

Hertzman



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: William W. Smith, et al. - Overtime Compensation -
"Two-Thirds Rule"

File: B-230414

Date: January 10, 1989

DIGEST

Seasonal firefighters who were placed on standby duty may, because of the emergency conditions in effect, be paid under title 5, United States Code, or under the Fair Labor Standards Act, overtime for their entire shift without deduction of 8 hours for sleep and meal time under the "two-thirds rule." Further, only bona fide meals may be deducted to determine compensable hours of overtime.

DECISION

This decision is in response to a request from a Forest Supervisor, United States Forest Service, San Bernardino National Forest, California, for an opinion as to whether 18 firefighters are entitled to overtime pay under 5 U.S.C. § 5542(a) (1982), or under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq.^{1/}, computed on the basis of the so-called "two-thirds rule."^{2/} The rule presumes the exclusion of sleep and mealtime from a shift of more than

^{1/} Federal employees engaged in fire protection activities may be entitled to compensation for overtime work under either 5 U.S.C. § 5542 or the FLSA, 29 U.S.C. § 201 et seq. If an employee is entitled to compensation under both laws, that employee receives compensation under whichever law provides the greater overtime benefit. See e.g., 54 Comp. Gen. 371 (1974). Payment for irregular overtime periods of less than 24 hours will generally result in greater benefits if calculated under the provisions of 5 U.S.C. § 5542.

^{2/} Under the two-thirds rule, 16 hours of a 24-hour shift involving substantial standby duty represent time in a pay status, and 8 hours of the 24-hour shift are excluded from the calculation of hours worked as time for eating and sleeping.

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24 hours. However, for the reasons that follow, we conclude that the two-thirds rule should not be applied in this case, and we are returning the claims to the agency for calculation of overtime pay under either title 5 or the FLSA.

BACKGROUND

The 18 employees here are all seasonal firefighters who were assigned to the Mammoth fire in the Inyo National Forest. The employees are all regularly scheduled for a basic workweek of 8 hours a day, 40 hours a week, 9:30 a.m. to 6 p.m., which we presume allows 30 minutes for lunch. Each agency workday runs from midnight to midnight. The employees are paid overtime for work officially ordered or approved in excess of 8 hours in a day, or in excess of 40 hours in an administrative workweek, in accordance with 5 U.S.C. § 5542(a) (1982). They are also nonexempt under the FLSA and therefore are entitled to overtime pay under 29 U.S.C. § 201 et seq. (1982). These employees do not receive annual premium pay for regularly scheduled standby under 5 U.S.C. § 5545(c)(1).

On August 23 and 24, 1987, the Fire Incident Commander restricted the employees to their base and placed them on standby duty during the evening and early morning hours. The employees have claimed overtime pay for 7, 8, or 10 hours for the days that they were restricted to the base depending on their tour of duty.^{3/}

The agency has agreed to pay the employees overtime under these circumstances; however, the agency is in doubt as to how the overtime should be computed. The agency's Regional Personnel Officer issued a memorandum to Forest Supervisors which said that, in closed camp situations, the employees would be in a pay status for a maximum of 16 hours (24 hours less 8 hours for sleeping), less time allocated for meals. Thus, the Personnel Officer concludes that the employees involved in the closed camp situation can be compensated for a maximum of 14-1/2 hours (16 hours less 1-1/2 hours for meals).

OPINION

In 25 Comp. Gen. 161 (1945), we approved use of the two-thirds rule premised on its application to a 24-hour shift. In a 24-hour shift, it is reasonable to presume that a

^{3/} The employees are also claiming hazard pay in some instances under the provisions of 5 U.S.C. § 5545(d) (1982). However, such pay is not at issue here.

portion of the employee's time will be spent sleeping and eating. However, irregular overtime shifts of less than 24 hours duration are more akin to a long workday, and it is not reasonable to presume that a portion of the employee's time will be spent sleeping. This policy has been adopted by both our Office and the Office of Personnel Management (OPM). Thomas A. Donohue, 64 Comp. Gen. 1 (1984).

In addition, OPM has published regulations pertaining to pay administration under the FLSA, and there is a specific provision in 5 C.F.R. § 551.432 (1988) pertaining to sleep time which provides that:

"(a) Except as provided in paragraph (b) of this section, bona fide sleep time that fulfills the following conditions shall not be considered hours of work if:

"(1) The tour of duty is 24 hours or more;

"(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and

"(3) There are at least 5 hours available for such time during the sleep period.

"(b) For employees engaged in fire protection activities or law enforcement activities, the exclusion of sleep time is appropriate for tours of duty of more than 24 hours only. However, paragraphs (a)(2) and (a)(3) of this section still apply to employees in these activities. . . ."

Applying these principles to the facts in this case, we note that all of the employees completed their duties at either 8 p.m. or 9 p.m. on August 23, the first day that the standby was ordered. Thus, the employees would be entitled to overtime compensation under 5 U.S.C. § 5542 or the FLSA for the balance of that day (until midnight) because, by adding the additional 3 or 4 hours to their actual work hours, their total shift was of less than 24 hours duration.

We believe that under the provisions of 5 C.F.R. § 551.432, supra, the employees are entitled to overtime reimbursement under the FLSA for the balance of their tours of duty. The agency restricted the employees to the base again on August 24 which had the effect of assigning them to a tour of duty for more than 24 hours. Thus, the exclusion of sleep time would be appropriate under the provisions of

5 C.F.R. § 551.432(b). However, only bona fide sleep time can be deducted for the purpose of computing overtime under the FLSA and there must be adequate facilities so that an employee can enjoy an uninterrupted period of sleep and there must be at least 5 hours available during the sleep period. 5 C.F.R. § 551.432(a)(2)(3), quoted above.

We have been advised that the employees were restricted to the fire incident base under emergency conditions without adequate facilities and on constant standby. Under those circumstances, we conclude that the hours the employees were restricted to base would constitute hours of work so as to entitle them to FLSA overtime under the circumstances of this case without any deduction for sleep time.

We also disagree with the agency's proposal to arbitrarily deduct 1-1/2 hours for meals, since only bona fide meals may be deducted to determine compensable hours of overtime. Donohue, supra, at 4.

Therefore, the claims are returned to the Forest Service for calculation of overtime pay under 5 U.S.C. § 5542(a) and the FLSA in accordance with the above discussion.

for 
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