

DECISION



17770
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Surity

FILE: B-200639

DATE: April 15, 1981

MATTER OF: Lewis E. Meyer

DIGEST: A Navy employee who received 25 percent premium pay based on scheduled duty including standby duty of 168 hours per pay period may not be paid overtime compensation in addition to 25 percent premium pay under the Missing Persons Act, 5 U.S.C. 5562, even though a record shows he was scheduled for duty in excess of 168 hours before being captured by hostile forces in Vietnam. Scheduled duty in excess of 168 hours was either regularly scheduled and thus not compensable in addition to standby premium pay or was irregular and could not have been the basis for continued overtime pay after he was captured.

Mr. Lewis E. Meyer, through his attorney, requests reconsideration of our ~~Claims Division's denial of his~~ claim for additional overtime compensation for the period from February 1, 1968, to March 27, 1973, when he was a civilian employee of the Department of the Navy interned by hostile forces in Vietnam. In view of the applicable provisions of law, we are sustaining our Claims Division's action.

On October 29, 1967, Mr. Meyer became an assistant fire chief at the Naval Support Activity at DaNang, Vietnam. His civil service classification was that of supervisory firefighter, grade GS-9. On November 9, 1967, the basic work schedule for assistant fire chiefs at the DaNang installation was established in a written directive at 168 hours per 2-week pay period (a 24-hour on-duty shift followed by a 24-hour off-duty shift every 48 hours). The directive stated that this basic work schedule qualified the assistant fire chiefs for additional premium pay equal to 25 percent of their salaries. The written directive contained the following additional provision:

"4. Due to the unique situation in the DaNang TAOR, it is necessary that the Assistant Fire Chief perform additional tasks as training, pre-fire planning,

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building inspections, etc. on what would ordinarily be their off shift. Therefore, the Assistant Fire Chiefs work schedule is hereby established as follows:

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On February 1, 1968, Mr. Meyer was captured by hostile forces, and he remained a captive until March 27, 1973. The Navy paid him his salary, applicable allowances and, in addition, 25 percent premium pay covering the 5 years of his internment. This payment was computed on the basis of the basic work schedule of 168 hours per pay period which had been established for him in November 1967 and which had remained in existence through the time of his capture in February 1968.

Mr. Meyer later filed a claim with our Office for additional overtime compensation covering the time of his internment between 1968 and 1973, based on overtime work performed during his off-duty shifts prior to his capture in February 1968. He indicated he was prompted to file the claim after learning of our ruling in Matter of Lawrence J. Stark, 54 Comp. Gen. 934 (1975) and 55 Comp. Gen. 147 (1975), in which we concluded that another Navy employee held captive in Vietnam was eligible for continued overtime compensation during the period of his captivity. As mentioned, however, our Claims Division denied Mr. Meyer's claim. The denial was based upon an administrative report submitted by the Department of the Navy indicating that prior to Mr. Meyer's capture in February 1968, he had been paid premium pay for regularly scheduled standby duty during his 168-hour per pay period basic work schedule under the authority of 5 U.S.C. 5545(c)(1), and that he had, therefore, been ineligible for separately computed regular overtime compensation for overtime work performed outside that schedule.

In requesting reconsideration of the denial of his claim for additional overtime compensation, Mr. Meyer states that his regular work schedule at the time of his capture was actually 224 rather than 168 hours per 2-week pay period. He states that for the work he

performed during his on-duty shifts (168 hours per pay period), he was being paid his basic salary for the first 80 hours, with the next 88 hours being covered by the 25 percent of basic salary premium pay. He recollects that he also worked overtime 8 hours during each of his off-duty shifts (an additional 56 hours per pay period), and that he was being compensated for that regular overtime work at the rate of one and one-half times the rate of his basic salary. He suggests that in these circumstances, credit for 56 additional hours of overtime compensation per pay period at the "time-and-a-half" rate should have been posted to his account during the time of his internment between 1968 and 1973. As will be explained below, Mr. Meyer could not have been paid on that basis prior to his capture under existing law and regulations.

The Missing Persons Act, as codified in chapter 55 (subchapter VII) of title 5, United States Code, generally provides that a Federal employee in a missing status is entitled to receive or have credited to his account, for the period he is in that status, the "same pay and allowances to which he was entitled at the beginning of that period." See 5 U.S.C. 5562(a). In the case referred to by Mr. Meyer, Matter of Lawrence J. Stark, 54 Comp. Gen. 934 and 55 Comp. Gen. 147, supra, we expressed the view that Mr. Stark, a grade GS-12 personnel specialist employed by the Navy who was captured by hostile forces in Vietnam, was eligible for continued overtime compensation during his captivity provided it could be established that overtime work had been a part of his regularly scheduled workweek at the time of his capture. Our ruling in the case of Mr. Stark was consistent with our longstanding interpretation of the Missing Persons Act concerning overtime compensation to be credited to the pay accounts of Federal employees interned by hostile forces. See, e.g., 22 Comp. Gen. 745, 750 (1943).

Statutory law governing the payment of overtime compensation to Federal employees is contained in chapter 55 (subchapter V) of title 5, United States Code. Specific conditions relating to compensation for standby duty are therein set forth at 5 U.S.C. 5545(c)(1), which provides in pertinent part as follows:

"(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of his subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 * * *." (Underscoring added.)

The legislative history of 5 U.S.C. 5545(c)(1) shows that it was enacted for the express purpose of allowing additional annual pay in lieu of overtime, night, and holiday pay for General Schedule employees who are required to remain at or within the confines of their stations during longer than ordinary periods of duty, but who spend a substantial part of their time on duty in a standby status rather than actually performing work. See Conference Rep. No. 2665, 83d Cong., 2d Sess. (1954); and Matter of Forest Service Dispatchers, B-189742, December 27, 1978. Additional compensation of 25 percent of basic pay is the maximum an employee may receive under that system, except for "irregular" or "unscheduled" overtime duty in excess of the regular tour of duty. See 42 Comp. Gen. 426 (1963) and B-178613, July 6, 1973. If the employee's entitlement to "time-and-a-half" overtime compensation for the hours of actual overtime work performed exceeds the amount of annual premium pay which would otherwise be payable for the performance of standby duties, the employee is to be paid that overtime compensation rather than standby premium pay. See 5 C.F.R. 550.142 (both January 1, 1980 and January 1, 1968 ed.).

In the present case, Mr. Meyer states that between November 1967 and the time of his capture in February 1968 he received his basic salary plus 25 percent premium

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pay to compensate him for the regular work and standby duty he performed during his basic 24-hour on-duty shifts every other day, and the available records indicate that this was in fact so. Hence, he was ineligible for any other overtime or premium pay except for irregular, unscheduled overtime duty performed during his off-duty shifts.

The November 9, 1967 memorandum is ambiguous in that it establishes a "work schedule" for assistant fire chiefs at DaNang that is 56 hours in excess of the "basic workweek" of 168 hours per pay period otherwise established. It is unclear whether the 8 hours of duty required during the period that would ordinarily be the assistant fire chief's "off-duty" time involved actual work of 8 hours or whether the 8 hours was additional standby or on-call time during which training, planning and inspectional duties were to be performed as required.

If the additional duty every other day involved actual performance of work for the full 8-hour period, it would not qualify as "irregular unscheduled overtime in excess of his regularly scheduled tour" so as to be compensable in addition to standby premium pay. However, had this additional 8 hours every other day involved actual work, Mr. Meyer would have been paid regular overtime compensation to the extent allowable for those 56 hours each pay period in lieu of premium pay under 5 U.S.C. 5545(c)(1), since the overtime compensation would have exceeded the 25 percent premium pay.

The only conclusion justified by the available facts is that the additional 8 hours of "duty" every other day was either additional standby duty or on-call time during which he was available for irregular overtime. Under 5 U.S.C. 5545(c)(1) standby premium pay is limited to 25 percent of the rate of basic pay for the employee's position. Although 5 C.F.R. 550.144 establishes rates less than 25 percent for standby tours of duty involving less than 84 hours per week (168 hours per pay period), the rate of 25 percent is the maximum that is payable for:

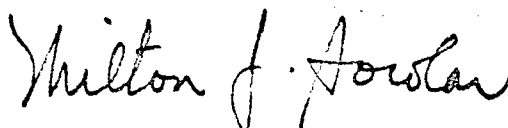
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"(1) A position with a tour of duty of the 24 hours on duty, 24 hours off duty type and with a schedule of * * * 84 hours or more a week * * *."

If the additional work assigned to Mr. Meyer during his off-duty shifts was considered "irregular" overtime duty, not a part of his regular workweek, overtime compensation is not payable since under the Missing Persons Act only overtime work which is part of the employee's regular workweek at the time he enters a missing status, may be credited.

Thus, although the facts are not clear from the information presented, it is unnecessary to determine more precisely what was the actual situation since in no case would Mr. Meyer be entitled to additional overtime or standby compensation for the years 1968 to 1973 on account of work he may have been performing during his off-duty shifts, at the time of his capture in 1968.

Accordingly, Mr. Meyer's claim for additional overtime compensation under the Missing Persons Act for the period of his internment between 1968 and 1973 may not be allowed, and we therefore sustain the action previously taken by our Claims Division to deny that claim.



Acting Comptroller General
of the United States