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DECISION

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

FILE: B-203915 DATE: June 8, 1982

MATTER OF: George K. Derby - Overtime Compensation and Per Diem for Travel Delays - Personal Convenience

DIGEST:

1. Employee, nonexempt under the Fair Labor Standards Act (FLSA), after completion of temporary duty on Friday afternoon, went on personal trip, took annual leave on Monday, and used Tuesday as day of travel to return to his office. Agency's charge of 8 hours to employee's annual leave account is within its administrative discretion and reasonable under these circumstances.

2. No additional per diem is payable to employee by reason of his failure to return to headquarters on the weekend, and per diem entitlement is limited to amount otherwise payable if the return travel had been performed after completion of temporary duty on Friday without interruption. Agency's allowance of 3/4 day's per diem is correct and reasonable.

3. 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 is determined by distinct and additional criteria contained in three statutes which are either not applicable or whose criteria are not met in the present case.

Elizabeth N. Rose, an authorized certifying officer with the Bureau of Mines, Department of the Interior requests an advance decision on the charge of 8 hours to the annual leave account of Mr. George K. Derby made by the Department for March 17, 1981. For the following reasons, we conclude that the charge was proper.

Mr. Derby is an Engineering Technician with the Bureau of Mines, Spokane, Washington, and the record

indicates that his position is covered by the provisions of the Fair Labor Standards Act (FLSA). During the week of March 9 through 13, 1981, he was assigned temporary duty (TDY) in Novato, California. Prior to his TDY, he received approval to take 8 hours of annual leave on Monday, March 16, 1981. On Friday, March 13, 1981, at 3 p.m., after completion of 8 hours of work, he left his TDY station for San Francisco, California where he boarded a flight for San Diego, California on personal business. Mr. Derby was on annual leave on Monday, March 16, 1981, and then used Tuesday, March 17, 1981, as a day of travel to return to his official duty station in Spokane, Washington. He arrived there at 2:45 p.m. on that day.

The Finance Office of the Bureau of Mines believes that Mr. Derby should be charged 8 hours of annual leave for Tuesday, March 17, 1981, because Mr. Derby could have returned on Saturday, March 14, 1981. On the other hand, Mr. Derby contends that the charge to his annual leave account was improper. Concomitant with the dispute over the charging of annual leave is the question of whether overtime compensation or per diem is allowable.

The proper resolution of this case depends upon three different legal concepts: (1) the so-called "two-day per diem" rule, (2) entitlement to overtime compensation under 5 U.S.C. § 5542 (1976) (for General Schedule employees) or 5 U.S.C. § 5544 (1976) (For Wage-Grade employees), and (3) entitlement to overtime compensation under FLSA, 29 U.S.C. § 201 et seq. (1976).

The so-called "two-day per diem" rule 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. 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 the present case, Mr. Derby's entitlement to per diem is governed by the cases cited above and more specifically by our decision in 46 Comp. Gen. 425 (1966) in which we held, with respect to an employee who had delayed his return travel from Friday to Monday, that no additional per diem was payable by reason of his failure to return to headquarters on the weekend, and that his per diem entitlement was limited to the amount otherwise payable if the return travel had been performed after completion of TDY on Friday without interruption. Accordingly, we conclude that the Bureau of Mines allowance of 3/4 day's per diem is correct and reasonable in the circumstances of the present case.

Entitlement to overtime compensation for an employee who is not exempt from FLSA may arise under 5 U.S.C. § 5542 (1976) (for General Schedule employees) or 5 U.S.C. § 5544 (for Wage-Grade employees), or under FLSA itself, 29 U.S.C. § 201 et seq. (1976). The employee is to be paid under whichever law gives him the greater benefit. 54 Comp. Gen. 371, 375 (1974).

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 in the statutory provisions cited above. The mere fact that the application of the "two-day per diem" rule results in an employee being required to travel on his own time is not sufficient to create an entitlement to overtime. See 60 Comp. Gen. ____, (B-198385, B-198386, B-198400, September 10, 1981). We have held that the traveltime

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 FLSA 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. Shirley B. Hjellum and Gary B. Humphrey, B-192184, May 7, 1979.

In the present case, since Mr. Derby is a General Schedule employee, the overtime compensation provisions of 5 U.S.C. § 5544 (1976) are not applicable. Therefore, we must refer to 5 U.S.C. § 5542 (1976) in order to determine whether time spent in a travel status away from the official duty station is "hours of employment," and thus compensable as overtime. Title 5, U.S.C. § 5542(b)(2) (1976) provides:

> "* * * 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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> (A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or
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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 be scheduled or controlled administratively."

Based upon the facts of this case, the Bureau of Mines considered Mr. Derby to be in an annual leave status on Tuesday, March 17, 1981, rather than travel status. As we explain below, that determination was within its administrative discretion. Accordingly, since Mr. Derby was not in a travel status, as required by 5 U.S.C. § 5542(b)(2) (1976), his activities do not satisfy that statutory requirement, and he is not entitled to overtime compensation under that provision.

Under FLSA, an employee who holds a nonexempt position, as Mr. Derby does, must be compensated at overtime rates for such work which exceeds 40 hours in any workweek. 29 U.S.C. § 207 (1976). However, there is no indication in the record that the total traveltime which took place during regular working hours on Tuesday, March 17, 1981, combined with all other hours of work for the week of March 16, exceeded the 40-hour limit for that week. Thus, Mr. Derby is not entitled to overtime under FLSA.

In order to account for the time absent from his official duty station on March 17, 1981, the Bureau of Mines decided to charge 8 hours to Mr. Derby's annual leave account. The charging of annual leave is primarily a matter for administrative discretion. Laxman S. Sundae, B-185652, December 28, 1976; Ernest W. Vogt, 46 Comp. Gen. 425 (1966). It would be reasonable for an agency to charge leave for excess traveltime not justified as officially necessary. In the circumstances of the present case there is no basis for concluding that the Bureau of Mines' decision to charge annual leave for the excess time which resulted from Mr. Derby's decision to interrupt his travel for personal convenience was outside the limits of its discretion.

Accordingly, the charge of 8 hours to Mr. Derby's annual leave account was proper.

Milton J. Socolar

for Comptroller General

of the United States