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**DECISION**



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

**FILE:** B-198260

**DATE:** September 29, 1981

**MATTER OF:** Monroe A. Curtis - Night differential while working "variable tour"

**DIGEST:** Army White Sands Missile Range often assigns General Schedule employees to "variable tour" when hours of work will change frequently. While assigned to a "variable tour," an employee frequently performs overtime and nightwork. White Sands considers any overtime involved to be "regularly scheduled," but it considers night differential to be "regularly scheduled" only when an employee works two or more periods of nightwork in a week. Under the circumstances we hold that any nightwork performed during a variable tour is also "regularly scheduled," since it occurs with the same frequency or "regularity" as does the overtime worked by the employee.

The issue in this decision is whether an agency may deny night differential pay to employees working on a "variable tour" schedule unless the employees have worked at least 15 minutes between the hours of 6 p.m. and 6 a.m. on 2 different days during a workweek. We hold that, since the agency considers any overtime work performed while on this "variable tour" to be "regularly scheduled" for the purposes of paying overtime in lieu of compensatory time, the agency must also pay night differential for work performed between 6 p.m. and 6 a.m., even if there is only one instance of such work during a workweek.

This decision is in response to a request from C. K. Hardy, Finance and Accounting Officer, U.S. Army White Sands Missile Range (White Sands), concerning the claim of Mr. Monroe A. Curtis for night differential pay for work performed between the hours of 6 p.m. and 6 a.m.

Mr. Curtis, a Range Controller at White Sands, is periodically assigned to what White Sands calls a

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"variable tour" in connection with scheduled missile firings. Employees such as Mr. Curtis are notified 2 weeks in advance of their assignment to a "variable tour," and tentative work hours are announced at least 3 days in advance, subject to change with 24 hours or less advance notice. A "variable tour" consists of 5 8-hour days Monday through Friday, but often with varying starting times each workday.

The first 8 hours each day on a "variable tour" are paid at regular rates, and any excess hours are paid at overtime rates since White Sands believes that the overtime occurs frequently enough to be considered regular and recurring. However, with regard to night differential pay for work performed between 6 p.m. and 6 a.m., White Sands considers such work "regularly scheduled" and thereby qualifying for night differential only if it occurred at least twice in a workweek during the basic 8-hour tour.

Mr. Curtis has submitted a claim going back to 1974, requesting payment of night differential for all work performed at night citing our decision in B-193398, November 27, 1979, published at 59 Comp. Gen. 101 (1979). He challenges the White Sands policy of paying night differential only where there are two or more instances of work at night performed within a workweek.

White Sands opposes payment of the claim, and the agency report points out that Mr. Curtis is one of approximately 200 General Schedule employees who work the "variable tour." White Sands states that it does not consider work at night as automatically qualifying a General Schedule employee for night differential. The report from White Sands points out that overtime work is not a qualifier for wage grade employees to receive night differential and that overtime work is a disqualifier for General Schedule employees for premium pay on Sundays or holidays. Therefore, the report concludes that overtime was not meant to be a qualifier for other types of premium pay.

The authority for the payment of night differential to General Schedule employees is contained in 5 U.S.C. § 5545(a) (1976), which defines nightwork as "regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m." In the absence of an established tour of duty or shift which falls between 6 p.m. and 6 a.m., our decisions have allowed payment of night differential for work performed during those hours in two situations. See 59 Comp. Gen. 101, 103, supra. First, we have allowed payment of night differential to employees such as security guards, couriers, or medical personnel who habitually and recurrently perform overtime work at night where, by virtue of the inherent nature of their employment, they are required to remain on duty until the completion of their tasks or until relieved from duty. See 42 Comp. Gen. 326 (1962); 41 id. 8 (1961); and Nathaniel R. Ragsdale, B-181237, April 15, 1975. See also Aviles v. United States, 151 Ct. Cl. 1 (1960). These employees often do not perform nightwork according to a fixed pattern but they do so for such a sufficiently long period of time that it becomes usual or customary. See Ragsdale, supra.

The second situation in which we have allowed payment of night differential in the absence of an established tour of duty or shift is where the nightwork to be performed is considered to be "regularly scheduled work." 59 Comp. Gen. 101, 103, supra. Our decisions have held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. 42 Comp. Gen. 326, 328, supra; 40 id. 397, 399 (1961); Robert C. Austin, B-188686, May 11, 1978; and B-174388, February 28, 1972. This is to be distinguished from overtime or nightwork which is scheduled on a day-to-day or hour-to-hour basis. See 52 Comp. Gen. 319, 322 (1972); B-151168, May 25, 1976; and B-168048, February 16, 1970. As can be ascertained from a review of our prior decisions, we have utilized the same definition of "regularly scheduled" for both overtime and night differential purposes.

In the present case, White Sands argues that overtime work performed during the "variable tour" is considered "regularly scheduled" since it occurs frequently

enough to be considered "regular and reoccurring." However, the report from White Sands concedes that the overtime work is rarely scheduled in advance (except for weekend work) and that it is usually scheduled on the same day in which it is worked due to mission failures, rescheduling, etc., which cannot be predicted in advance. While we might question the determination by White Sands that any overtime performed during a "variable tour" is "regularly scheduled", we will not, on the basis of the record before us, overturn that determination.

Our review of the record indicates that while assigned to the "variable tour" Mr. Curtis appears to have performed nightwork with nearly the same frequency and "regularity" as he performed overtime work. For example, during a 24-week period from January to June 1980, Mr. Curtis worked 4 weeks without overtime or nightwork, 1 week with just one instance of nightwork, 1 week with just overtime work, and 19 weeks with both overtime and nightwork. In 1979 the record indicates Mr. Curtis worked 28 weeks without overtime or nightwork, 1 week with just one instance of nightwork, 6 weeks with just overtime work, and 16 weeks with both overtime and nightwork.

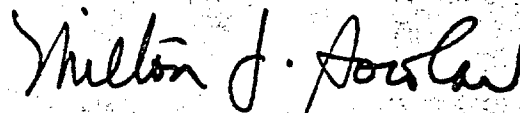
Since our decisions discussing what constitutes work that is "regularly scheduled" apply equally to overtime and nightwork, we cannot under the circumstances of this case apply different standards for the payment of overtime compensation and night differential pay, since overtime and nightwork occurred with about the same frequency or "regularity." Therefore, we conclude that Mr. Curtis and any similarly situated employees are entitled to payment for night differential even when there is only one instance of work between 6 p.m. and 6 a.m. in a workweek.

Since we have questioned the determination by White Sands to treat any overtime performed during a "variable tour" as "regularly scheduled," we recommend that the appropriate officials review this determination to make certain that it is consistent with applicable laws, regulations, and decisions of our Office. Although we do not know the nature of the duties performed by

B-198260

employees such as Mr. Curtis during a "variable tour," we suggest that a more appropriate basis for payment of overtime and night differential might be our decisions concerning employees who habitually and recurrently perform overtime or nightwork by virtue of the inherent nature of their duties, which require them to remain on duty until a task is completed or they are relieved. See 59 Comp. Gen. 101, 103, supra, and decisions cited therein.

Finally, we note that since Mr. Curtis' claim was first received in this Office on December 9, 1980, his entitlement to additional compensation under this decision extends back only 6 years from that date. See 31 U.S.C. § 71a (1976). Any similar claims which are 4 or more years old should be forwarded to the Claims Group of our Office for recording in order to toll the running of the statute of limitations.



Acting Comptroller General  
of the United States