153272

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Molly D. Kinsley, et al. -- Claims for FLSA Compensation for Standby Duty

File: B-235609.2

Date: January 9, 1995

DIGEST

1. Department of Health and Human Services appeals determinations of the Director, Office of Personnel Management (OPM), that three of its employees are entitled to standby pay under the Fair Labor Standards Act (FLSA) for various periods from 1980 to 1985. As set forth in Lee R. McClure, 63 Comp. Gen. 546 (1984), GAO accords great weight to OPM determinations on FLSA claims and will not overrule those determinations unless they are clearly erroneous or contrary to law or regulation. Upon review of the three claims, GAO concludes that there is no basis to overturn the factual findings and the legal determinations of the OPM Director.

2. Two employees of the Sells, Arizona, Indian Hospital claim compensation for standby duty under the Fair Labor Standards Act (FLSA). For periods before May 22, 1983, their claims are barred by the expiration of the 6-year statute of limitations. For those periods on or after that date when their homes were on the Hospital compound, the OPM Director denied their claims because they were free to engage in most of their normal off-duty activities during the waiting periods, so that their home activities were not substantially limited. OPM's denials are affirmed under 5 C.F.R. § 551.431(a)(1) (1993), which requires that, in order for standby duty to be compensable under the FLSA, the employee cannot use the time effectively for his or her own purposes. See Lee R. McClure, 63 Comp. Gen. 546 (1984).

3. Employee of the Schurz, Nevada, Indian Hospital appeals OPM's partial denial of his claim for compensation for standby duty under the Fair Labor Standards Act. For the period before March 17, 1980, the claim is time-barred. For the period from March 17, 1980, to December 31, 1984, the

OPM Director determined that the employee qualified for stand-by pay because his activities were substantially limited. However, for the period from January 1, 1985, to June 6, 1985, the OPM Director determined that his normal off-duty activities at his home which was then on the Hospital compound were not substantially limited during waiting periods. Thus, the employee did not meet the standards in 5 C.F.R. § 551.431(a)(1) (1993). OPM's denial is affirmed based on the record. See Lee R. McClure, 63 Comp. Gen. 546 (1984).

DECISION

On October 25, 1993, the Director, Office of Personnel Management (OPM), issued "reconsideration decisions" on whether eight employees of the Indian Health Service, Department of Health and Human Services (HHS), were entitled under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (1988), to compensation for standby duty under a variety of circumstances.[1] By letter dated December 13, 1993, HHS appealed those portions of three of the reconsideration decisions resolved in favor of Ms. Molly D. Kinsley, Ms. Delma A. Zambrano, and Mr. Gary M. Brown.[2] Subsequently, Ms. Mary L. Grosse has appealed the denial of her claim, and Ms. Zambrano and Mr. Brown appealed those portions of their claims that were denied.[3]

BACKGROUND

For convenience of reference, Ms. Kinsley, Ms. Grosse, and Ms. Zambrano are referred to as the "Sells claimants" since their claims arose from their work for the Public Health Service's Indian Hospital in Sells, Arizona, and Mr. Brown and the four other claimants (who have not appealed here) are referred to as the "Schurz claimants" since their claims arose from their work for the Public Health Service's Indian Hospital in Schurz, Nevada.

By letter dated May 18, 1989, which was received by our Office on May 22, 1989, HHS appealed the initial decisions

---

[1]The names of these eight employees are: Molly D. Kinsley, Mary L. Grosse, Delma A. Zambrano, Gary M. Brown, Harvey Glazier, George Ponton, Alvery D. Williams, and Arthur Hicks.

[2]The HHS appeal was submitted to our Office by Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration.

[3]No appeals have been filed from the decisions of the Director, OPM, denying the claims of Harvey Glazier, George Ponton, Alvery D. Williams, and Arthur Hicks.

dated December 14, 1987, of OPM's Dallas Region granting the claims of the "Sells claimants." Thus, the claims of Molly D. Kinsley, Mary L. Grosse, and Delma A. Zambrano were first received in our Office on May 22, 1989. By letter, B-235609, October 19, 1989, we remanded those claims to OPM for reconsideration since OPM had advised us that, on July 10, 1989, its San Francisco Region had denied the FLSA claims of Gary M. Brown and the four other "Schurz claimants"[4] which were similar to the claims of the three "Sells claimants" and that OPM wished to reconcile the determinations made by its regional offices in regard to similarly situated claimants.

Previously, by letter dated March 10, 1986, HHS had first informed the Claims Group of our Office about the claims of the five Schurz claimants. HHS had sent this letter to our Office for the purpose of tolling the statute of limitations, and our Claims Group received it on March 17, 1986. Thus, the claims of Gary M. Brown and the four other Schurz claimants were first received in our Office on March 17, 1986.[5]

STATUTE OF LIMITATIONS

As the reconsideration decisions of the OPM Director recognize, the threshold issue is the relevant statute of limitations which is to be applied to the four claims for FLSA compensation for standby duty presented here, which are for various periods from 1980 to 1985.[6]

---

[4]The names of the four other claimants are listed in footnote 3, above.

[5]While not relevant to this appeal, which is concerned only with FLSA claims, we note that the Schurz claimants also filed Federal Employees Pay Act claims under 5 U.S.C. §§ 5545(c)(1) and 5544(a) (1988), which our Claims Group denied in Settlement Certificate Z-2865468, Feb. 11, 1988. No appeal was taken. Also, our Office is aware of pending court actions in the four cases on appeal here. See Kinsley v. Indian Health Services, No. CIV-93-453-T-RMB, Order and Judgment of March 3 and 4, 1994, respectively, (D. Arizona) (Bilby, J.), dismissing complaint, appeal filed on May 2, 1994; and Brown v. United States, 28 Fed. Cl. 141 (April 20, 1993). Further proceedings at the trial level are also pending in Brown v. United States, No. 91-1104C (Fed. Cl.).

[6]The claim of Ms. Kinsley is for waiting periods served from October 4, 1983, to April 8, 1985; the claim of Ms. Grosse is for the same from October 12, 1981, to September 29, 1983; the claim of Ms. Zambrano is for the same from February 23, 1981, to August 11, 1985; the claim of

While these claims were pending before our Office, § 640 of the Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2434 (September 30, 1994) was enacted, as follows:

> "SEC. 640. In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) for claims filed before June 30, 1994."[7]

As shown above, all of the pending claims were filed before June 30, 1994. Thus, applying a 6-year statute of limitations to the claims of the Sells claimants, Molly D. Kinsley, Mary L. Grosse, and Delma A. Zambrano, filed on May 22, 1989, we are barred from considering their claims for any period arising before May 22, 1983. As to the claim of the Schurz claimant, Gary M. Brown, filed March 17, 1986, we similarly cannot consider his claim for any period arising before March 17, 1980.

OPM'S RECONSIDERATION DECISIONS

Based on a lengthy 5-day on-site investigation by OPM personnel, the OPM Director made various factual findings as to the circumstances of each of the four claims involved. The HHS essentially does not dispute those factual findings. Thus, we accept OPM's factual findings, as set forth, infra. in regard to each of the claims.[8]

Mr. Brown is for the same from January 20, 1980, to June 6, 1985.

[7]The enactment of § 640, referenced above, obviates the need for us to discuss the effect, if any, of Joseph M. Ford, 73 Comp. Gen. 157 (1994) on the instant cases. In Ford, we held that FLSA claims filed administratively are subject to the 2-year limitation period in 29 U.S.C. § 255(a) (1988). In light of section 640, the Ford holding is applicable only to claims filed on or after June 30, 1994.

[8]We have held that the proper forum for rebutting contrary evidence is during OPM's investigation of the complaint and that the party questioning OPM's factual findings has the burden to show that those findings were clearly erroneous. Paul Spurr, 60 Comp. Gen. 354 (1981); John B. Cleveland, B-221088, Sept. 11, 1986. Thus, we need not discuss further OPM's findings as to the unavailability of electronic pagers for the employees here.

The applicable OPM regulation involved in all the cases is 5 C.F.R. § 551.431 (1993), which provides, in relevant part, that:

> "(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:
>
> "(1) The employee is restricted to an agency's premises, or so close thereto that the employee cannot use the time effectively for his or her own purposes; or
>
> "(2) The employee, although not restricted to the agency's premises:
>
> "(i) Is restricted to his or her living quarters or designated post of duty;
>
> "(ii) Has his or her activities substantially limited; and
>
> "(iii) Is required to remain in a state of readiness to perform work.
>
> "(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:
>
> "(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or
>
> "(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person."

OPM's General Analysis

Before addressing each individual complaint, the OPM Director outlined his general approach. He stated that the intent of 5 C.F.R. § 551.431 is to make any waiting time which substantially limits an employee's use of that time for private purposes compensable under FLSA; i.e., waiting time is compensable if the employee's normal daily off-duty activities are substantially limited.

As to both the Sells group and the Schurz group, the OPM Director found that, in addition to their regular duty hours, the claimants regularly served waiting periods for

possible emergency calls on weekday evenings and weekends; that the waiting periods were not voluntary; and that they were scheduled by the agency on a regularly recurring basis, although the employee could arrange for a substitute. Since the typical employee's normal daily off-duty activities are centered around the employee's home, the OPM Director concluded that the claimants whose homes were within the response-time radius of the hospital were not substantially limited from engaging in normal off-duty activities and those claimants whose homes were outside the response-time radius of the hospital were so substantially limited. He then proceeded to analyze the individual situations.

Claim of Ms. Molly D. Kinsley

Ms. Kinsley, an x-ray technologist at the Sells Indian Hospital, claims FLSA compensation for standby duty for certain nights and weekends from October 4, 1983, to April 8, 1985, when, in addition to her regular on-duty hours, she served waiting periods for possible emergency calls. For the reasons stated above, because her claim arose after May 22, 1983, her entire claim for the period of October 4, 1983, to April 5, 1985, is timely.

Sells Indian Hospital had no written policy directly defining the expected response time, i.e. the maximum time allowed from the calling of a waiting employee to duty until the employee reported for duty. However, OPM interviews with officials at Sells Indian Hospital disclosed that its unwritten policy was to expect a 15-minute to 20-minute response time for most calls and rarely to allow up to a 30-minute response time for some types of emergencies.

During the entire period, OPM found that Ms. Kinsley's home was located in Tucson, Arizona, approximately 65 miles from the Sells Indian Hospital. In the 15-20 minute response time generally expected by HHS, Ms. Kinsley could not reach the Sells Indian Hospital from her home. Consequently, OPM found that, when she was required to serve waiting periods, she had to stay in the immediate community of Sells Indian Hospital, outside the community where she engaged in normal daily off-duty activities.

Applying the criteria of 5 C.F.R. § 551.431(a) (1993), quoted above, OPM determined that Ms. Kinsley's activities were substantially limited and that the waiting periods she served were compensable under the FLSA. Thus, OPM granted her claim.[9]

---

[9]OPM also determined that, since Ms. Kinsley was required to stay near Sells Indian Hospital at the substantial distance of 65 miles from her home, her activities around Sells did

Claim of Ms. Mary L. Grosse

Ms. Grosse, an x-ray technologist at the Sells Indian Hospital, claims FLSA compensation for standby duty for certain nights and weekends from October 12, 1981 to September 29, 1983, when, in addition to her regular on-duty hours, she served waiting periods for possible emergency calls. For the reasons stated above, her claim is time-barred for the period before May 22, 1983. Thus, we consider her claim only for the period of May 22 to September 29, 1983.

During that period, OPM found that Ms. Grosse's home was located on the Hospital compound. In the response time expected by Sells Indian Hospital, Ms. Grosse could easily reach it from her home which was on the Sells Indian Hospital compound. Thus, OPM found that she was free to engage in most of her normal daily off-duty activities during her waiting periods, so that her activities at her home were not substantially limited. Accordingly, OPM determined that her circumstances did not fulfill the requirements of 5 C.F.R. § 551.431(a) (1993) and denied her claim.

Claim of Ms. Delma A. Zambrano

Ms. Zambrano, an x-ray technologist at the Sells Indian Hospital, claims FLSA compensation for standby duty for certain nights and weekends from February 23, 1981, to August 11, 1985, when, in addition to her regular on-duty hours, she served waiting periods for possible emergency calls. For the reasons stated above, her claim is time-barred for the period before May 22, 1983. Thus, we consider her claim only for the period of May 22, 1983, to August 11, 1985.[10]

During that period, OPM found that Ms. Zambrano's home was located in Anegam Village, Arizona, approximately 45 miles from the Sells Indian Hospital. In the response time expected by HHS, Ms. Zambrano could not reach the Hospital from her home. Consequently, OPM found that, when she was

---

not rise to the level of engaging in normal daily off-duty activities, and, hence, it did not reach the argument that she was free to move around Sells subject to the telephone or electronic pager notice exceptions of 5 C.F.R. § 551.431(b)(1) (1993).

[10]From April 1, 1981, to January 8, 1983, Ms. Zambrano lived on the hospital compound and OPM denied her claim for that period. She has appealed the denial, but we do not consider her appeal because that period is time-barred.

required to serve waiting periods, she had to stay in the immediate community of the Sells Indian Hospital, outside the community where she engaged in normal daily off-duty activities.

Applying the criteria of 5 C.F.R. § 551.431(a) (1993), quoted above, OPM determined that Ms. Zambrano's activities were substantially limited and that the waiting periods she served were compensable under the FLSA. Thus, OPM granted her claim for the period in question.[11]

Claim of Mr. Gary M. Brown

Mr. Brown, a maintenance mechanic at the Schurz Indian Hospital, regularly served waiting periods for possible emergency calls as a medical ambulance driver from January 20, 1980, to June 6, 1985, for which he claims FLSA compensation for standby duty. For the reasons stated above, his claim is time-barred for the period before March 17, 1980.

During the period from March 17, 1980, to December 31, 1984, OPM found that Mr. Brown lived in Yerington, Nevada, approximately 26 miles, and 30 minutes commuting time, from Schurz Indian Hospital. In the approximately 15 minutes response time expected by HHS at the Schurz Indian Hospital, Mr. Brown would be unable to reach the Hospital from his home after being contacted for duty.

Consequently, OPM found that, when serving waiting periods, he had to stay in the immediate community of Schurz, Nevada, either with relatives or in an apartment. This temporary residence required him to be outside the community where he engaged in normal daily off-duty activities, i.e. Yerington, Nevada. OPM found that his activities were substantially limited during the period from March 17, 1980, to December 31, 1984. Thus, OPM concluded that Mr. Brown fulfilled the criteria of 5 C.F.R. § 551.431(a) (1993), and it granted his claim for that period.[12]

In contrast to the time period immediately above, OPM found that Mr. Brown's home during the period from January 1, 1985, to June 6, 1985, was a mobile home on the Hospital grounds. Within the expected response time of approximately

---

[11]As in the Kinsley case, supra, OPM did not reach the argument that the telephone or electronic beeper notice exceptions of 5 C.F.R. § 551.431(b)(1) (1993) are applicable in her circumstances. See footnote 9 above.

[12]As to the telephone or electronic beeper notice exceptions of 5 C.F.R. § 551.431(b)(1) (1993), see footnote 9 above.

15 minutes, he could easily reach the Hospital from his mobile home after being contacted, or he could be contacted by beeper in or around Schurz, Nevada. OPM found that he was free to engage in most of his normal daily off-duty activities in the area of his mobile home during the waiting periods.

Therefore, in regard to the period from January 1, 1985,[13] to June 6, 1985, when Mr. Brown was living in his mobile home on the Schurz Indian Hospital grounds, OPM determined that his activities were not substantially limited. OPM therefore concluded that he is not entitled to FLSA compensation for standby duty for that period.

HHS's RESPONSE TO OPM's DETERMINATIONS

HHS makes two main arguments. The first is that OPM has created a new test for determining whether standby duty is compensable, i.e., whether or not the employee could serve the waiting time in the immediate vicinity of his or her home. This test, HHS asserts, is not based either on OPM's own regulations or on any court's interpretation of standby duty under the FLSA. The second main argument advanced by HHS is that OPM's "substantially limited" test contravenes the Supreme Court's test that to be compensable the waiting time must be spent primarily for the benefit of the employer.

In making its first argument, that the employees' waiting time does not meet the criteria for standby duty under the OPM regulation, HHS contends that the three claimants who were awarded compensation by OPM were not restricted to the hospital or so close thereto that they could not use the time predominantly for their own benefit; they were only required to remain within a radius of the hospital to be able to return within 15 or 20 minutes. Moreover, while waiting to be called, they were not required to perform work-related activity. Instead, they were free to engage in their own activities.

HHS further argues that, while OPM's FLSA regulations at 5 C.F.R. Part 551 do not address the issue upon which OPM based its determinations, namely, the distance that each employee lived from the worksite, other OPM regulations at 5 C.F.R. § 550.143(a)(1), in prescribing when annual standby duty premium pay is authorized, state that the employee must be officially ordered to remain at his station and not

---

[13]The OPM report states that sometime in January 1985 he moved to the Hospital compound. If the date of his actual move was after January 1, the additional days in January are also allowable as part of the prior period.

remain there because of geographic isolation. HHS believes that a similar interpretation should be applied under the FLSA regulations, so that the remoteness of the hospital in relation to the residence of the employee could not be considered a factor.

HHS contends that the effect of the OPM ruling is to reward those employees who choose to live at a considerable distance from their workplace, even in instances where the employee knows he is subject to being on-call when he chooses where he will live. In this regard, HHS cites the case of Mr. Brown who, according to the record, was aware of the call back duty when he was appointed to the position and still chose to live more than 26 miles from the hospital.

The second main HHS argument is that the OPM decisions regarding the three employees contravene the Supreme Court's test for standby duty by improperly focusing on where the employees performed the standby duty. The Supreme Court's test is that waiting time is compensable under the FLSA statute if the time is spent "primarily for the benefit of the employer and his business." Armour & Co v. Wantock, 323 U.S. 126, 132 (1944) (emphasis added). There, the Supreme Court upheld the conclusion of the lower courts that time spent by fireguards on the employer's premises was working time compensable under FLSA. HHS also cites Skidmore v. Swift & Co., 323 U.S. 134, 136-137 (1944).

According to HHS, the critical issue is not where the employee spends the waiting time, but how the employer spends that time, i.e. "whether the employee can use the [on-call] time effectively for his or her own purposes." Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189 (5th Cir. 1989). As examples, it cites Curtis N. Anderson, B-218519, Oct. 15, 1985, where we held that an employee assigned to a remote site and living in government housing who had to respond to calls after duty hours was not entitled to additional compensation under the FLSA since he had use of his off-duty time primarily for his own activities. HHS also cites, among other cases, the decision of the Court of Appeals for the Fifth Circuit in Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, cert. denied, __ U.S. __, 112 S.Ct. 882 (1992), that a hospital technician was not on standby duty under the FLSA, even though he was the only technician on-call and was required to respond to his employer's place of business within 20 minutes of being called.

Thus, HHS concludes that under Armour and other cases there must be a determination that the waiting time was spent predominantly for the benefit of the employer for compensation to be awarded, and OPM did not make that determination. Accordingly, HHS requests that we overturn

OPM's decisions allowing compensation to the three employees in question.

OPINION

Because the statutory authority to administer the FLSA with respect to federal employees is assigned to OPM,[14] we accord great weight to OPM's determinations, and we will not overrule OPM's determinations on FLSA matters unless we find that OPM's factual findings are clearly erroneous or that OPM's legal conclusions are contrary to law or regulation. Lee R. McClure, 63 Comp. Gen. 546 (1984).

We first consider whether the OPM Director's decisions are consistent with the OPM regulation. Although the Director did not find it necessary to analyze each claim against each sub-point of the regulation, we believe that his decisions are appropriately reviewed under the standards of 5 C.F.R. § 551.431(a)(1) or (a)(2)(1993), quoted supra. Subsection (a)(1) requires as a condition of compensation for standby duty that the employee must be restricted to the agency's premises, or so close thereto that the employee cannot use the time effectively for his or her own purposes. Subsection (a)(2) applies to an employee restricted to his or her living quarters while awaiting the call to duty. Since the Director awarded compensation only to those employees who could not spend their waiting time at home, we agree with HHS that the Director must have relied on (a)(1) in allowing compensation to Ms. Kinsley, Ms. Zambrano and Mr. Brown.

As to whether the Director properly applied subsection (a)(1) to the three employees, HHS points out that none of those employees was restricted to the hospital grounds. The Director determined, however, that the required response time kept the three employees so close to the grounds that they could not use their off-duty time effectively for their own purposes.

Specifically, the Director found that each of the claimants either (1) lived within the small Indian reservation town where each hospital was located, in which case the employee could easily report for duty within the allotted response time from his home or; or (2) lived a substantial distance outside the town, in which case the employee could not report for duty from home within the allotted time but had to serve the waiting period within the reservation town. The Director further found that the typical employee's normal daily off-duty activities were centered at and immediately around the home and consequently those who could

[14] 29 U.S.C. §§ 203 and 204(f) (1988).

not serve their waiting time at home were substantially limited from engaging in normal daily off-duty activities.

Based on this finding, it would appear that the criterion applied by the OPM Director, i.e., whether or not time on standby duty can be spent at one's residence, is a useful and appropriate indicator in this case of whether an employee on standby can use his or her waiting time effectively for his or her own purposes. We are unable to conclude that a better criterion exists under the circumstances presented here, where it appears that both the housing opportunities and the range of available activities in these small towns were quite limited. And while we find some appeal in the criterion suggested by HHS that we consider "how" standby waiting time is spent, rather than "where" it is spent, the record does not include information on the actual activities of these employees while on standby; and, as a practical matter, we doubt whether it would be obtainable. We conclude, therefore, that the OPM Director's decision that the waiting time of these employees while away from home was compensable is both reasonable and consistent with subsection (a)(1) of the OPM regulation.

The other OPM regulation at 5 C.F.R. § 550.143(a)(1) which HHS cites, deals with employees who are required to remain within or near the confines of their duty stations in standby status for longer than ordinary periods of duty. Under the provisions of 5 U.S.C. § 5545(c)(1)(1988), an agency is authorized to pay such an employee a premium not to exceed 25 percent of his basic pay on an annual basis. As HHS states, the regulation requires that, in order to qualify for premium pay under the statute, the employee must be official ordered to remain at his duty station and not remain there voluntarily or merely as a result of geographic isolation.

This regulation applies to Title 5 premium pay and does not apply to the administration of pay under the FLSA. Under the FLSA, an employee is either on duty or off duty and there is no provision for annual premium pay for standby duty, as exists under the Title 5 provision. See, Anderson, supra. Thus, an employee is on standby duty under the FLSA only if the circumstances described in subsections (a)(1) or (a)(2) of the FLSA regulation apply, regardless of whether there is a specific order from the agency for the employee to remain at his duty station.

Finally, regarding HHS's first argument, we do not think the OPM ruling has the effect of rewarding these employees merely because they choose to live a substantial distance from their duty station despite being aware of a call-back requirement. Instead, on the basis of its on-site investigation, OPM recognized the unusual circumstances

presented here, namely that the hospitals were located in small, remote towns. Under these circumstances, OPM could reasonably find that the employees whose homes were outside the response-time radius of the hospitals, and who could not remain at home while on standby, were unable to engage in their normal off-duty activities.

HHS's second argument, as noted above, is that the OPM decisions contravene the Supreme Court's test in Armour & Co. v. Wantock, supra, and its companion case, Skidmore v. Swift & Co., supra. The test in Armour and Skidmore, i.e., whether the waiting time is spent predominantly for the employer's benefit or for the employee's, is dependent upon all the circumstances of each case and is essentially equivalent to the federal-sector FLSA requirements in 5 C.F.R. § 551.431(a)(1993), quoted above.

As the Supreme Court stated in Skidmore no legal principle "precludes waiting time from also being working time." The Court added that it did not attempt to, and cannot, lay down a legal formula to resolve the many varied fact situations involved in waiting time cases and that whether waiting time in a concrete case falls within the Act is a question of fact to be resolved by appropriate finding at the trial court. The "facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." 323 U.S. at 136-137.

The Court also stated in Skidmore that rulings, interpretations and opinions of the Administrator, Wage and Hour Division, Department of Labor, while not controlling upon the courts, constitute a body of experience and informed judgment that courts may properly use for guidance. We believe the same may be said for the opinions and interpretations of the OPM Director. As applied to federal government employees, the Office of Personnel Management has been assigned the same role of administering FLSA and issuing regulations as the Department of Labor performs for the private sector. 29 U.S.C. §§ 203 and 204(f) (1988). The United States Claims Court has stated that "OPM's regulation in 5 C.F.R. 551.431 is an accurate reflection of the concepts of standby duty and on call status as developed in judicial decisions." Allen v. United States, 1 Cl. Ct. 649 (1983) (citing Armour & Co. v. Wantock and several other decisions).

In other words, under OPM's regulations, if the agency requires the employee to perform standby duty at or near the agency's premises so that the employee cannot use the time effectively for his or her own purposes, then the waiting time is spent primarily for the benefit of the employer. Although HHS asserts that OPM looked only at where these employees spent their waiting time, we find that OPM

properly focused on the employees' effective use of their time.

The Anderson decision of our Office cited by HHS is not inconsistent with the OPM's decisions here contested. Although Mr. Anderson, who lived and worked at a dam site for the Army, was required to make phone calls to ascertain water elevation at the dam site, the record showed that he was still mostly free to come and go as he pleased. In contrast, the three employees in this case were effectively restricted to the immediate vicinity of their workplaces away from home and could not engage in their normal free-time activities.

We also find that the Court of Appeals decision cited by HHS, Bright, supra, is consistent with the OPM rulings. In concluding that the employee's 20-minute response time upon being called back to duty did not qualify as standby duty under the FLSA, the court was largely influenced by the fact that the employee was able to wait at home. 954 F.2d at 673 and 676. The OPM Director was also influenced by the same fact.

As stated in Halferty v. Pulse Drug Co., 864 F.2d 1185, 1189 (5th Cir. 1989), cited by HHS, the critical issue in standby duty cases is whether the employee can use the time effectively for his or her own purposes. OPM found that these three employees were substantially limited in their normal activities when they were required by the short response-times imposed by HHS to remain in the small, remote Indian villages. In effect, this constitutes a finding that the time was spent primarily for the employer's benefit, Thus, the OPM decisions do not contravene the Supreme Court's test.

CONCLUSION

Contrary to HHS's arguments that OPM's decision contravened its own regulation and the Supreme Court's test, we conclude that OPM could reasonably determine that the circumstances of the three claimants who were required to spend their waiting time away from home satisfied the criteria of 5 C.F.R. § 551.431 (a)(1)(1993), namely, that they were restricted so close to the agency's premises (the hospital) that they could not use the waiting time effectively for their own purposes. We further conclude that OPM could reasonably determine that, when they were living on or near the hospital compounds, the employees were not substantially limited in their off-duty activities and, thus, not entitled to FLSA compensation.

Therefore, under the review standards of Lee R. McClure, 63 Comp. Gen. 546 (1984), we conclude that the

determinations of the OPM Director in regard to the claims of Mr. Brown, Ms. Kinsley, and Ms. Zambrano are not clearly erroneous nor contrary to law or regulation. We affirm the reconsideration decisions of the OPM Director on the three claims. These three employees are entitled to compensation under the FLSA for the periods of time stated above.

As to the appeal of Ms. Grosse, her claim is time-barred for the period of October 12, 1981, to May 21, 1983, and we affirm OPM's denial of her claim for the period of May 22, 1983 to September 29, 1983, because she was able to spend the waiting time at home and, thus, she could use the time effectively for her own purposes and her activities were not substantially limited. For these reasons, we affirm the OPM Director's decision on her claim.

Robert P. Murphy
General Counsel