

DECISION



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

50965

FILE: B-183107

DATE: AUG 12 1975 97501

MATTER OF: Lawrence J. Stark - Overtime compensation while held as prisoner of war

DIGEST: Civilian employee is entitled to overtime compensation based on amount received prior to missing status if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation continues throughout missing status period even though office to which employee was assigned is disestablished. However, where overtime compensation is not part of regularly scheduled pay and allowances, employee does not receive same unless he "may become entitled" thereafter" and such entitlement would be based on overtime performed by his replacement or average irregularly scheduled overtime of employees in his unit.

This matter concerns an appeal by Mr. Lawrence J. Stark of decision B-183107, April 30, 1975, 54 Comp. Gen. ____, regarding the amount of compensation that Mr. Stark should receive for the period he spent as a prisoner of war.

In our previous decision we held that Mr. Stark was entitled under the Missing Persons Act, 5 U.S.C. § 5561, et seq. (1970), to receive overtime compensation during the period of his missing status. Such compensation was to be determined from the amount of overtime hours Mr. Stark's replacement worked, or in the alternative, on the basis of the average number of overtime hours worked by other employees performing similar duties in the same office where Mr. Stark was employed. Furthermore, we held that Mr. Stark was not entitled to overtime compensation subsequent to the disestablishment of his office, unless it could be shown that Mr. Stark would have been reassigned or transferred to another office where he would have continued to perform overtime work.

Mr. Stark appeals the method described to determine his overtime compensation, and the possible discontinuance of overtime pay after the disestablishment of his office. Mr. Stark claims that his overtime hours were part of his regularly scheduled workweek, thus his compensation should be based on such.

Under the Missing Persons Act, an employee in a "missing status" as defined by the Act is "entitled to receive or have credited to his account, for the period he is in that status, the same pay and allowances to which he was entitled at the beginning of that period or may become entitled thereafter." 5 U.S.C. § 5562(a) (Supp. III, 1973). The "same pay and allowances" includes overtime compensation if it was part of an employee's regularly scheduled workweek when the person's missing status began. That compensation does not diminish even if the office to which the employee was assigned is abolished during the period of the employee's missing status.

While the methods of computing overtime described in our previous decision would be proper in determining an employee's pay and allowances to which he would "become entitled thereafter," 5 U.S.C. § 5562(a) (Supp. III, 1973), 22 Comp. Gen. 745, 750 (1943), it may not be proper if the pay and allowances which the "person was entitled at the time of the beginning of the absence" is greater.

The term "pay and allowances" is defined in 5 U.S.C. § 5561(6) (1970), which provides in pertinent part:

"(6) 'pay and allowances' means—

"(A) basic pay;

"(B) special pay;

"(C) incentive pay * * *."

If Mr. Stark's overtime was part of his regularly scheduled workweek, then under 5 U.S.C. § 5562(a), it is included in the employee's pay and allowances. In this connection the Court of Claims held in Dilks v. United States, 119 Ct. Cl. 826, 829 (1951), that:

"Inasmuch as the language of the Act, taken by itself, would include any allowance of which a captured person was validly in receipt, proof that Congress intended to exclude any one type of allowance would have to be specific. * * * We merely held as a matter of law that under the broad and

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inclusive language of section 2 of the Missing Persons Act, one type of allowance of which Dilks was admittedly in receipt under competent, unrevoked and existing orders at the time of his captivity, could not be excluded from his account in the absence of proof of a specific congressional intent to so exclude it."

There is no indication of exclusionary intent as to regularly scheduled overtime pay to be found from either the statutory language or the legislative history of the Missing Persons Act. Indication of an exclusionary intent can be found in "Hearings on H.R. 4405 Before the House Committee on Naval Affairs," 78th Cong., 2d Sess. 2343 (1944).

"It has been administratively determined that pay and allowances to be credited during absence include all continuing pay and allowances to which entitled at beginning of absence but not temporary allowances such as per diem for travel expense. H.R. 4405 retains the present language and change is not deemed necessary." (Emphasis added.)

Whether Mr. Stark's overtime hours prior to his status as missing were part of his regularly scheduled workweek, or whether they were temporary allowances is a question for consideration and determination by the Secretary of the Navy under 5 U.S.C. § 5566(c). B-140639, November 13, 1959. If the determination is made in favor of the former, then Mr. Stark's compensation should be based on such. If Mr. Stark's overtime is found to be the latter, then his compensation shall be determined according to one of the methods discussed above and in B-183107, April 30, 1975, 54 Comp. Gen. ___.

The record indicates that Mr. Stark and employees similarly situated performed overtime work prior to the period of Mr. Stark's internment. Also, the amount of overtime varied from pay period to pay period and there is nothing to show that such work was regularly scheduled. Therefore, on the basis of the present record the method of determining Mr. Stark's overtime stated in our prior decision is for application. However, if additional evidence is obtained to show that any overtime hours were part of the regularly scheduled workweek, it should be included in the computation of Mr. Stark's compensation even past the date where the employee's office is disestablished. 22 Comp. Gen. 984 (1943).

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Our prior decision, B-183107, April 30, 1975, 54 Comp. Gen. ____, is modified accordingly.

Payment in accordance with the foregoing decision should be made to Mr. Stark by the Department of the Navy.

R.F. KELLER

Deputy Comptroller General
of the United States