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DECISION

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

FILE: B-197431 DATE: August 19, 1980

MATTER OF: Primo F. Mandac PM

DIGEST: Claimant, a radiology technician for the Veterans Administration, was required to be available by telephone to perform after hours radiological services. He is not entitled to premium pay because his residence had not been designated as his duty station and his activities were not so narrowly restricted as to bring him within purview of 5 U.S.C. § 5545(c)(1) as implemented by 5 C.F.R. § 550.143. Neither would employee's on-call status be considered hours of work for payment of overtime under 5 U.S.C. § 5542.

Primo F. Mandac appeals the Claims Division's denial of his claim for overtime compensation for standby duty as a radiology technician at a Veterans Administration medical facility. As will be explained, we affirm the denial of this claim.

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Mr. Mandac is a radiology technician at the Veterans Administration Medical Center, Sepulveda, California. For the period from May 1, 1974, to February 28, 1978, except for a period when he was in disability status, the claimant is seeking compensation for being on standby status. According to the record, the standby status consisted of Mr. Mandac and other individuals being periodically scheduled to remain on call to perform radiological procedures outside their regularly scheduled work hours. Generally, Mr. Mandac was scheduled to be on call one out of every four nights and to remain at home during this time or notify the hospital operator of his whereabouts so he could be contacted, if needed.

There are two provisions in title 5 of the United States Code which conceivably could provide authority to reimburse an employee such as Mr. Mandac. They are sections 5545(c)(1) and 5542, which will be discussed below.

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Section 5545(c)(1) of title 5, United States Code (1970), authorizes the head of an agency to pay premium pay on an annual basis to an employee in a position "requiring him regularly to remain at, or within the confines of his duty station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work." Regulations in effect during the period of Mr. Mandac's claim (5 C.F.R. § 550.143(b)) provide the following guidance as to when "on-call" time spent by an employee at his residence qualifies as time spent "at or within the confines of his station."

> "(b) The words 'at, or within the confines of, his station', in § 550.141 means one of the following:
>
> "(1) At an employee's regular duty station.
>
> "(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel required to stand by in readiness to perform actual work when the need arises or when called.
>
> "(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may

> leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

As previously noted, the record indicates that the agency informed the claimant that he was not restricted to his residence but could leave if he notified the operator where he could be reached. Mr. Mandac has taken exception to this fact in his letter seeking this appeal. He alleges that his supervisor told him that he was restricted to his headquarters. We are, thus, faced with a disputed issue of fact. This Office does not conduct adversary proceedings in adjudicating claims but decides them on the written record presented by the parties. When there are disputes of fact which cannot be resolved without an adversary hearing, we are bound to accept the agency's statement of the facts. William C. Hughes, Jr., B-192831, April 17, 1979; and Ambrose W. J. Clay et al., B-188461, December 20, 1977.

Thus, the situation here falls under the general rule that where an employee is not restricted to his residence and his residence is not designated as his duty station, he is not entitled to compensation by virtue of being on call. John T. Teske, B-190369, February 23, 1978; and Glen W. Sellers, B-182207, January 16, 1975.

Neither do we think that the restrictions placed on Mr. Mandac while on call during the period in question qualify him for overtime compensation under 5 U.S.C. § 5542 which provides in pertinent part as follows:

> "(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 * * *."

In order to qualify for overtime compensation under this provision, the claimant must establish that the "on-call" time at home constituted "hours of work" within the meaning of those words as used in the law. In Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), and in Moss v. United States, 173 Ct. Cl. 1169 (1965), the U.S. Court of Claims, in defining "hours of work," concluded that where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such capacity does not amount to "hours of work" under the above-cited statute and is not compensable. The Rapp case involved an employee who was required once or twice a month to remain at home from the end of work in the afternoon until the following morning to answer the telephone for any emergency calls received during that time. He was free to leave his residence whenever necessary, provided he notified his supervisor so that calls could be diverted in his absence. The Court of Claims held that the employee was not entitled to overtime compensation under those circumstances inasmuch as the time so spent was not predominately for his employer's benefit.

Accordingly, Mr. Mandac would not qualify for overtime under the rule espoused in the Rapp and Hawkins and Moss cases which we have consistently followed. John T. Teske, B-190369, February 23, 1978; and Arthur H. Easter, B-180927 August 20, 1974. He, of course, was entitled to overtime compensation for work he performed when he was called to duty and he has received such compensation.

Although Mr. Mandac is a nonexempt employee under the Fair Labor Standards Act (FLSA) of 1938, as amended, 29 U.S.C. §§ 201 et seq., it does not appear that the on-call time for which he claims would qualify as FLSA overtime. In this regard, Federal Personnel Manual Letter No. 551-14, May 15, 1978, para. 1.c provides:

> "* * * An employee who is merely required to leave word where he or she can be reached * * * is 'waiting to be engaged,' and is not working for purposes of the FLSA. This is true even if the employee is restricted to a reasonable mileage or time callback radius."

Accordingly, we affirm the Claims Division's denial of Mr. Mandac's claim.

Milton J. Socolar

For the Comptroller General
of the United States