

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

12259 *Agustin*
PL II

FILE: B-193653

DATE: December 11, 1979

MATTER OF: Nurses at Federal Correctional Institution -
[Overtime Entitlement] *title*

addressee
0.3478

DIGEST: Several nurses, GS-7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden only official authorized to order or approve overtime did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment. *56*

R Mr. Norman A. Carlson, Director of the Bureau of Prisons, Department of Justice, requests a decision as to entitlement to overtime compensation for several nurses who worked 6 days during one week and 4 days during the other week of a pay period including related adjustments, if any, that should be made.

The record shows that during the period April 10, 1977, through June 17, 1978, several nurses, grades GS-7 and 9, who were employed at the Federal Correction Institution (Institution), Butner, North Carolina, were scheduled by their immediate supervisor to work 6 days in one administrative workweek and 4 days in the other administrative workweek of each pay period. The agency report states that the work schedules of these nurses were established by their immediate supervisor in response to the nurses' request.

The warden of the Institution is the only official at the Institution authorized to order or approve overtime. We have been advised that the basic workweek of these nurses is the 40-hour period consisting of 8 hours in each of 5 consecutive days within the administrative workweek which is the 7-day period of Sunday through Saturday. We were also advised that the warden did not have any knowledge of the work schedule as established.

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Whether the nurses would be entitled to overtime compensation for the period of time worked in excess of 40 hours during each workweek is controlled by the overtime provision at 5 U.S.C. 5542 (1976) and the applicability of the overtime provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq.

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

"Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or * * * in excess of 8 hours in a day, performed by an employee are overtime work* * *."

Only that overtime which has been officially ordered or approved in writing or induced by an official having authority to order or approve overtime work is compensable overtime. Joan J. Shapira, B-188023, July 1, 1977. Thus, since the appropriate authorizing official, the warden, has not ordered, approved, or induced the performance of work in excess of 40 hours in a workweek there is no entitlement to compensation for those overtime hours worked pursuant to 5 U.S.C. 5542 (1976).

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. to Federal employees. The FLSA requires payment to nonexempt employees of overtime compensation for hours worked in excess of 40 hours per week. 29 U.S.C. 207 (1976).

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/ Under the provisions of 29 U.S.C. 204(f) (1976) the Civil Service Commission (Commission), now the Office of Personnel Management, is authorized to administer the provisions of the FLSA. Under the FLSA a nonexempt employee becomes entitled to overtime compensation for hours of work in excess of 40 hours a week for all work which management "suffers or permits" to be performed. See para. 3c of the Federal Personnel Manual (FPM) Letter No. 551-1, May 15, 1974. 2925

The Commission has issued criteria for determining whether an employee is exempt under the FLSA. See 5 C.F.R. Part 551, Subpart B and FPM Letter No. 551-7, July 1, 1975.

Concerning the exemption of professional employees, paragraph C3c of Attachment to FPM Letter No. 551-7, provides in pertinent part as follows :

"c. Exemption of Employees in Occupations Identified
in the Series Definition as Professional

* * * * *

"(1) The GS-7 level frequently is a developmental level at which employees receive close supervision in process as well as on completion of the work, which precludes exemption. However, some professional disciplines include, as part of the academic training, substantial experience in the practical application of theory and techniques (e.g., nursing or physical therapy) or laboratory courses that closely parallel work situations. Thus, in some professions, employees require relatively brief on-the-job training and are able to apply professional knowledges and independent judgment which qualifies for exemption at the GS-7 grade level."

While the above-cited paragraph indicates that all of the nurses in question would be exempt under the FLSA, paragraph 1C of FPM Letter 551-7 also provides in pertinent part that determination as to the exempt or nonexempt status of a position ultimately rests on the actual duties of the position.

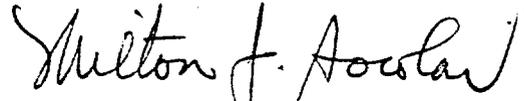
Any questions which may arise concerning the proper FLSA status of each of these nurses should be directed to the Office of Personnel Management which has the authority to make final determinations as to whether Federal employees are covered by the various provisions of the Act. See B-51325, October 7, 1976.

Those nurses who are determined to be nonexempt under the FLSA would be entitled to overtime compensation for those hours of work in excess of 40 hours in a week. Thus, they would be entitled to additional payment in the amount of the difference between the overtime rate and the straight time rate already received for those hours of work in excess of 40 hours in a week.

Regarding the nurses who are found to be exempt under the FLSA, although the additional day worked in the 6-day workweek was not officially ordered or approved overtime work under 5 U.S.C. 5542, in view of the particular circumstances present, especially the fact that the performance of work was in accordance with the schedule established by their supervisor at the nurses' request, the Bureau may treat the additional day worked

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in the 6-day workweek as an offset for the day not worked in the 4-day workweek thus eliminating any other adjustment.

A handwritten signature in cursive script, reading "Milton F. Aoulan".

For The Comptroller General
of the United States