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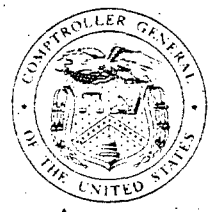
DECISION



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

[Computation of Fractional Hours]

FILE: B-197037 DATE: July 1, 1980

MATTER OF: "Rounding up" and "rounding down" odd minutes of irregular unscheduled overtime

DIGEST: GAO has no legal objection to proposal of Director, Office of Personnel Management, to provide by regulation, under its authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of "rounding up" and "rounding down" to nearest quarter hour (or fractions less than a quarter of hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code.

The Director of the Office of Personnel Management, by letter dated November 29, 1979, has requested an opinion of this Office in regard to the following proposed action on the part of the Office of Personnel Management (OPM):

> "* * * we are considering providing by regulation, under our authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of 'rounding up' and 'rounding down' to the nearest quarter hour (or fractions less than a quarter of an hour, i.e., 10 minutes, 6 minutes, etc.) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code. * * *"

More specifically, the Director's request is framed against the following interpretive reasoning and background information:

> "In administering the overtime provisions of the Fair Labor Standards Act (FLSA), we have

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> encountered a problem regarding the crediting of fractional hours of overtime work. Many agencies have asked us to explore the possibility, under our regulatory authority under sections 5504, 5548, and 6101 of title 5, United States Code, to provide for 'rounding up' or 'rounding down' fractional hours of irregular, unscheduled overtime work to the full fraction being used to account for the overtime work. While this practice is permissible under the FLSA, it may be interpreted to be inconsistent with the long-standing principle under title 5, United States Code, that overtime work must actually be performed to be compensable. See 55 Comp. Gen. 629; 46 Comp. Gen. 217; 45 Comp. Gen. 710; 42 Comp. Gen. 195."

As indicated in the Director's letter, decisions of this Office addressing compensable hours of work for purposes of an overtime entitlement under 5 U.S.C. § 5542 have generally required the performance of actual work. The general rule applicable to both classified and wage board employees is that since the authority for payment of overtime compensation contemplates the actual performance of duty, an employee may not be compensated for overtime work when he does not actually perform work during the overtime period. 42 Comp. Gen. 195 (1962); 45 id. 710 (1966;) 46 id. 217 (1966); and 55 id. 629 (1976).

While we believe the continued general validity and applicability of this rule is necessary for the determination of the overtime entitlement under 5 U.S.C. § 5542, we do not believe that this rule requires the rejection of the "rounding up" odd minutes of irregular unscheduled overtime concept proposed here by OPM. We have recognized that there are instances and authorities which permit the payment of overtime compensation where no actual work was performed. An example of this is where an employee has been denied overtime work in violation of a mandatory provision in a negotiated labor-management agreement. In this type of case we have held that

the employee may receive backpay for the overtime work not performed. 54 Comp. Gen. 1071 (1975); 55 id. 405 (1975); and 55 id. 629 (1976). Thus, we believe that the "rounding up" odd minutes of irregular unscheduled overtime proposal under consideration here--while it may involve small payments for overtime which has not been performed--is not legally inconsistent or otherwise invalid on that basis alone.

We turn now to practical considerations touching the desirability of the OPM proposal. The Director's letter states the following:

> "In the private sector, the practice of 'rounding up' or 'rounding down' odd minutes of irregular, unscheduled overtime work is a common one. This practice has been permitted under the FLSA by the Department of Labor (DOL). As stated in a DOL Interpretative Bulletin at 29 C.F.R. 785.48(b):
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> > 'It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employee's starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked'.
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> "The Congress mandated that the FLSA be administered in the Federal sector 'in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which

> are applicable in other sections of the economy.' (See H. Rept. 93-973, March 15, 1974, p. 28.) Given this mandate, we believe it would be reasonable to allow agencies the use of this accounting method under the FLSA. This would simplify administration and would also help to insure that employees are protected from abuse of the de minimis concept. (Under this concept, agencies may disregard insignificant amounts of irregular, unscheduled overtime as de minimis, if the total time disregarded in a workweek does not exceed the fraction being used for crediting overtime work. The de minimis concept does not apply to regularly scheduled overtime work. See attachment 2 to FPM Letter 551-6.) Under the 'rounding' system, the odd minutes of irregular, unscheduled overtime work disregarded by 'rounding down' under the de minimis concept would, over a period of time, presumably be balanced by the odd minutes gained from 'rounding up' whenever more than half of the fractional unit is worked. Therefore, we believe it to be in the best interest of agencies and employees to allow the agencies to use this method of crediting irregular, unscheduled overtime work when appropriate. (Of course, agencies would still have the option of using the other methods provided in FPM Letter 551-6.)
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> "However, there would be no point in allowing the use of this method under the FLSA, if it is not also permissible for overtime computations under title 5, United States Code. Obviously, a situation in which overtime would be credited differently under each law would create an administrative burden which would be far in excess of any value derived from the method."

We have in the past experienced varying degrees of difficulty in formulating and applying the de minimis rule to diverse factual circumstances. Generally our recent decisions reflect the position of this Office that preshift and postshift activities that might be regarded as work, but which do not involve

a substantial measure of time and effort, are de minimis, and may not serve as a basis for the payment of regular overtime compensation. William C. Hughes, Jr., B-192831, April 17, 1979. Thus in Arthur L. Butler, B-190803, February 9, 1978, we denied overtime compensation for preshift and postshift duties of 2 minutes daily. In that case we noted that the rule expressed by the Court of Claims in Baylor v. United States, 198 Ct. Cl. 331 (1972) was that the net daily overtime must be 10 minutes or more in order to qualify as compensable working time, and such a requirement has been uniformly applied in decisions of this Office. See also 53 Comp. Gen. 489 (1974).

The de minimis concept was adopted by the Court of Claims and this Office as a means of simplifying the administrative burden of computing small amounts of irregular overtime. At that time there were no administrative regulations on the subject. The Office of Personnel Management has the authority to prescribe regulations necessary for the administration of the overtime statutes. 5 U.S.C. §§ 5504, 5548, 6101 (1976). We believe that its authority includes the authority to regulate the computation of small amounts of irregular unscheduled overtime, even if that means departing from the de minimis concept heretofore adopted by the Court of Claims and this Office.

In view of the above, we have no objection to the Office of Personnel Management's proposal to provide by regulation, that an agency may institute the practice of "rounding up" and "rounding down" to the nearest quarter hour (or fractions less than a quarter of an hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code.

Milton J. Socolar

Acting Comptroller General
of the United States