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DECISION



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

[Questions Concerning Compensation Under Flexible Work Schedules]

FILE: B-199206

DATE: October 7, 1980

MATTER OF: Sharon E. Jenkins - Flexible Work Schedules - Credit Hours vs. Overtime Hours

DIGEST:

- (1) Under Title I (flexible schedules) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, credit hours are hours of work performed at the employee's option and are distinguished from overtime hours in that they do not constitute overtime work which is officially ordered in advance by management. Therefore, since an employee was ordered to work 5 hours at the end of the pay period when she was scheduled to take off, and since she had already accumulated 10 credit hours, and since she had already worked 40 hours that week, the 5 hours of work are overtime.
- (2) An employee on a flexible schedule who is ordered to work 5 hours which are overtime hours at the end of a pay period, may, on her request, receive compensatory time off for such time so long as she does not accrue more than 10 hours of compensatory time in lieu of payment for regularly or irregularly scheduled overtime work.

Wayne B. Leshe, Chief Accountant and an authorized certifying officer with the Federal Communications Commission, has asked whether and in what manner an employee may be compensated in circumstances where, as the result of exigencies of the service, she is precluded from using scheduled credit hours under Title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95-390, September 29, 1978.

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FACTS

On November 16, 1979, the Federal Communications Commission executed a Memorandum of Agreement on Alternate Work Schedules with the National Treasury Employees Union for the purposes of participating in an alternate work schedule experiment under the Federal Employees Flexible and Compressed Work Schedules Act of 1978, (hereinafter called the Act). Incident to this ongoing program the following claim has arisen. On May 28, 1980, Ms. Sharon E. Jenkins, a GS-6 employee of the agency, applied for approval to use 5 credit hours on May 30, 1980, during the hours of 12:30 p.m. to 5:30 p.m. The application for the use of 5 credit hours was approved by Ms. Jenkins' supervisor on May 28, 1980. On the morning of May 30, 1980, Ms. Jenkins scheduled use of her credit hours was cancelled by her supervisor as a result of exigencies of Government business. Ms. Jenkins worked the 5 hours she was scheduled to take off and these hours were in excess of 40 hours which she had already worked that week.

Section 106(a) of the Act restricts credit hour accumulation to a maximum of 10 hours per pay period. Since May 30th was the last work day of the pay period, and in view of the 10 credit hour maximum permissible balance she was already maintaining, Ms. Jenkins could not carry over 15 credit hours into the next pay period.

The submission points out that Section 4-A6 of the Memorandum of Agreement referenced above provides the following in regard to credit hours:

"If an employee will have accumulated more than ten credit hours by the end of a bi-weekly pay period and has failed to obtain prior supervisory approval to use the credit hours within that pay period, the excess credit hours will be lost without compensation. However, if the use of credit hours has received prior supervisory approval and the employer subsequently places a work requirement on the employee which prevents the employee from using the excess credit hours during the pay period, the employee shall be compensated for the loss of these

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excess credit hours in accordance with applicable laws and regulations."

The agency promulgated a directive, FCCINST 1253 to implement the above section of the Memorandum of Agreement. Part III A, Section D3(a) of the directive further defines the procedures to be used to pay excess credit hours and reads as follows:

"If the total credit hours exceed 10 credit hours at the end of the pay period, the excess amount will be recorded as follows--

'(a) If the use of credit hours has received prior supervisory approval and the employee was precluded from taking the credit hours as a result of orders of a supervisor, the number of hours will be shown on the line paid this period.' The number of hours shown will be preceded by a minus sign. The following statement will be typed in the remarks section. 'Payment for _____ credit hours to be made.' The supervisor must sign this statement. (See Illustration No. 7.)"

QUESTION NO. 1

The first question presented for our consideration is as follows:

"Can the FCC pay Ms. Jenkins for the excess credit hours at the end of the pay period since the excess hours were caused by a supervisory cancellation of the approval to use the credit hours in question and they could not be rescheduled."

Section 101 of the Act defines credit hours and overtime hours respectively as follows:

"(1) the term 'credit hours' means any hours, within a flexible schedule established under this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday; and

"(2) the term 'overtime hours' means all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but does not include credit hours."

As a result, an employee who is covered by a flexible schedule which permits him or her to vary the length of the workday (i.e., variable day, variable week, and maxiflex schedules) may be ordered by management to work hours that are in excess of the number of hours which the employee planned to work on a specific day. If the hours ordered to be worked are in excess of 8 in a day or 40 in a week at the time they are performed, those hours are compensable as overtime hours.

Accordingly, Ms. Jenkins is entitled to overtime compensation for the 5 hours worked in the week ending May 30, 1980, since those hours were ordered by her supervisor due to the exigencies of Government business and since they were in excess of 40 hours in a week at the time they were performed.

QUESTION NO. 2

The second question presented for our consideration is as follows:

"Could Ms. Jenkins be paid overtime or be given compensatory time off for the 5 credit hours in question."

The agency's ability to grant Ms. Jenkins compensatory time off in lieu of payment of overtime compensation for the 5 hours worked in excess of 40 hours in the week ending May 30, 1980, is limited both by statute and regulation. In accordance with section 103(a)(1) of the act, granting compensatory time off in lieu of payment for the irregular overtime hours which Ms. Jenkins worked would be permissible only upon her request. Moreover, the Office of Personnel Management regulation contained at section 620.104 of title 5, Code of Federal Regulations (1980) provides that an employee on a flexible schedule may earn up to, but no more than, 10 hours of compensatory time off in lieu of payment for regularly or irregularly scheduled overtime. If an employee enters

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a flexible schedule program with more than 10 hours of compensatory time to his or her credit, that employee may earn no further compensatory time until his or her compensatory time balance is less than 10 hours.

Accordingly, the agency may grant compensatory time off to Ms. Jenkins so long as (1) the grant of compensatory time off does not violate the maximum accrual provisions of 5 C.F.R. 620.104, thereby resulting in simultaneous acquisition and forfeiture of any hours of compensatory time off; and (2) the grant of compensatory time off is at Ms. Jenkins' request. If Ms. Jenkins does not request compensatory time off or cannot be granted it under 5 C.F.R. 620.104, then she is entitled to receive overtime compensation under section 103(a)(2) of the Act.

In conclusion we note that Part III A Section D3(a) of FCCINST 1253 may be read to provide payment at the employee's regular hourly rate for credit hours scheduled and approved but not used as a result of orders of a supervisor. Consistent with our decision here, where such hours are in excess of 8 in a day or 40 in a week, that payment procedure would be contrary to the provisions of sections 103 and 106 of the Act. Rather, overtime compensation or compensatory time off where appropriate, must be provided for such hours of work.



for the Comptroller General
of the United States