

DECISION

19131 Botrisord
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200670**DATE:** August 14, 1981**MATTER OF:** Louise Fung, et al. - [Entitlement to Night
Differential Pay]

DIGEST: Four employees, whose schedules were changed by their supervisor from 8 a.m. - 4:30 p.m. to 4:30 p.m. - 1 a.m. for a period in excess of 2 weeks so they could be present during annual inventory of furniture and equipment, claim entitlement to night differential pay. Although prior approval for schedule change was not received from appropriate official, employees are entitled to night differential pay for work performed between 6 p.m. and 6 a.m. 36 Comp. Gen. 657 (1957), distinguished.

The issue in this case is whether employees whose tours of duty have been changed to night shifts for a period of 2 weeks but without prior approval are entitled to night differential pay. We conclude that under the circumstances the absence of prior approval for the change in tours of duty will not defeat the employees' entitlement to night differential pay.

This decision is in response to a request from Ms. Deborah S. DuSault, Acting Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), for an advance decision concerning the entitlement of Louise Fung, Robert Jones, Richard Cole and Vaosa Tagaloa to night differential.

The four individuals, employees of HUD Region 9, had a regular tour of duty from 8 a.m. to 4:30 p.m. For the period from August 7, 1980, to August 23, 1980, their tour of duty was changed to 4:30 p.m. to 1 a.m. in order for them to be present during an annual inventory of furniture and equipment performed by a private contractor. It appears that the employees' supervisor, Ms. Flora C. Gee, Director of the Administrative Services Division for Region 9, assigned the employees to the new duty tour, but she did not have authority to change their hours of work. She subsequently requested approval from Mr. Roderick O. Symmes, Director of the Office of Regional Administration. By memo of August 19, 1980, Mr. Symmes approved Ms. Gee's request for the change in tour

~~214009~~

116108

of duty and for night differential pay and stated that the approval was to cover the period from August 7, 1980, to August 23, 1980. Ms. DuSault has asked whether the employees' entitlement to night differential is affected by the fact that their change in duty tour was not authorized in advance by the appropriate official.

The authority for payment of night differential is contained in 5 U.S.C. § 5545(a) (1976), which provides, in pertinent part, as follows:

"Except as provided by subsection (b) of this section nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., * * *

"Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate."

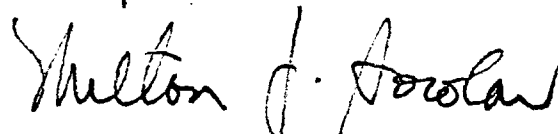
In 36 Comp. Gen. 657 (1957), we analyzed the phrase "regularly scheduled work" in connection with night differential entitlement and stated that, "standing alone, the word 'scheduled' as here used carries with it the import of 'duly authorized' since Federal employees normally work schedules established by proper authority." 36 Comp. Gen. 657, at 659. Section 6101(a)(3)(A) of title 5, United States Code, requires that assignments to tours of duty be scheduled in advance, and, as we stated in 36 Comp. Gen. 657, supra, it is contemplated that such schedules are duly authorized. Although the tours of duty here in question were not duly authorized in advance, the employees were apparently notified in advance of the change. We do not feel that the lack of due authorization in advance defeats the entitlement of these employees to night differential in view of the circumstances of this case. The proper official authorized the tour of duty change, he did so soon after the change was made, and he provided that his authorization was to be retroactive.

The facts in the present case are distinguishable from those presented in 36 Comp. Gen. 657, supra. In our prior decision we considered the entitlement of employees to night differential pay where the employees worked a one-time shift at night and did not have their tours of duty rescheduled. We held that such employees were not entitled to night differential pay for irregular or occasional work at night

B-200670

except where the work was "regularly scheduled" to occur at least 1 day during each of 2 or more workweeks. 36 Comp. Gen. 657, at 660. In the present case, the regular tours of duty for these four employees have been rescheduled by their supervisor for a period of more than 2 weeks. Under these circumstances, we believe these employees are entitled to night differential pay for work performed between 6 p.m. and 6 a.m. during this period.

Accordingly, we hold that the claims for night differential pay may be paid, if otherwise proper.

A handwritten signature in black ink, reading "Milton J. Jordan". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States