

DECISION



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

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MATTER OF:

David E. Bobo, Norman L. Hulsey, and
Willis B. Loftis - Sick Leave and Overtime
Pay for Irregular Tour of Duty

DIGEST:

1. Three National Aeronautics and Space Administration (NASA) employees assigned to computer programmer positions contend that NASA improperly established their basic workweek as the first-40-hours of duty performed within 6 days of the administrative workweek. NASA assignments were proper since it has discretionary authority under 5 C.F.R. § 610.111 to establish a first 40-hour workweek for the employees upon a determination that it was impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek.
2. National Aeronautics and Space Administration (NASA) employees assigned to a first-40-hour workweek under 5 C.F.R. § 610.111 contend that local regulations governing their use of sick leave, which permit their supervisor to retroactively determine that a day on which they were sick may be accounted for as a nonworkday, are contrary to law and Civil Service Commission (CSC) regulations. Inasmuch as the local regulations could be applied to deprive employees of the use of sick leave, the local regulations are inconsistent with CSC regulations and, therefore, must be amended.
3. National Aeronautics and Space Administration (NASA) employees assigned to a first-40-hour workweek claim that agency has improperly accounted for days on which they were

sick as nonworkdays. Consequently, they had to work an additional day to obtain 40 hours that otherwise would have been at overtime pay rates. Agency is instructed to investigate matter and charge sick leave to employees where it was improperly denied and pay employees for overtime that results from the correction of time and attendance records.

This decision is in response to a request of June 16, 1975, by Local 3434 of the American Federation of Government Employees (hereinafter Local), which has a collective bargaining agreement with the Marshall Space Flight Center of the National Aeronautics and Space Administration (NASA), concerning the validity of the Center's sick leave and overtime regulations for employees on a first-40-hour basic workweek. We solicited the views of NASA and the national union concerning this matter.

The three employees represented by the Local are computer programmers in the Financial Management Office of the Marshall Space Flight Center, Alabama. The employees and the Local contend that section 5542 of title 5, United States Code, and Federal Personnel Manual (FPM) Supplement 990-2, Book 590, § S1-3a(2)(d), provide that only employees engaged in professional or technical engineering or scientific activities may be placed on a basic workweek which consists of the first 40 hours worked in an administrative workweek. The employees argue that they are service personnel supporting a great variety of work at the Center, and that they have been erroneously assigned a first-40-hour tour of duty. They also contend that the Center's interpretation of the above-cited law and regulations systematically deprives them of sick leave and overtime pay, and therefore is erroneous. The employees also claim that overtime pay is due them as a result of several specific instances in which sick leave was requested and denied.

The employees and the Local were afforded a grievance hearing pursuant to the collective bargaining agreement between the Local and the Center. The grievance examiner ruled that the Center's interpretation of the regulations was correct and denied the employees' claims for overtime pay. The Local then requested that

the General Accounting Office rule as to the validity of the Center's interpretation of the law and regulations. Several issues are presented to us and they are answered below.

Validity of First-40-hour Workweek

The first issue to be considered is whether the Center may place these employees on a first-40-hour workweek. The employees argue that an agency can only place professional and support technicians actually engaged in engineering and scientific activities on a first-40-hour basic workweek, and that they only service these activities along with all other Center activities. Their argument is based on section 5542 of title 5, United States Code, which states in pertinent part:

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates * * *."

FPM Supplement 990-2, Book 550, § S1-3a(2)(d), promulgated pursuant to the statute, provides as follows:

"(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under section 610.111(b) of this chapter, overtime work means each hour of work in excess of 40 hours in an administrative workweek that is:

"(1) Officially ordered or approved, and

"(2) Performed by an employee

when the employee's basic pay exceeds the minimum rate for GS-10 or when the employee is engaged in professional or technical engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture."

The statute and regulations quoted above do not support the employees' contention. They define the manner in which overtime is to be measured, not the classes of employees who may be placed on a first-40-hour basic workweek. The above-quoted statute and regulations state that all employees are to receive premium pay when they perform officially ordered or approved work in excess of 40 hours in an administrative workweek or 8 hours in a day (except those employees whose basic pay is above GS-10, step 1, or who are engaged in professional, technical engineering, or scientific activities and are on a first-40-hour workweek).

The Civil Service regulations governing the scheduling of a first-40-hour workweek are:

"Authority of agencies. (1) Each agency is responsible for fixing the hours of work of Federal employees subject to the requirements of applicable laws and regulations. * * *" FPMR Supplement 990-2, Book 610, § S1-1a.

"When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than

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6 days of the administrative workweek as the basic workweek, and additional hours of officially ordered or approved duty within the administrative workweek are overtime work." FPM Supplement 990-2, Book 610, § S1-3c(b).

These regulations, which are also included in 5 C.F.R. § 610.111, permit an agency to place any employee on a first-40-hour workweek, upon the determination that it is impracticable to prescribe a regular schedule of definite hours of duty for each workday. If the Civil Service Commission had intended to limit the assignment of a first-40-hour workweek to certain classes of employees, it would have specified such classes in this regulation, not in the regulation governing overtime. In this connection we point out that the regulations cited implement 5 U.S.C. § 6101.

While any employee may properly be placed on a first-40-hour workweek, the overtime regulations quoted above are clear in their requirement of premium pay for employees working more than 8 hours in a day, unless they come within the excepted classes. In this regard, we have been advised by the agency that all but one of the employees here involved are classified at the GS-10 level or above and thus within one of the exceptions to the 8-hour overtime rule. Moreover, the record indicates that each of these employees are " * * * assigned to perform the duties of a * * * support technician position in the physical, mathematical, natural, medical, or social sciences, or engineering or architecture." FPM Supplement 990-2, Book 550, § S1-3a(2)(d). Therefore, overtime for these employees is defined as each hour of work in excess of 40 hours in an administrative workweek that is officially ordered or approved. FPM Supplement 990-2, Book 550, § S1-3a(2)(d). Finally, we note that the grievance examiner found that the agency acted in accordance with applicable law and regulations in the establishment of the workweek of these employees. Accordingly, the assignment of these employees to a first-40-hour basic workweek does not appear to be inconsistent with law or Civil Service Commission regulations.

Validity of Sick-Leave Regulations for First-40-Hour Employees

We must now consider whether the Center's regulations governing the use of sick leave by employees assigned to a first-40-hour workweek are consistent with applicable law and Civil

Service Commission regulations. In this regard section 6.103b of the Center's Personnel Manual governing the irregular MSFC 40-hour tour of duty provide as follows:

"b. The basic workweek for employees on an irregular 40-hour tour of duty will consist of the first 40 hours of duty time. The following factors will be considered in determining the first 40 hours of duty time:

"(1) Time actually worked, except time actually worked on a holiday. Time will not be accumulated in increments of less than 1/4 hours.

"(2) Holiday time, a maximum of eight hours.

"(3) Leave Time:

"(a) Normally, employees on an irregular 40-hour tour of duty should not be charged leave on a daily basis. At the end of the administrative workweek if the employee has not performed 40 hours of work, then leave, either annual or sick, as appropriate, will be charged in an amount sufficient to create a pay base of 40 hours * * * ." (Emphasis supplied.)

A review of the law and civil service regulations governing the use of sick leave indicates that the provisions set forth below are relevant to the issue here involved.

Leave days are defined in 5 U. S. C. § 6302(a) as follows:

"(a) The days of leave provided by this subchapter are days on which an employee would otherwise work and receive pay and are exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order." (Emphasis supplied.)

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The above-quoted statute is implemented by FPM Supplement 990-2, Book 630, § S2-4, which states:

"a. Leave days. Leave is not charged on any day other than a leave day as defined by section 6302(a) of title 5, United States Code."

Also, FPM, chapter 630, § S2-4, which provides:

"a Leave days. Both annual and sick leave are charged to an employee's account only for absence on regular workdays, that is, days on which he would otherwise work and receive pay * * *."

The Civil Service Commission regulations in 5 C. F. R. § 630.401 (1975) state that an agency shall grant sick leave to an employee generally when the employee: (1) receives medical, dental, or optical examination or treatment; (2) is incapacitated for duty by sickness or injury; (3) must care for a family member afflicted with a contagious disease; or (4) would jeopardize the health of others at his post of duty because of exposure to a contagious disease.

In view of the above an agency must grant sick leave to an employee, even when assigned to a first-40-hour workweek, should he become sick on a day he would otherwise have worked and received pay.

NASA, however, maintains that the MSFC regulation 6.103, quoted above, is authorized by 5 C. F. R. § 630.210, which allows agencies to prescribe supplemental regulations governing leave for uncommon tours of duty, and that it is fair to employees and protects the Government against improper use of attendance and leave records in order to obtain overtime pay. NASA concedes that if it can be documented that employees were in fact scheduled to work, they should be charged annual or sick leave for the number of hours scheduled for work on the days of leave used. However, NASA contends that it is impracticable to schedule in advance the hours of work of these employees and that such prescheduling is not done.

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A careful review of the record before us indicates that the Center does prearrange the hours of work of these first-40-hour-workweek employees, at least to a limited degree. These employees know that they are to report for work at a designated time and place unless they are otherwise informed. As reflected in its regulations, apparently the Center believes that, should an employee request sick leave on a day that he would otherwise have reported for duty and worked, it has authority to subsequently change that day to a nonworkday for the employee. While we agree that an agency has great discretion in arranging the work schedule of first-40-hour-workweek-employees, it does not have authority to change a day on which the employee would have worked into a nonworkday after the employee has requested sick leave for that day. Such procedure is contrary to law and regulation. See FPM, chapter 630, § S2-4a, supra, and FPM Supplement 990-2, Book 630, § S2-4, supra. Moreover, it improperly deprives an employee of his right to take sick leave to which he is entitled under 5 C.F.R. § 630.401, supra. However, the agency retains the right to determine the number of sick leave hours that are to be charged to a first-40-hour-workweek employee, based on the number of hours the employee would have worked had he been available.

Regulations will not be upheld by a reviewing authority if clearly erroneous or contrary to the statute they are designed to implement or amplify. McDade v. Morton, 353 F. Supp. 1006 (D.C. D.C. 1973), Kettell v. Johnson & Johnson, 337 F. Supp. 892 (D.C. Ark., 1972). Also, local regulations must conform to applicable general regulations. 40 Comp. Gen. 704 (1961). Inasmuch as the Center's regulations governing sick leave for first-40-hour-workweek employees are contrary to law and Civil Service Commission regulations, they are invalid and are required to be amended to preclude retroactive scheduling that effectively deprives employees of their right to take sick leave to which they are otherwise entitled.

In order to correct past deficiencies caused by the Center's regulation, NASA is required to initiate an investigation for the period that time and attendance records are available to determine whether any of these employees were improperly denied sick leave and, if so, on what dates. Employees found to have been improperly denied sick leave, should be retroactively charged such leave. In addition a determination should be made whether the added use of leave in a given administrative workweek would result in an increase in overtime under provisions of 5 U.S.C. § 5542, supra. In the event that any of the employees here involved are found to be entitled to additional overtime,

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it should be computed on the basis of the employee's rate of pay for the period in question and paid under the authority contained in 5 U.S.C. § 5542.

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For, Comptroller General
of the United States