



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: HUD Attorneys - Compensatory Time - Travel
Outside Normal Duty Hours
File: B-254001
Date: March 14, 1994

DIGEST

Attorneys who must travel with little or no notice in response to the Government National Mortgage Association determining an Issuer of government-guaranteed mortgage-backed securities to be in default may not receive compensatory overtime for travel performed outside of their normal duty hours. Although the agency cannot control an Issuer becoming at risk or insolvent, the decision whether and when to declare a default is within the control of the agency, and thus is not an administratively uncontrollable event travel to which would be compensable. See 5 U.S.C. § 5542(b)(2)(B)(iv) (1988).

DECISION

This decision is in response to a request from the Department of Housing and Urban Development (HUD)¹ whether compensatory time may be granted to attorneys for time spent traveling outside their normal duty hours as described below. We conclude that compensatory time may not be granted for the travel time in question.

BACKGROUND

The Government National Mortgage Association (GNMA) is a government corporation located within HUD, 12 U.S.C. § 1717(a) (1988), and is administered at the direction of the Secretary of HUD, 12 U.S.C. § 1723(a). GNMA enters into Guaranty Agreements with private entities (Issuers) allowing the entity to issue mortgage-backed securities (MBS) that are guaranteed by GNMA. When an Issuer defaults, GNMA claims the pooled mortgages that back the MBS', the mortgage servicing files and custodial documents, the funds in the Issuer's custodial accounts that hold the principal and

¹The Director, Policy and Planing Division, Office of the Assistant Secretary for Administration, submitted the request.

interest and tax and insurance payments from the individual mortgagors.

According to HUD, upon default, Issuers may withdraw the funds from these custodial accounts or refuse to turn over files, documents, and records to GNMA. Therefore, to secure the government's interests, HUD states, when a default is declared, a default team must leave at once for the Issuer's offices with little or no advance notice.

An attorney from the HUD Office of the General Counsel's Finance Division accompanies the default team. The attorney delivers the default notice to an officer of the Issuer and assures the retitling of custodial accounts containing GNMA funds. In the event the Issuer requests a stay in a U.S. bankruptcy court, the Finance attorney assists the local U.S. Attorney in having the GNMA funds released. The attorney is then expected to return to headquarters as soon as possible to deal with further problems that might arise from the default. HUD states that this often results in the attorney traveling at night after regular working hours.

The issue according to HUD, is represented by this example:

"Recently, GNMA declared a default and within minutes a Finance Attorney departed for Boston at 2:00 p.m. The Finance Attorney, GNMA staff members and GNMA's accounting contractor delivered the default letter and otherwise conducted the default. The Finance Attorney left Boston as quickly as possible, but did not return home until 9:30 p.m. We would like to provide compensatory time to the Finance Attorney for her work beyond normal duty hours."

OPINION

Compensatory time is available on the same basis as overtime pay, 5 U.S.C. § 5543 (1988), and generally is not available for time spent in travel status outside an employee's normal duty hours, 5 U.S.C. § 5542(b)(2). However, section 5542(b)(2)(B) contains four exceptions, the only one of which applicable here allows overtime if the travel "results from an event which could not be scheduled or controlled administratively . . ."

We have long held that this requirement contemplates more than the fact that administrative pressures make scheduling difficult or impracticable and that for an event to qualify as administratively uncontrollable under this provision, "there must be a total lack of government control." See Daniel L. Hubbel, et al., 71 Comp. Gen. 122 (1991), and decisions cited therein. See also, Barth v. United States,

568 F.2d 1329 (Ct. Cl. 1978), in which the Court of Claims also construed this exception very narrowly and held that there must be a "total lack of Government control."

We have identified few circumstances in which the event giving rise to the travel was totally beyond administrative scheduling or control. In one case hearings scheduled by a federal court, to which executive agency employees were required to travel, constituted an administratively uncontrollable event since the court was not in the executive branch, and thus its actions were beyond that branch's administrative control. See 70 Comp. Gen. 77 (1990). In another case travel outside normal duty hours to a privately sponsored training course met the test where the agency had no control over the content or scheduling of the course. See William A. Lewis, et al., 69 Comp. Gen. 545 (1990).

Also, several of our cases in this area involve a response to some type of emergency and necessarily are limited to their facts. In Charles S. Price, et al., B-222163, Aug. 22, 1986, we approved compensatory time for three Food and Drug Administration inspectors who had to respond on an emergency basis to an outbreak of food poisoning caused by contaminated perishable foods, the inspections of which could not be delayed. We noted that when the necessity for travel is so urgent as to preclude proper scheduling of travel, overtime compensation may be paid. Id. at 3. However, our holding was based in part on the need to immediately quarantine perishable foods and was limited to travel related to the initial investigation/containment phase of the emergency.

Where the agency has some degree of control, although indirect, the test has not been met. For example, where the event necessitating the travel arose from a contract between an agency and another party that required the other party to give the agency advance notice of the event, the event was not totally administratively uncontrollable. See Phillip J. Jordan et al., 72 Comp. Gen. 286 (1993), in which we denied overtime claims by agency employees who traveled to witness acceptance tests scheduled and conducted by contractors because the contractors were required to give the agency advance notice of the testing dates. See also Dr. L. Friedman, 65 Comp. Gen. 772 (1986).

In Daniel L. Hubbel, et al., 68 Comp. Gen. 30 (1988), affirmed, 71 Comp. Gen. 122 (1991), similarly, we concluded that the National Labor Relations Board (NLRB) could not pay overtime for travel by its personnel who conduct union representation elections, even though the NLRB must accommodate employer and employee considerations in setting the date and time for an election, since the NLRB retains some control in view of its broad discretionary authority to

schedule elections. We did agree, however, that overtime may be paid on a case-by-case basis to investigators who are required by statute to investigate within 3 days certain complaints alleging unfair labor practices because the NLRB had no control over when a complaint was filed. In the case presented for our review, an attorney had to travel to take a deposition of a witness who would not have been available for another 5 days, and thus the attorney could not complete the investigation on a timely basis unless he traveled the same day the charge was filed.

HUD argues that its situation is similar to the emergency-type cases described above since, when a default occurs, immediate travel is necessary to protect the government's interests. However, we believe that the circumstances of a default differ from those of the cases described above where there was a total lack of administrative control or scheduling. In Price, the government had no control over the outbreak of the health hazard requiring emergency inspections, and in Hubbel, the NLRB had no control over the filing of the unfair labor practices and had a statutory mandate to investigate the charge within 3 days.

In the case of an Issuer default, however, GNMA is exercising its rights under a Guaranty Agreement. Although GNMA cannot control an Issuer becoming at risk or insolvent, GNMA does have complete control over the decision whether and when to declare a default. Put another way, the decision to declare a default, which then gives rise to the need for immediate action, is a discretionary act over which GNMA has control.

Therefore, the situation described in HUD's example is not one in which the agency has a total lack of control. Accordingly, compensatory time is not available under the circumstances described in the example.



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