



The Comptroller General  
of the United States

Washington, D.C. 20548

*Reading RLS-I*

## Decision

Matter of: William L. Schaeffer, et al. - Premium Pay -  
Night Differential Pay Claims -  
File: B-222378  
Date: March 13, 1987

### DIGEST

1. Three employees filed claims with their agency in 1985 for night differential under 5 U.S.C. § 5545 for overtime hours during the period January 1, 1977, through February 28, 1983. Those claims were not received in the General Accounting Office (GAO) until March 20, 1986. Therefore, that portion of the claims which arose prior to March 20, 1980, may not be considered since 31 U.S.C. § 3702(b)(1) (1982) bars consideration of all claims presented to GAO more than 6 years after the date the claims first accrued. Further, the filing with an administrative office does not satisfy the requirement of the barring act.
2. Employees working as petroleum inspectors are not entitled to night differential under 5 U.S.C. § 5545 for overtime performed prior to February 28, 1983, since the nature of their work is not predictable enough to allow the agency to schedule their hours in advance.

### DECISION

This decision is in response to a request from Peter H. Tovar, Chief, Accounting and Finance Division, Defense Logistics Agency. It concerns the entitlement of three employees in the Los Angeles regional office, Defense Contract Administration Services, to receive night differential pay during the period January 1, 1977, through February 28, 1983.

#### SIX-YEAR BARRING ACT

Under 31 U.S.C. § 3702(b)(1) (1982), a claim against the government must be received here within 6 years of the date that claim first accrued. We have held that timely receipt of a claim is a condition precedent to a claimant's right to have that claim considered on its merits. Furthermore, the filing of a claim with any other government agency does not satisfy the requirements imposed by this provision.

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Frederick C. Welch, 62 Comp. Gen. 80 (1982). We have also held that a backpay claim accrues on the date the services were rendered and on a daily basis for each day services are rendered thereafter. 29 Comp. Gen. 517 (1950); and Burke and Mole, 62 Comp. Gen. 275 (1983).

Our file shows that the earliest correspondence received in this Office concerning the three claims for night differential pay was the agency letter received here on March 20, 1986. Therefore, any compensation claim which arose prior to March 20, 1980, is forever barred from consideration. That portion of the claims which arose during the period March 20, 1980, to February 28, 1983, is not so barred and may be considered on the merits. We conclude, however, that the claimants are not entitled to night differential pay for the period after March 20, 1980, for the following reasons.

#### NIGHT DIFFERENTIAL

The claimants, Messrs. William L. Schaeffer, Jr., Cyril B. Coenen and Ray D. Bronken, are all employed as petroleum inspectors by the Defense Contract Administration Services, - Los Angeles Region. They are classified and paid under the General Schedule. Their duties, generally, involve monitoring the loading or off-loading of petroleum tankers. The tankers are required to lay off shore and can only dock when called upon. As a result, while the inspectors do have regularly scheduled duty hours, there are times when they are called in on an on-call or emergency basis. The Defense Contract Administration Services cannot schedule the inspectors' additional work since the agency has no control over tanker docking and off-loading and it is those events which cause the inspectors to be called to duty at odd hours.

The law governing night, standby, irregular and hazardous duty differential pay for General Schedule employees is found in 5 U.S.C. § 5545 (1982). Subsection (a) thereof authorizes the payment of night differential of 10 percent of basic pay for "regularly scheduled" work performed between the hours of 6 p.m. and 6 a.m.

The night differential pay claims of Messrs. Schaeffer, Coenen and Bronken, are each broken down into three categories:

- a. For overtime performed between 1800 - 2400 hours.

- b. For continuation of duty overtime performed between 2400 - 0600 hours.
- c. For "Call-Out" overtime performed between 2400 - 0600 hours.

According to the agency, category a night differential has been paid in each case, but in categories b and c, it has not been paid and has been submitted here as questionable, especially category c, on the basis that it is administratively uncontrollable.

The claimants contend that our decision James Barber, et al., 63 Comp. Gen. 316 (1984), controls their entitlement. They also assert entitlement based in part on regulations contained in the Federal Register dated January 28, 1983. They have suggested that those regulations provide, in all instances, that agencies are required to control and schedule employees' weekly work load in advance, and if they fail to do so, premium pay will be paid for work performed outside regularly scheduled hours. However, as stated in James Barber, et al., 63 Comp. Gen. at 321, the revised regulations may not be applied retroactively. Thus, the principles stated in 59 Comp. Gen. 101 (1979) govern employees' entitlement to night differential for work performed between January 1977 and February 28, 1983. 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.<sup>1/</sup> Further, as part of the test to establish regularly scheduled work, we stated in Customs Special Agents, B-191512, October 27, 1978, that the overtime involved need not be subject to a fixed hours-of-work schedule, but it must occur so frequently and at such regular intervals as to fall into a predictable and discernible pattern.

From the description of the type of work required to be performed by the present claimants it is evident that it is virtually impossible for any needed overtime work to be administratively scheduled in advance. From the itemization by each of the claimants of the hours they worked over nearly a 3-year period (March 20, 1980, through February 28, 1983), it is equally evident that it was infrequent and at highly irregular intervals, without any predictable pattern. In view thereof, night differential payments may not be allowed for any of the situations described in categories b and c. Accordingly, their claim is denied.

<sup>1/</sup> We were informally advised by the agency that category a overtime was apparently paid on this basis.

Collateral to the above, we note that in April and May 1985, each of the three claimants were paid night differential on the basis of our decision 59 Comp. Gen. 101, supra, for the overtime hours in category a, for the entire period claimed from January 1, 1977, through February 28, 1983. Thus, the agency paid some amounts in violation of the 6-year limitation period contained in 31 U.S.C. § 3702(b)(1) (1982), and ordinarily such erroneous payments should be recouped. See Transportation Systems Center, 57 Comp. Gen. 441 (1978).

However, under the provision of 5 U.S.C. § 5584 (1982), waiver of a debt to the United States is authorized where there is an administrative error, and no fault exists on the part of the employee who received the payment. Under 4 C.F.R. § 91.4(b) (1986), waiver may be granted by the head of the agency when the amount of the overpayment is not more than \$500. Therefore, since the erroneous amounts are less than \$500 in each case, they should be considered for waiver by the agency. If the issue of waiver cannot be resolved by the agency, it should be forwarded to us for determination.

*for*   
Comptroller General  
of the United States