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DECISION

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

FILE: B-198385, B-198386, and B-198400

DATE: September 10, 1981

MATTER OF: John B. Schepman, et al. - Overtime Compensation for Travel

DIGEST:

1. Entitlement to overtime compensation while in travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires at least that: (1) travel result from event which could not be scheduled or controlled administratively, and (2) immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. In instant case, neither condition was fulfilled, and request for overtime compensation is denied.

2. Our so-called "two-day per diem" rule merely governs payment of per diem when employee delays travel in order to travel during regularly scheduled working hours. Entitlement to overtime compensation, however, is determined by the distinct criteria under 5 U.S.C. § 5542(b)(2) as interpreted by our decisions. Mere compliance with "two-day per diem" rule will not result in payment of overtime compensation since per diem and overtime are governed by different criteria.

This decision is in response to consolidated appeals by Messrs. John B. Schepman, H. Paul Ringhand, and Leland R. Alexander, employees of the Food and Drug Administration (FDA), Department of Health and Human Services, Cincinnati, Ohio, from our Claims Group's actions of December 21, 1979, Settlement Certificate Nos. Z-2818652, Z-2818653, and Z-2819227, respectively, denying their requests for overtime compensation.

The above-named employees (hereafter claimants), along with several others, were required to travel from their duty station in Cincinnati, Ohio to Cleveland, Ohio, on November 6 or 7, 1978, on very short notice.

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A Temporary Restraining Order had been issued by the United States District Court, and these employees, who were FDA investigators and analysts, had to assist the United States Attorney in the preparation of his case and had to be prepared to testify as witnesses on behalf of the Government at a hearing on November 9, 1978. The claimants traveled to Cleveland within regularly scheduled working hours which were 8 a.m. to 4:30 p.m. On Thursday, November 9, 1978, the hearing took place. At approximately 5:30 p.m., when the hearing was over, the claimants were released and instructed to return to their duty stations. The claimants returned to Cincinnati that evening by Government car which took approximately 6 hours. The following day was Friday, November 10, 1978, a Federal holiday. The next regularly scheduled workday for the claimants did not begin until 8 a.m. on Monday, November 13, 1978.

After returning to their duty stations, the claimants reported the hours spent in travel for the return trip as overtime, and submitted expense vouchers for the trip. Their supervisors requested overtime compensation for the travel time back to Cincinnati as compensable overtime work as provided for in 5 U.S.C § 5542(b)(2)(B)(iv) (1976).

All parties involved and our Claims Group agree that the initial trip to Cleveland resulted from an administratively uncontrollable event, i.e., the Court's scheduling of the hearing. Furthermore, FDA now agrees that Friday, November 10, 1978, was a holiday for all purposes, and cannot be considered an ordinary workday for travel purposes.

The proper resolution of the instant case depends upon an understanding of two distinct legal concepts which often appear in the same case: (1) the so-called "two-day per diem" rule, and (2) the employees' entitlement to overtime compensation or compensatory time for time spent traveling.

The former concept governs payment of per diem when an employee delays travel in order to travel during regularly scheduled working hours, and was set forth in our decision, James C.Holman, B-191045, July 13, 1978 as follows:

> "* * * insofar as permitted by work requirements, travel may be delayed to permit an employee to travel during his regular duty hours where the additional expenses incurred do not exceed 1-3/4 days' per diem costs. 56 Comp. Gen. 847 (1977). * * *"

This rule originally evolved as a prohibition against delaying travel over a weekend for the sole purpose of allowing an employee to travel during working hours. It was predicated in part on the statutory policy of 5 U.S.C. § 6101(b)(2) calling for the scheduling of employee travel, to the maximum extent practicable, within the regularly scheduled workweek (which will be discussed further, below). 56 Comp. Gen. 847, 848 (1977). Thus, the "two-day per diem" rule, as stated in that decision and in 55 Comp. Gen. 590, 591 (1975), provides that where scheduling to permit travel during normal duty hours would result in the payment of 2 days or more of per diem, the employee may be required to travel on his own time rather than on official time.

In order to be entitled to overtime compensation, however, the circumstances of an employee's travel must meet the distinct and additional criteria for payment of overtime compensation set forth at 5 U.S.C. § 5542 (b)(2). The mere fact that the "two-day per diem" rule applies is not sufficient to create an entitlement to overtime. We have held that the travel time on nonworkdays may be compensated when the above statutory criteria are met. 51 Comp. Gen. 727, 732 (1972) and 50 id. 674, 676 (1971). Similarly, an employee may be paid overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. when travel must be performed on a nonworkday during regular working hours in order to avoid the payment of more than 1-3/4 days' per diem costs. Shirley B. Hjellum and Gary B. Humphrey, B-192184, May 7, 1979.

In the instant case, since the claimants as professional employees are exempt from coverage under FLSA, their entitlement to overtime compensation is governed by the applicable provisions of 5 U.S.C. § 5542(b)(2)(B) which, in relevant part, provides:

> "(b) For the purpose of this subchapter--
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> "(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless--
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> * * * * *
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> "B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

There is nothing in the administrative record which indicates the applicability of items (i),(ii), or (iii). Thus, the issue presented is whether the claimants' return trip can be considered as resulting from an event which could not be scheduled or controlled administratively as that phrase has been interpreted by our decisions. In addition, an employee's travel is to be scheduled in accordance with the provisions of 5 U.S.C. § 6101(b)(2) which provides:

> "To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

As interpreted by our decisions, 5 U.S.C. § 5542 (b)(2)(B)(iv) requires that, for the purpose of allowing overtime compensation or compensatory time, the following conditions be present: (1) travel resulting from an event which could not be scheduled or controlled administratively, and (2) an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours.

51 Comp. Gen. 727 (1972) and Mark Burstein, B-172671, March 8, 1977. The interrelationship between our "two-day per diem" rule, and entitlement to overtime compensation can be seen in cases where, for example, we have required that in addition to the two foregoing conditions, both of which must be met, the employee must also fulfill a third condition namely, notwithstanding that there is sufficient notice of the uncontrollable event to permit scheduling of the travel during his regularly scheduled duty hours, the scheduled start of the event must require travel during a period of at least two successive off-duty days. 51 Comp. Gen. 727, 732 (1972) and 50 Comp. Gen. 674, 676 (1971).

Although initial travel to a place may fall within one or more of the conditions of 5 U.S.C. § 5542(b)(2)(B) to qualify as hours of employment, we have consistently held that the return travel itself must meet one of those conditions in order to qualify the travel time involved as hours of employment. 51 Comp. Gen. 727 (1972); 50 id. 519 (1971); 50 id. 674 (1971); and William C. Boslet, et al., B-196195, February 2, 1981. In the instant case, the record fails to reveal that the claimants were required to return to Cincinnati by an administratively unscheduled or uncontrollable "event," i.e., anything which necessitates an employee's travel. 51 Comp. Gen. 727 (1972) and Mark Burstein, B-172671, March 8, 1977. While FDA obviously had no control over the time that the Court dismissed the hearing, the fact that the return travel began at that time is not determinative. To meet the requirements of the statute, the event which necessitated the claimants' travel outside of regular duty hours must have been one which could not be scheduled or controlled administratively. As found by our Claims Group, the only purpose of the claimants' travel was to return to their duty station. Furthermore, an employee's mere presence at his permanent duty station on the next workday is not normally considered an administratively uncontrollable event. John B. Currier, 59 Comp. Gen. 96 (1979) and Raymond Ratajczak, B-172671, April 21, 1976.

Even if the first condition had been fulfilled, however, there is no indication in the record that there was an immediate official necessity, in connection

with the event, and, thus, the second condition was not fulfilled either. While an FDA memorandum in the file of this case indicates the claimants were not "ordered" to return to their duty station, another notes that at 5:30 p.m. they were "instructed to return to their duty stations." There is nothing in the record to show that there was any official necessity for them to return immediately to Cincinnati, so neither of the requirements for the entitlement to overtime compensation for travel time is met.

In their submissions, claimants have placed great emphasis on the "two-day per diem" rule. Their argument is to the effect that this rule required their return on Thursday night. Furthermore, they argue that their actions are in accord with the Federal Personnel Manual Supplement (FPM Supp.) 990-2, Book 550, subchapter S1-3b (Case No. 5), relating to premium pay, which states in part as follows:

> "On the other hand, if the employee (whose regular hours of work are 8 a.m. to 5 p.m., Monday through Friday) completes the course at 5 p.m. Friday, his travel on either Friday night or Saturday (depending on availability of transportation) will be payable because, under a decision of the Comptroller General (B-160258, November 21, 1966), he is not entitled to per diem if he should remain until Monday, and thus, his travel time cannot be controlled realistically."

The above line of argument, however, represents a confusion between the two distinct legal concepts of the "two-day per diem" rule, and entitlement to overtime compensation. As explained in more detail above, the former concept merely governs payment of per diem when an employee delays travel in order to travel during regularly scheduled working hours. The latter concept is governed by the distinct and additional criteria

for payment set forth at 5 U.S.C § 5542(b)(2). It is true that the policies of 5 U.S.C. § 6101(b)(2) requiring scheduling, to the maximum extent practicable, of travel within an employee's regularly scheduled workweek are common to both concepts. However, merely because an employee complies with the "two-day per diem" rule, it does not follow that he is entitled to overtime compensation under 5 U.S.C. § 5542(b)(2)(B)(iv), which requires at least that (1) the travel result from an event which could not be scheduled or controlled administratively, and (2) an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. 51 Comp. Gen. 727 (1972) and Mark Burstein, B-172671, March 8, 1977. As can be seen from some of our cases, the proper application of these two different but related concepts will result, in certain cases, in the conclusion that there is no statutory authority for allowing payment of either per diem for delaying travel until it can be accomplished during normal working hours or overtime compensation when the employee travels outside normal working hours. Charles C. Mills, B-198771, December 10, 1980 and B-163654, January 21, 1974. See Barth v. United States, 568 F.2d 1329 (Ct. Cl. 1978).

In regard to claimants' argument based on the FPM Supp. example, we must reluctantly conclude that the FPM Supp. has improperly applied the case of B-160258, November 21, 1966, which is published at 46 Comp. Gen. 425 (1966). That decision, while it is still legally valid, deals only with per diem and its relevant rules. It did not purport to deal with the question of overtime compensation. While the FPM Supp. example is correct in finding that there would be no entitlement to per diem in the example given if the employee should remain until Monday, it incorrectly assumes that such compliance will necessarily entitle the employee to overtime compensation merely because his travel time cannot be controlled realistically. As shown above, such an assumption is unfounded, and the "two-day per diem" rule and entitlement to overtime compensation are governed by different criteria. Accordingly, the claimants' argument fails because 46 Comp. Gen. 425 (1966) in this context was only concerned with per diem, and has no applicability to the question of entitlement to overtime compensation. We have provided the Office of Personnel Management with a copy of this decision.

For the foregoing reasons, we affirm the disallowance by our Claims Group of claimants' request for overtime compensation for travel.

We note that the answer to question 2 in our decision Earl S. Barbely, B-192839, May 3, 1979, is inconsistent with this decision. To the extent of the inconsistency, Barbely will no longer be followed.

Milton J. Socolar

Acting Comptroller General
of the United States