GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-230872

April 14, 1988

The Honorable John R. Bolton
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Bolton:

Subject: L. Gail Nerseth, Edward W. McChesney, George J. Margel v. United States
Claims Court No. 102-88C

We refer to your letter dated March 22, 1988 (JRB:DMC: Hastern:vlp 154-102-88), requesting a report on the petition filed March 15, 1988, in the above-captioned case. The petition was filed by three dispatchers employed by the Department of Agriculture Forest Service who seek overtime compensation for after-hours phone duty during the periods from January 1981 thru May 10, 1984, for the hours from approximately 6 p.m. until 11 p.m., minus 2 hours for which they have previously been compensated. Additionally, one or more of the plaintiffs is seeking overtime compensation for various other periods in 1984 and 1985.

The plaintiffs base their cause of action on the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. The FLSA generally requires overtime pay for a workweek longer than forty hours.

With regard to the standard of proof necessary to substantiate a claim under the FLSA, the decisions of our Office impose a special burden on the agencies. Initially, the employee must prove that he has worked the overtime with sufficient evidence to show the amount and extent of his work as a matter of just and reasonable inference. B-199783, Mar. 8, 1981. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. Civilian Nurses, 61 Comp. Gen. 174 (1981). Additionally, we have held that while claims against the government must be predicated, if at all possible, upon official records, we will accept other

forms of evidence or documentation where agency action has precluded the availability of official records which might reflect overtime. See , supra.

Under the FLSA an employee is either on duty or off duty. The Act does not recognize a semi-duty status such as standby duty. Therefore, it is necessary to determine whether the employee's off duty time is compensable as hours of work under the FLSA. The OPM has published guidelines to help agencies determine whether the employee's off-duty time can be considered as hours of work. These provisions are found in 5 C.F.R. § 551.431, and provide that in order for an employee to be considered working for purposes of the FLSA: (1) his whereabouts must be narrowly limited; (2) his activities substantially restricted; (3) he must be required to remain at his living quarters; and (4) remain in a state of readiness to answer calls for his service. See also FPM Letter 551-14, May 15, 1978.

The mere fact that an employee is required to live in government quarters would not qualify him for FLSA overtime. His off-duty movements and activities must be severely restricted. See , 61 Comp. Gen. 301 (1982).

By Settlement Certificate Z-2864602, March 6, 1987, our Claims Group held that one of the plaintiffs, , was not entitled to overtime compensation under 5 U.S.C. § 5542 for the alleged performance of compensable after-hours duty for the period from 11 p.m. to 7 a.m. on scheduled nights of telephone coverage duty in her home from January 1, 1981, through March 17, 1984, since the evidence of record did not support an "on duty" status within the meaning of 5 U.S.C. § 5542. The Settlement Certificate pointed out that our Office has consistently held that where an employee is allowed to standby in his own home with no duties to perform except to be available to answer the telephone, the time spent does not constitute hours of work. This is so because the employee is free to engage in a wide range of personal activity, and it cannot be said that her time spent is predominately for his employer's benefit. Our Claims Group additionally advised Ms. h that if she wished to have her claim considered under the FLSA, she must submit her claim to the Office of Personnel Management (OPM) since OPM is authorized under 29 U.S.C. § 204(f) to administer the FLSA.

By letter dated December 30, 1985, the plaintiff requested that our Office consider his back pay claim for the time period in question; and by letter dated April 7, 1986, plaintiff also requested

that our Office consider his back pay claim for the time period in question. By letters of today we are advising both of these plaintiffs that the Comptroller General will not consider their request since it is a longstanding rule that the Comptroller General will not act on matters which are the subject of litigation.

We know of nothing that would form the basis for a counterclaim or setoff against the plaintiffs in this case.

The undersigned attorney is handling this case in our Office and may be contacted at .

Sincerely yours,

Herbert I. Dunn

Herbert I. Dunn
Senior Attorney