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DECISION

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

FILE: B-204984

DATE: May 10, 1982

MATTER OF: Donald Cross - Overtime compensation under negotiated labor-management agreement

DIGEST:

1. Employee claims overtime compensation for travel from training assignment outside normal work hours. His claim was initially filed as a grievance which was determined to be a dispute over pay administration and jointly submitted to the Comptroller General by the agency and the union under an additional disputes resolution procedure contained in a negotiated labor-management agreement. The request has been handled as a labor-relations matter under 4 C.F.R. Part 22 (1981), and pursuant to 4 C.F.R. § 22.7(b), the Comptroller General will issue a decision to the parties on their joint request.

2. Bureau of Reclamation employee who traveled outside of normal work hours in connection with a training assignment has no specific entitlement to overtime compensation for his traveltime under 5 U.S.C. § 5544. Prevailing Rate employee here is a member of a bargaining unit which has rates of pay and working conditions determined by collective bargaining. Their contract provisions are covered by the savings provisions in section 9(b) of Pub. L. No. 92-392, August 19, 1972, and in section 704 of Pub. L. No. 95-454, October 13, 1978, the Civil Service Reform Act of 1978. Accordingly, the provisions of the labor-management agreement negotiated in accordance with prevailing rates and pay practices govern the entitlement to overtime compensation.

3. Provision of 5 U.S.C. § 4109 prohibiting payment of premium compensation to employees during periods of training does not in itself preclude payment of overtime compensation to

employees traveling to and from places of training. Here, controlling labor-management agreement provision, which is protected by the savings provision of section 9(b) of Pub. L. No. 92-392, August 19, 1972, provides for payment of overtime among other things for time worked in excess of 8 hours in a workday and time worked outside of regular hours on a workday, but is silent on issues of travel as hours of work or travel to or from training performed outside normal work hours. We conclude that there is no law or other authority which establishes an overtime entitlement for travel from training assignment outside normal work hours.

4. Fair Labor Standards Act (FLSA) does not modify any existing pay laws, rather it establishes a minimum standard to which "nonexempt" employees are entitled. Fact that employee may have overtime compensation entitlement under provision of negotiated labor-management agreement protected by the savings provision of section 9(b) of Pub. L. No. 92-392, August 19, 1972, does not preclude entitlement of a nonexempt employee to overtime compensation under the terms and conditions of FLSA, which would only be used if it provided a greater benefit. However, where that same employee has been determined to be "exempt" from provisions of FLSA, his entitlement to overtime compensation arises--if at all--under the labor-management agreement.

This matter comes before us as a joint submission from the Mid-Pacific Regional Office, Bureau of Reclamation, Department of the Interior (agency), and the International Brotherhood of Electrical Workers, Local 1245 (union). It involves the overtime compensation claim of Mr. Donald Cross who performed travel outside his normal working hours in connection with a training assignment. The issue was initially the subject of a grievance, which, when determined to be a

disagreement over pay administration, was jointly referred to the Comptroller General in accordance with the General Labor Agreement concluded by the parties. The request has been handled as a labor-relations matter under our procedures contained in 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689-92, August 21, 1980). Pursuant to 4 C.F.R. § 22.7(b), our decision follows.

FACTS AND CONTENTIONS OF THE PARTIES

The record shows that Mr. Cross, an Operations Supervisor at the Bureau of Reclamation's Shasta Office in Redding, California, is an hourly employee and a member of a bargaining unit represented by Local 1245, for which personnel policies, working conditions, and pay matters are negotiated and formalized in a General Labor Agreement between the agency and the union. Mr. Cross left Redding at 2:30 p.m. on Sunday, October 26, 1980, by Government-furnished auto to attend a training course titled "Introduction to Supervision." Mr. Cross arrived in Sacramento at 6 p.m, and attended the training session during the week, returning to his duty station on Friday, October 31, 1980. He left Sacramento at 4 p.m. Friday and arrived in Redding at 8 p.m. that same day. This required Mr. Cross to travel the equivalent of 6 hours outside his normal work hours.

Mr. Cross submitted a claim for 6 hours of overtime related to the above travel to and from his training assignment. The claim was denied by the agency on the following basis:

> "a. The General Labor Agreement is silent on this specific issue. Supplementary Labor Agreement No. 2, Article III, Section 1 defines overtime as: 'Overtime is defined as (a) time worked in excess of forty (40) hours in an administrative workweek, (b) time worked in excess of eight (8) hours on a workday, (c) time worked on a nonworkday except for prearranged holiday work during regular work hours, and (d) time worked outside of regular hours on a workday. Nothing contained herein shall be construed to require the payment of overtime compensation

under more than one of the foregoing definitions for a single period of overtime.

"b. Mr. Cross is an Operations Supervisor, which is a job that fully meets the full range of Foreman in terms of his responsibilities and is in a supervisory position. This determination was made based on a review of the duties and responsibilities of the position Mr. Cross occupies along with the definition of executive exemption found in Federal Personnel Manual System Letter Number 551-7 dated July 1, 1975, (copy attached). As such, the Bureau determined Mr. Cross met the criteria which made him an exempt employee under the provisions of the FLSA, which precludes the payment of overtime for travel under the Act.

"c. Since it was determined the position was exempt under provisions of the FLSA, we believe that overtime authority must come from general authorities on pay administration found in Title 5, USC. Section 5542(b)(2) of that Title states that time spent in a travel status away from the official duty station is not hours of work (i.e., time worked) unless it occurs within the regularly scheduled workweek, workday. Further, Title 5 precludes the payment of overtime for time traveled for training. Since Mr. Cross was determined to be exempt under FLSA because he was a full-time supervisor, there was no legal basis for payment of overtime in this instance."

After receiving the Bureau's determination not to pay his claim, Mr. Cross grieved under the negotiated grievance procedure contained in the General Labor Agreement between the Parties. Being an hourly paid employee employed in connection with the Central Valley Project, Mr. Cross is covered by provisions of the General Labor Agreement. Mr. Cross and the Union's position in the grievance is that it is improper for someone to declare a bargaining unit member exempt and therefore subject to pay provisions different than other bargaining unit members.

The Bureau counters that the Basic Agreement (Article I, Section 1) states in part that the Agreement is subject to all applicable Federal laws and regulations, all of which are regarded as paramount. Thus, in considering the initial claim of Mr. Cross, the Bureau held that the FLSA and title 5, United States Code were paramount. As Mr. Cross was considered an exempt employee and not entitled to overtime under these two laws, his claim was denied.

ANALYSIS AND OPINION

A. OVERTIME UNDER TITLE 5

The provisions of 5 U.S.C. § 4109(a)(1), which prohibit payment of premium compensation to employees during periods of training, such as that performed by Mr. Cross, do not prevent payment of overtime compensation to employees traveling to and from places of training. B-165311, November 12, 1968. However, the performance of travel to or from training outside of normal work hours does not automatically create an overtime entitlement. In enacting 5 U.S.C. § 6101(b)(2), it is clear that the Congress intended that generally travel should not be scheduled outside of an employee's regularly scheduled workweek. At the same time, however, it left to the discretion of the employing agency the determination of when it is impracticable to schedule official travel within the scheduled workweek of an employee. Wallace N. Peterman, B-197128, March 31, 1980. Moreover, Congress did not provide a remedy if an agency fails to adhere to the policy enunciated in 5 U.S.C. § 6101(b) (2), there being nothing in that section requiring the payment of compensation for travel outside an employee's regularly scheduled workweek. 51 Comp. Gen. 727, 733 (1972). The four conditions for paying overtime for travel outside duty hours are found in section 5544 of title 5, United States Code, governing overtime compensation for prevailing-rate employees.

There is however a caveat, apparently unrecognized by the parties, which precludes consideration of Mr. Cross' overtime claim under title 5, United States Code. This conclusion follows from the fact that Mr. Cross' overtime entitlement is governed by the provisions of the General Labor Agreement between the agency and the union which is

covered by the savings provisions of section 9(b) of Pub. L. No. 92-392 and the subsequently enacted savings provisions in section 704 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, October 13, 1978, 92 Stat. 1218.

Section 9(b) of Pub. L. No. 92-392, August 19, 1972, 86 Stat. 574, states:

> "(b) The amendments made by this Act shall not be construed to--
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> "(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;
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> "(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or
>
> "(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date."

The record shows that the labor-management agreement between the agency and the union here is a revision of the General Labor Agreement between the Bureau of Reclamation and the Central Valley Trades Council that was effective August 29, 1952. Jurisdiction was transferred to Local

1245, International Brotherhood of Electrical Workers, effective June 2, 1964. Article II, Section 4 of the agreement, provides that wage schedules, working rules, and other matters are determined through negotiation. Therefore, the agreement here is covered by the savings provisions of section 9(b) quoted above.

In like manner the labor-management agreement is covered by section 704 of Pub. L. No. 95-454 set out as a rate under 5 U.S.C. § 5343, Supp. III 1979 which states as follows:

> "SEC. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.
>
> "(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--
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> > "(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;
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> > "(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or
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> > "(C) any rule, regulation, decision or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter

> V of chapter 55 of title 5, United States Code."
> (Underscoring supplied.)

In view of the above provisions of law, particularly section 704(b)(C), the prevailing rate employees here are entitled to negotiate contract provisions in accordance with prevailing rates and pay practices without regard to 5 U.S.C. § 5544 or any rule, regulation, decision, or order made thereunder. Such contract provisions which may be inconsistent with 5 U.S.C. § 5544 are protected by law and may be properly implemented. 58 Comp. Gen. 198 (1979). Therefore, the provisions of the labor-management agreement between the agency and the union govern Mr. Cross' overtime entitlement. See B-195442, June 5, 1980.

However, the application of section 704(a) is premised on the concept that prevailing rates and practices shall be used in determining what the terms and conditions of employment and other employment benefits are. Moreover, section 704(b) specifically requires that the pay and pay practices of employees under these negotiated contracts "* * * shall be negotiated in accordance with prevailing rates and pay practices * * *." Thus, even though the Congress gave broad authority for the negotiation of wages to those employees who had historically negotiated their wages, Congress insisted that the authority shall be governed by prevailing rates and pay practices. See B-198590, August 26, 1981.

As has been indicated, the contract provision here in question was in existence before August 19, 1972, and thus falls within the purview of sections 9(b) and 704. However, the agreement is silent on the issues of travel as hours of work and overtime compensation for travel to and from training performed outside normal work hours. The union has made no argument that the claimed overtime is provided for by the terms of the agreement. Although we normally would not undertake to interpret the provisions of a collective bargaining agreement, 1/ we have been asked by the parties to the agreement to rule on the agency's denial of the employee's claims for 6 hours

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1/ See generally Aletha B. Bowie and Melinda Zarriello, B-200002, April 2, 1982.

overtime. In our opinion, there is nothing in the agreement to authorize payment of the claim.

B. OVERTIME UNDER FLSA

The union contends that it is improper for someone to declare a bargaining unit member exempt and therefore subject to pay provisions different than other bargaining unit members. Thus the union argues, Mr. Cross has an additional entitlement under the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 29 U.S.C. § 201, et seq., as amended (FLSA). Although we concur with the agency's contention that Mr. Cross is exempt from coverage under FLSA, a preliminary discussion will facilitate our analysis.

The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, which brought Federal employees under the coverage of the FLSA, were not intended to decrease an employee's compensation Rather, they set a minimum standard of payment to which an employee is entitled. If an employee receives greater benefits under the FLSA, then his compensation should be computed under the FLSA. If he receives greater remuneration under existing pay rules, then the employee continues to receive that benefit. The FLSA is only used if it provides greater compensation.

The Civil Service Commission issued "Interim Instructions for Implementing the Fair Labor Standards Act," Federal Personnel Manual Letter No. 551-1 on May 15, 1974. Paragraph 2 of that letter states:

> "While the FLSA does not modify any existing pay laws, it does establish a minimum standard to which nonexempt employees are entitled. To the extent that the FLSA would provide a greater pay benefit to a nonexempt employee (e.g., a higher overtime rate) than the benefit payable under other existing pay rules, the employee is entitled to the FLSA benefit. If other existing pay rules provide a greater benefit, of course the employee continues to receive that benefit."

In discussing the history of the FLSA and the 1974 amendments, we stated in 54 Comp. Gen. 371, 373 (1974):

"The FLSA was first enacted into law on June 25, 1938, and has been amended several times to raise the minimum wage provisions of the original act as well as to expand the coverage of the act to encompass additional groups of employees. It is clear, however, throughout its 36 year history, that the benefits provided were always regarded as minimums, not maximums; a floor and not a ceiling. * * *"

As a result we have held that the minimum wage and overtime rates of the FLSA apply only if they operate to give the covered employee a greater benefit than his or her existing pay rules. Bobby F. Cutright, B-182575, July 28, 1975. Thus, if Mr. Cross were a "nonexempt" employee for purposes of coverage under FLSA, and if it were determined that he was in fact entitled to overtime compensation under the labor-management agreement, he would receive overtime compensation under whichever method produced the greater benefit.

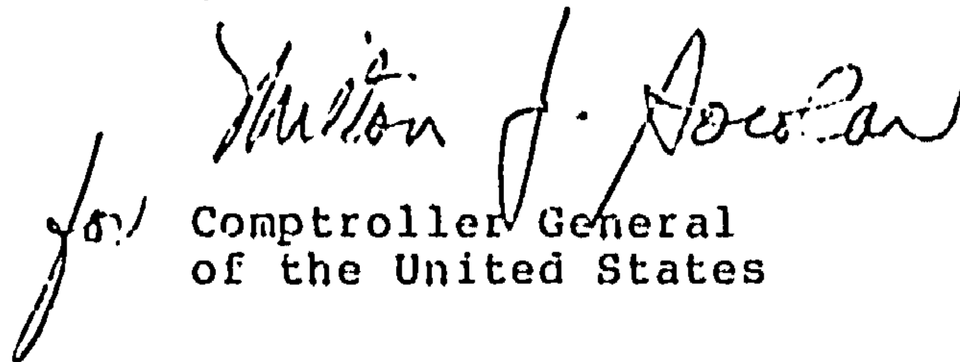
In Mr. Cross' case however, the agency has determined that he is a supervisor and has met the criteria making him an "exempt" employee under 29 U.S.C. § 213(a)(1), and that he is therefore precluded from coverage for purposes of claiming overtime under FLSA. On the record before us, we must concur with this determination.

Our position in this regard follows from the fact that 29 U.S.C. §§ 201, 204(f) authorizes the Office of Personnel Management to administer the provisions of that Act with respect to most Federal employees. Thus, the Office of Personnel Management is responsible for determining which Federal employees are covered by FLSA. The criteria for determining who is "nonexempt" (covered) and who is "exempt" are set forth in FPM Letter 551-7, July 1, 1975. That letter with its attachment provide instructions to agencies for applying the FLSA exemption provisions. The FPM Letter 551-9, March 30, 1976, provides for an FLSA compliance and complaint system under which an employee alleging an FLSA violation has the right to file a complaint with OPM. This procedure for processing complaints includes an initial investigation on the basis of written presentations from all parties and also provides for onsite investigations, if necessary. Upon completion of the investigation, a compliance order is issued by OPM where violations are found to have occurred.

In view of the authority granted the former Civil Service Commission (now OPM) to administer FLSA for Federal employees, we held in Claims Representatives and Examiners, B-51325, October 7, 1976, that such authority necessarily carried with it the authority to make final determinations as to FLSA coverage and, therefore, that we will not review the Commission's determinations as to an employee's exemption status. See Civilian Aircraft Pilots, B-203128, January 4, 1982.

In Mr. Cross' case there is no evidence of any exemption complaint or appeal to OPM. Moreover, there is no contradictory evidence offered to refute his status as an exempt employee, and we have no reason to challenge the agency's conclusion.

Accordingly, it is our opinion that since Mr. Cross is exempt from coverage under FLSA, his entitlement to overtime in the circumstances of his claim arises-- if at all--under the provisions of the labor-management agreement. And, as we have indicated, we find nothing in the labor-management agreement to authorize payment of overtime to Mr. Cross for the 6 hours of travel.



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