employees is 5 U.S.C. § 5542(a) (1982), which provides in part:

"For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or [with exceptions not relevant here] in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly

B-212699

rate of basic pay of the employee, and all that amount is premium pay.

"(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay."

The implementing OPM regulations provide, at 5 C.F.R. § 550.111(a) and (b) (1985):

"(a) Except as provided by paragraph (d) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is:

"(1) Officially ordered or approved:
and

"(2) Performed by an employee.
Hours of work in excess of eight in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

"(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113." (Emphasis supplied.)

Section 550.113 of 5 C.F.R. tracks the language of 5 U.S.C. § 5542(a)(1) and (2) in generally fixing the overtime rate as the lower of 1-1/2 times an employee's basic hourly rate of pay or 1-1/2 times the minimum basic rate for GS-10.

The language of 5 U.S.C. § 5542(a) strongly implies, and the OPM regulation explicitly provides, that hours of work in excess of 8 in a day are not included in computing hours in excess of 40 in a week. We adopted the same interpretation of substantively identical statutory

language in 42 Comp. Gen. 329 (1962). OPM's method of computing title 5 overtime in the present case clearly is inconsistent with this interpretation. OPM counts a total of 24 hours of the employees' 48-hour workweek as overtime hours for purposes of title 5. This includes both the 16 hours worked in excess of 8 in a day for Sunday through Tuesday and the full 8-hour shift worked on Wednesday. We disagree with OPM for the following reasons.

Under the provisions of 5 U.S.C. § 6101 (1982), the head of an agency is required to establish a basic administrative workweek of 40 hours for each full-time employee in his organization, and provide that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days. This requirement has been upheld by the Court of Claims in Acuna v. United States, 479 F.2d 1356, 202 Ct. Cl. 206 (1973), cert. denied, 416 U.S. 905 (1974); and by this Office in James E. Sommerhauser, 58 Comp. Gen. 536 (1979).

Neither the statute nor the OPM regulations provide for an exception to the above rules when an employee's basic 40-hour workweek includes some hours that qualify for overtime compensation. Nothing in the statute precludes an agency from making hours in excess of 8 in a day part of the basic workweek. However, since an employee is entitled to basic pay for work performed during the 40-hour basic workweek,^{4/} the actual overtime pay is the difference between the basic rate of pay and the overtime rate for those hours. In this context, we believe that 40 hours of basic pay represents nothing more than a floor on an employee's entitlement for the basic workweek; it does not prevent an agency from paying additional compensation for hours within the basic workweek that qualify as overtime work under title 5. Thus, BPA's structuring of the employees' basic workweek in the present case does not detract from their entitlements under 5 U.S.C. § 6101.^{5/}

^{4/} See Footnote 3 above.

^{5/} We have been informally advised that BPA reports 40 hours of work each week for these employees for retirement purposes. Therefore, the employees are receiving proper retirement credit.

Thus, the rule as properly applied to these BPA employees with uncommon tours of duty may be stated as follows: hours that are both included in the basic workweek and are in excess of 8 hours in a day may not be counted in determining whether or not an employee has exceeded 40 hours in an administrative workweek. Applying this rule to the facts here, the BPA employees are entitled to title 5 overtime pay for the 16 hours worked in excess of 8 hours in a day during the tours of duty worked Sunday through Tuesday. However, since those overtime hours may not be counted twice, only 24 of the hours worked during that period may be counted in determining whether the employees exceeded 40 hours of work during the administrative workweek. Therefore, they may receive only basic pay for the 8 hours worked on Wednesday.

2. Comparison of Overtime Entitlements under Title 5 and under FLSA

The second issue is whether overtime compensation or total remuneration provides the correct basis for deciding which of the statutory authorities applies.

As far as we can determine, this is the first case to directly present the issue. Shortly after enactment of the 1974 amendments which made FLSA applicable to Federal employees, the Civil Service Commission issued FPM Letter 551-1, supra, which instructed agencies to calculate Federal employee overtime entitlements under both title 5 and FLSA and to apply the authority that provided the greater benefit. Our decision in 54 Comp. Gen. 371 (1974) endorsed the concept of comparing FLSA and title 5 entitlements and applying the more beneficial; however, we did not address how this comparison should be made.^{6/}

As OPM points out, two examples in Attachment 5 to FPM Letter 551-1 indicate that the FLSA-title 5 comparison should be made on the basis of total weekly remuneration. In fact, BPA states that it also compared overtime on this basis until OPM issued final regulations on Federal pay

^{6/} The issue in 54 Comp. Gen. 371 was whether FLSA applied at all to the overtime entitlements of Federal employees or whether, as one agency maintained, the existing title 5 overtime provisions preempted FLSA.

administration under FLSA in December 1980.^{7/} According to BPA, however, these regulations now require that the comparison be made on the basis of overtime compensation alone. The BPA points to 5 C.F.R. § 551.513, which provides:

"§ 551.513 Payment of greater overtime pay entitlement.

"An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter [title 5 overtime], or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority."

The OPM's position, notwithstanding the provisions of section 551.513, is that the basic principle in applying title 5 and the FLSA is that employees are to be paid by whichever method provides the greater total remuneration. The OPM also found that, under proper methods of computation, both overtime entitlement and total remuneration for these claimants are less under title 5 than under FLSA. We agree that whether overtime pay or total pay under title 5 and FLSA are compared, the results of the comparisons should be the same if both types of overtime are properly computed. Additionally, as set out in 5 C.F.R. § 551.513, quoted above, the comparison is to be made on a workweek basis, not a pay period basis as contended by Mr. Nyberg.

However, because it is not safe to say that comparing overtime will always achieve the same result as comparing total compensation, and because the plain language of 5 C.F.R. § 551.513 is at variance with the OPM position stated above, we believe that the regulation is inconsistent with the intent of Congress in applying FLSA to Federal

^{7/} See 5 C.F.R. Part 551, published at 45 Fed. Reg. 85659 (December 30, 1980). The overtime provisions of the current regulations, 5 C.F.R. §§ 551.501-551.541 (1985), are the same as the December 1980 version for purposes here relevant.

employees and may be confusing to employing agencies as illustrated by this case. Therefore, we strongly recommend that OPM revise the regulation to make it clear that the greater total benefit is to be controlling.

In applying our above-stated interpretation to the instant case, the correct computation of title 5 overtime compensation is set out below. Since there is no dispute as to the computation of FLSA overtime, we will not reproduce the entire calculation, merely the result. Repeating the work schedule, it consists of four 10-hour shifts worked within Sunday, Monday and Tuesday, resulting in total hours worked of 14 on Sunday, 14 on Monday and 12 on Tuesday, with an additional 8-hour shift worked on Wednesday. For Mr. Nyberg (grade GS-11, step 10), at the then current October 1980 pay rates, the computation is as follows:

Hourly rate of pay

| | | |
|-----------------------|---|---------|
| Basic pay | | \$14.06 |
| Night pay | | 1.41 |
| Sunday pay | | 3.52 |
| Overtime Pay (GS-10/1 | ; | 14.76 |
| times 1 1/2) | | |

Title 5 Overtime Pay Computation

| | | | | | |
|---------------|-----------------------------|---|-----------------------|---|--------------|
| Basic pay | 40 hours | X | \$14.06 | = | \$562.40 |
| | (for Sun., Mon., and Tues.) | | | | |
| Night pay | 28 hours | X | 1.41 | = | 39.48 |
| Sunday pay | 8 hours | X | 3.52 | = | 28.16 |
| Straight time | 8 hours | X | 14.06 | = | 112.48 |
| | for Wed. ^{8/} | | | | |
| Overtime pay | 16 hours | X | \$.709 ^{9/} | = | <u>11.20</u> |
| | | | Total Pay | | \$753.72 |

^{8/} Since only 24 of the hours worked Sunday through Tuesday are counted toward 40 hours for title 5 overtime purposes (see p. 9 above), the 8 hours worked Wednesday are paid at the regular rate.

^{9/} With respect to the hours of work included in the 40-hour basic workweek which are in excess of 8 in a day, the only compensation included as overtime is the difference between the rate of basic pay and the overtime rate.

B-212699

FLSA Overtime Pay Computation

| | |
|------------------------------|-----------------|
| Basic pay | \$562.40 |
| Night pay | 39.48 |
| Sunday pay | 28.16 |
| FLSA overtime ^{10/} | 174.40 |
| Total Pay | <u>\$804.44</u> |

Pay Comparison

| <u>Total Compensation</u> | | <u>Overtime Compensation</u> | |
|---------------------------|----------|------------------------------|----------|
| FLSA | \$804.44 | FLSA | \$174.40 |
| Title 5 | 753.72 | Title 5 | 11.20 |

Accordingly, the computation of overtime entitlement under title 5, United States Code, should be made based upon the rules and principles set forth in this decision. Inasmuch as the computation of overtime under the Fair Labor Standards Act results in greater total compensation, Mr. Nyberg and other control systems monitors are entitled to the payment of overtime compensation under the Fair Labor Standards Act.

for 
 Comptroller General
 of the United States

^{10/} Only the employees' hours of work in excess of 40 in the week count as FLSA overtime hours. Thus, while the employees in this case have 16 hours of title 5 overtime, they have only 8 overtime hours for purposes of FLSA.