

DECISION



DIGESTS - L. O. P
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-185021

DATE: August 31, 1978

MATTER OF: Department of the Treasury - Travel
to Unfair Labor Practice Hearings

DIGEST: Department of Treasury employees traveled on Sunday in order to appear as witnesses at unfair labor practice hearing on following Monday. Agency questions whether unfair labor practice hearing is administratively uncontrollable event for purpose of determining employee's entitlement to overtime compensation under 5 U.S.C. § 5542 (1976). Since Assistant Regional Director, Department of Labor, may cause notice of hearing to be issued setting the time for the hearing with sufficient time for agency to schedule travel, the administrative control of the hearing remains with the Government. Thus, travel time outside of the regularly scheduled workweek to an unfair labor practice hearing may not be considered as hours of work for overtime compensation.

This action concerns the request of Glen A. McDonald, Chief, Fiscal Division, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, for an advance decision as to whether employees who travel on Sunday to participate in an unfair labor practice hearing scheduled for the following Monday morning may be paid overtime compensation.

Mr. McDonald reports that pursuant to Executive Order 11491, October 29, 1969, as amended, the Assistant Secretary for Labor Management Relations, Department of Labor, scheduled an unfair labor practice hearing in Washington, D.C., on Monday, November 7, 1977, between the Bureau and the National Treasury Employees Union, the exclusive representative of a group of bargaining unit employees at the Bureau. Four employees from Kentucky were called to testify on Monday morning as witnesses at the hearing. In order to arrive in time for the Monday hearing, the employees traveled to Washington, D.C., on Sunday and requested overtime pay for such travel. The question that Mr. McDonald presents is whether an unfair labor practice hearing is an administrative uncontrollable

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event within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) (1976) for the purpose of determining entitlement to overtime compensation.

Mr. McDonald discusses the issue as follows:

"Since the Department of Labor has the apparent authority to schedule the hearing date, (see Rules and Regulations of the Assistant Secretary of Labor for Labor Management Relations 29 CFR Part 20) it might appear that the hearing is an administratively controllable event. Yet, it must be recognized that the Assistant Secretary does entertain motions for postponement or time extension from any party to the dispute. Perhaps, too, due to the participation of more than one government agency, the unfair labor practice hearing could be compared to an agency hearing on an aircraft accident which is specifically cited in the FPM as an example of an administratively controllable event, see FPM Supplement 990-2, 550.8.03. However, in this instance, the presence of an outside organization (NTEU) as a party and the adversary nature of the proceedings would seem to frustrate that analogy."

Mr. McDonald also submits an opinion from the Bureau's Office of Chief Counsel, the relevant portion of which is set forth below:

"An unfair labor practice hearing is clearly an 'event' within the meaning of the statute and the scheduling of the hearing, even though not within the control of this Bureau, is scheduled by the Department of Labor at a time mutually acceptable to the parties. By the same token, a hearing will not be scheduled at a time which is inconvenient, for good cause shown, to the Union. Considering

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all of the factors which affect the scheduling of a hearing. We would certainly attempt to justify compensating an employee for Sunday travel to attend such a hearing. We would argue that, from the Bureau's standpoint, the scheduling of the hearing was not controllable by the Bureau.* * *

Section 5542 of title 5, United States Code (1976), provides, in pertinent part:

"(b) For the purpose of this subchapter

* * * * *

"(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless-

* * * * *

"(B) the travel* * * (iv) results from an event which could not be scheduled or controlled administratively."

Additional guidance with regard to the phrase "could not be scheduled or controlled administratively" is provided by Federal Personnel Manual (FPM) Supplement 990-2, Book 550, subchapter 1, para. S1-3b(2)(c)(iv) (July 1969), which states in pertinent part:

"Travel which results from an event which cannot be scheduled or controlled administratively is also a new condition under which travel is considered hours of work. The phrase could not be scheduled or controlled administratively refers to the ability of an executive agency (as defined in section 105 of title 5,

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United States Code) and the government of the District of Columbia to control the event which necessitates an employee's travel. The control is assumed to be the agency's whether the agency has sole control (or the control is achieved through a group of agencies acting in concert, such as a training program or conference sponsored by a group of Federal agencies, or sponsored by one in the interest of all, or through several agencies participating in an activity of mutual concern, such as an agency hearing on an aircraft accident." (Emphasis added.)

Thus, the issue presented in this case is to what extent did the Bureau or other administrative agency control the scheduling of the unfair labor practice hearing.

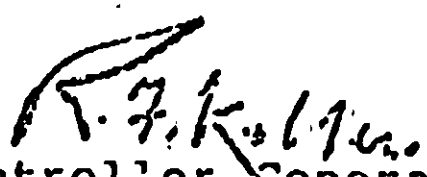
Regulations governing unfair labor practice proceedings are contained in 29 C.F.R. Part 203 (1977). Pursuant to section 203.9 the Assistant Regional Director may cause a notice of hearing to be issued if he finds that there is a reasonable basis for the complaint and that no written settlement has been executed. Section 203.10 requires that such notice of hearing set a time for the hearing that is not less than 10 days after service of the notice of hearing. Thus, with regard to the initial scheduling of the hearing, control rests with the Government. While provision is made in section 203.19(a) for a motion to postpone the hearing, the control of the rescheduling of the hearing still rests with the Government, albeit with a view towards accommodating all parties. Furthermore, we believe that one effect of the 10-day rule is to provide ample opportunity for the agency to schedule the leave of its employees.

Mr. McDonald refers to the example in the FPM Supp. 990-2, quoted above, to the effect that an agency hearing on an aircraft accident is a controllable event, notwithstanding that the control may be shared among a number of agencies. He also appears to distinguish that example from the instant case on the basis that the union is an outside organization in an adversary role. However, we do not view that factor as relating to whether the Government maintains the final authority to control the scheduling of the hearing. Likewise, we do not

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consider the Office of Chief Counsel's argument that the Bureau does not control the scheduling of the hearing as being dispositive of the issue. Rather, we believe the situation in this case is similar to that in the example in the FPM concerning an agency hearing on a aircraft accident in which the hearing officer has the authority to designate the time for the hearing, giving due consideration to the convenience of the witnesses. See 49 C.F.R. §§ 831.26 (1976). Parties to such hearings may include not only other Government agencies, but also those persons, companies, and associations whose employees, functions, activities, or products were involved in the accident. See 49 C.F.R. §§ 831.27 and §§ 831.16. In short, an aircraft accident hearing may involve numerous Federal agencies and private concerns. While parties to such hearings are specifically not adversary parties (49 C.F.R. §§ 831.20), as we stated above, we do not believe that such factor is of such a compelling nature as to support a distinction between an unfair labor practice hearing and a hearing on a aircraft accident regarding the question whether the former is an administratively uncontrollable event.

In summary, we find that an unfair labor practice hearing held pursuant to 29 C.F.R. Part 203 is an event which could be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542. Thus, the employees are not entitled to overtime compensation for travel performed on the Sunday preceding the Monday hearing.


Deputy Comptroller General
of the United States