DOCUMENT RESUME

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[The Right of Veterans Administration Employees Receiving Premium Pay to Absences on Holidays without Charge to Leave]. B-127474. April 19, 1977. 8 pp.

Decision by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).
Contact: Office of the General Counsel: Civilian Personnel.
Budget Function: General Government: Central Personnel Management (805).
Organization Concerned: Department of the Navy: Assistant Secretary of the Navy (Manpower and Reserve Affairs); Veterans Administration; Veterans Administration: VA Hospital, Dallas, TX.
Authority: Federal Employees Pay Act of 1945 (5 U.S.C. 5545(c)(1)). 54 Comp. Gen. 662. 35 Comp. Gen. 710. 42 Comp. Gen. 426. 5 C.F.R. 550.140-550.144. F.P.M. Supplement 990-2, Book 550, subch. 1-8b(2).

Questions were raised concerning the right of employees receiving premium pay to have leave restored for absences on holidays. A former Comptroller General decision allowing restoration of leave was overruled, and another modified decision was applied to absences excused by administrative determination. When an employee's services are administratively required on a holiday, and he absents himself, he is to be charged annual or sick leave, as appropriate. This decision represents a changed construction of law, and it is limited to prospective application. (HTW)

Leslie Wilcox
Civ.Pers.

01987

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-127474 DATE: April 19, 1977

MATTER OF: Veterans Administration Employees Receiving Premium Pay - Absences on Holidays

DIGEST: 1. In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. § 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision.

2. Although the rates of premium compensation established at 5 C.F.R. § 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. § 5545(c)(1) at rates prescribed at 5 C.F.R. § 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified.

This decision concerns the question whether employees receiving premium pay under 5 U.S.C. § 5545(c)(1) (1970) may be absent on holidays without charge to leave. This subject has been addressed in 35 Comp. Gen. 710 (1956) and, more recently, in 54 Comp. Gen. 662 (1975). Our review of the matter has been made in response to requests by the Assistant Secretary of the

Navy (Manpower and Reserve Affairs) and the Administrator of Veterans Affairs. The requests indicate there are various problems in implementing our holding in 54 Comp. Gen. 662, supra, and that the decision was based on an inaccurate agency statement.

In 35 Comp. Gen. 710, supra, we held that employees receiving premium pay under section 401(1) of the Federal Employees Pay Act of 1945, as amended, now 5 U.S.C. § 5545(c)(1), in part because their positions require holiday work, should be charged leave on holidays not worked which fall within their regularly scheduled tours of duty. The rule of this decision, as restated in Federal Personnel Manual Supplement 990-2, Book 550, subchapter 1-8b(2) (July 21, 1971), requires that employees receiving premium pay under 5 U.S.C. § 5545(c)(1) be charged leave for absences on holidays falling within their regularly scheduled tours of duty.

In 1974, four X-ray technicians employed at the Veterans Administration Hospital, Dallas, Texas, raised a question concerning the application of the Civil Service Commission's regulation to employees whose rates of premium pay reportedly were not based upon considerations of holiday work. The employees involved were assigned to regular 40-hour workweeks during which they performed actual work and to additional regular periods of standby duty outside their regular 40-hour workweeks for which they received premium compensation under the following provision of 5 U.S.C. § 5545(c)(1):

> "(c) The head of an agency, with the approval of the Civil Service Commission, may provide that--
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> "(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in

> excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 * * * by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors * * *."

With respect to those particular employees, the Hospital Director advised us that holiday pay was not considered in arriving at their rates of premium pay.

In reliance upon the Hospital Director's statement as to the basis upon which the employees' rates of premium compensation were determined, we held in our 1975 decision (54 Comp. Gen. 662, at 664):

> "* * * Since section 5545(c)(1) provides for premium pay for that standby duty required of an employee, it would follow that where an employee was not scheduled to perform standby duty on a holiday and, thus, the computation of his premium pay did not take into account the extent to which performing work on that holiday would have been made more onerous to him, section 5545(c)(1) would not require that the employee work on the holiday or be charged leave for his absence. * * * In the instant case, since standby duty was not required of the employees on the holidays in question and was, therefore, not considered in the setting of their premium pay, no charge to leave was required to be made. Decision 35 Comp. Gen. 710, supra, is amplified to the extent stated herein."

In reviewing this holding we find that it may be construed to hold that premium pay is payable partly in consideration of the extent to which standby duty outside the employee's regularly scheduled workweek is made more onerous by the fact that it occurs on a holiday. In fact, premium pay authorized by 5 U.S.C. § 5545(c)(1) is in lieu of other specific forms of additional compensation including holiday premium pay and the reference in that subsection to the extent to which the duties of the employee's position are made more onerous by holiday work is intended to indicate that the amount of holiday premium pay the employee would otherwise receive is to be taken into account in determining his rate of premium pay. Since holiday premium pay provided for by 5 U.S.C. § 5545 is not payable for work on a holiday that is in excess of 8 hours or overtime work, it is improper to take work on a holiday into account in establishing the rate of premium pay except insofar as it falls within his regular 8-hour workday. Also, standby time which extends a tour of duty beyond 40 hours a week is included in determining the premium pay rate. Accordingly, our decision in 54 Comp. Gen. 662, supra, is overruled and our holding in 35 Comp. Gen. 710, supra, is modified as hereinafter indicated.

Regarding 54 Comp. Gen. 662, supra, the Veterans Administration informed us that the Hospital Director's statement that holiday pay was not a factor in arriving at the employees' rates of premium compensation is inaccurate. Presumably, that statement reflected the Hospital Director's determination that the services of the employees involved were not required on every holiday. In fact, we are advised that the rates of premium pay paid such employees are those prescribed by the Civil Service Commission and set forth at 5 C.F.R. § 550.144. With respect to positions in which the employees have basic workweeks involving actual work and standby duty for additional periods, that section provides in pertinent part:

"§ 550.144 Rates of premium pay payable under § 550.141.

"(a) An agency may pay the premium pay on an annual basis referred to in § 550.141, to an employee who meets the requirements of that section, at one of the following percentages of

that part of the employee's rate of basic pay which does not exceed the minimum rate of basic pay for GS-10;

* * * * *

"(3) A position in which the employee has a basic workweek requiring full-time performance of actual work, and is required, in addition, to remain on standby duty; 14 to 18 hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek--15 percent; 19 to 27 hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek--20 percent; 28 or more hours a week on regular workdays, or extending into a nonworkday in continuation of a period of duty within the basic workweek--25 percent; 7 to 9 hours on one or more of his regular weekly nonworkdays--15 percent; 10 to 13 hours on one or more of his regular weekly nonworkdays--20 percent; 14 or more hours on one or more of his regular weekly nonworkdays--25 percent.

"(4) When an agency pays an employee one of the rates authorized by subparagraph (1), (2), or (3) of this paragraph, the agency shall increase this rate by adding (i) 2-1/2 percent to the rate when the employee is required to perform Sunday work on an average of 20 to 40 Sundays over a year's period or (ii) 5 percent to the rate when the employee is required to perform Sunday work on an average of 41 or more Sundays over a year's period but the rate thus increased may not exceed 25 percent.

"(b) If an employee is eligible for premium pay on an annual basis under § 550.141, but none of the percentages in

> paragraph (a) of this section is applicable, or unusual conditions are present which seem to make the applicable rate unsuitable, the agency may propose a rate of premium pay on an annual basis for the Commission's approval. The proposal shall include full information bearing on the employee's tour of duty; the number of hours of actual work required; and how it is distributed over the tour of duty; the number of hours in a standby status required and the extent to which the employee's whereabouts and activities are restricted during standby periods; the extent to which the assignment is made more onerous by night, holiday, or Sunday duty or by hours of duty beyond 8 in a day or 40 in a week; and any other pertinent conditions."

The Civil Service Commission verifies that it has not received a request from the Veterans Administration pursuant to 5 C.F.R. § 550.144(b) to establish special rates of premium pay for its employees and confirms that the rates of premium pay established by 5 C.F.R. § 550.144(a) are based on the assumption that employees will perform duty on holidays falling within their regularly scheduled tours of duty. Thus, the rates of premium pay received by the X-ray technicians involved in 54 Comp. Gen. 662, supra, were in fact based on considerations of holiday duty.

Nonetheless, the situations described in 54 Comp. Gen. 662, supra, does raise an administrative problem. As in the case of the Veterans Administration Hospital, Dallas, Texas, we understand that there are installations at which full staffing on holidays by employees receiving premium compensation under 5 U.S.C. § 5545(c)(1) is unnecessary. The primary concern of Congress in enacting that subsection was ease of administration. We do not think it was the intention of Congress to require employees to perform unnecessary work or standby duty. Yet it appears that that could well be the result of our decision in 35 Comp. Gen. 710, supra, when strictly construed in light of the Civil Service Commission's regulations at 5 C.F.R. §§ 550.141 through 550.144. This result could be avoided by careful advance planning to

determine the specific number of holidays a particular employee's services will be needed and application to the Civil Service Commission to establish a special rate applicable to such employee. However, this would tend to deprive agencies of the flexibility necessary to adjust work assignments to accommodate illnesses and other unanticipated absences. Therefore, we believe this problem may be resolved without obtaining special rates through the use of administrative discretion as set forth below.

The premium pay rates set forth at 5 C.F.R. §§ 550.144(a)(1) through 550.144(a)(3) are not established on the basis of precise numbers of hours in duty status but apply to ranges of hours varying between a specified minimum and maximum. Subsection 550.144(a)(4) similarly authorizes payment of an additional 2-1/2 percent per annum for work on an average of 20 to 40 Sundays. Although the regulations do not ascribe a specific rate to holiday work or standby duty as such, it does not appear that the rates of premium pay payable would necessarily be decreased by the elimination of the consideration of work on some or all holidays. Therefore, since the rate of premium compensation that an employee receives presumably would be the same or negligibly different regardless of the amount of holiday work considered in establishing that rate, upon further consideration, we believe that an employee receiving premium pay under 5 U.S.C. § 5545(c)(1) may be excused from work on holidays within his regular tour of duty without charge to leave when the employing activity determines that his services are not required.

We find support for the above conclusion in 42 Comp. Gen. 426 (1963) where we recognized that employees receiving premium compensation may be excused from standby duty without deducting the hourly equivalent of their premium compensation where their services are not required on a particular day. That case involved instances when it was known in advance that conditions of weather or other factors would occasionally render standby duty unnecessary. We there authorized determination of the appropriate percentage rate of premium compensation based on the yearly calculation of standby tours to derive a weekly average and noted that since the percentage rates are geared to ranges of standby duty hours, we did not consider the regulations to require rigid adherence to a fixed weekly standby schedule.

In view of the above we hold that an agency may excuse employees receiving premium pay under 5 U.S.C. § 5545(c)(1) from regular or standby duty without charge to leave on holidays when the employees' rates of premium pay are established under 5 C.F.R. § 550.144(a)(1) and (2) as well as to those receiving premium pay at rates established under 5 C.F.R. § 550.144(a)(3). However, this decision applies only when there has been an administrative determination that the employees' services are not required on a particular holiday. Thus, when an employee's services are administratively required and he absents himself on a holiday within his regularly scheduled tour of duty for personal reasons, he is to be charged annual or sick leave as appropriate. In so holding we recognize that the need for holiday work on the part of certain categories of employees, such as firefighters, will render their excusal on holidays unlikely.

Since this decision represents a changed construction of law it is limited to prospective application. We understand that, on the basis of 54 Comp. Gen. 662, supra, some employees have had their leave accounts retroactively recredited with annual leave and have received lump-sum leave payments or have taken leave to which they would otherwise not have been entitled. Since such payments or use of leave were made pursuant to 54 Comp. Gen. 662, no action is necessary and the employees may be considered properly to have been paid or to have taken leave. Also, inasmuch as there has been considerable confusion in this area, those employees who were not charged leave for absences on holidays prior to the date of this decision may be regarded as having properly been excused from duty on such days.

R.F. Keller

Deputy Comptroller General
of the United States