

DECISION

216915 21752 *Harman*
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

118315

FILE: B-206443

DATE: May. 5, 1982

MATTER OF: Computation of overtime due hostages

DIGEST: Employees held as hostages in United States Embassy in Iran are entitled to be paid for overtime they would have worked had they not been taken hostage. If prior to the takeover the employees worked regularly scheduled overtime, for the period of internment, they are entitled to pay consistent with overtime regularly scheduled. For overtime which was not regularly scheduled, the hostages are entitled to overtime they would have earned but for internment and, under the circumstances of this case (i.e., takeover of Embassy and internment of all employees), the determination of how much overtime they would have worked is for Department of State to make.

The question in this case is the appropriate method to be used to determine the amount of overtime compensation due the Government employees who were taken hostage at the United States Embassy in Tehran, Iran, in November 1979. Overtime compensation should be paid consistent with the amount of overtime the hostages would have earned but for their internment. Under the circumstances of this case, the Department of State may base the computation on the average amount of overtime earned by each hostage for the six pay periods immediately preceding the seizure of the Embassy.

Due to the unrest in Iran during the latter part of 1979, the work force at the United States Embassy in Tehran was reduced to a skeleton force. In order to accomplish the required work of the Embassy, the skeleton force worked more overtime than that worked by personnel at other United States Embassies until the Embassy was seized by Iranians on November 4, 1979.

Department of State personnel who are in the process of determining the amount of compensation due the employees held hostage, including overtime compensation, are uncertain

as to the correct method of computing the overtime, Department representatives indicate that they are considering paying the hostages overtime based on the average amount earned by each hostage for the six pay periods immediately preceding the seizure of the Embassy.

Department personnel indicate that they are aware of certain of our previous decisions in the area of paying overtime to employees in a missing status, particularly Matter of Stark, 54 Comp. Gen. 934 (1975) and 55 Comp. Gen. 147 (1975); and 22 Comp. Gen. 745 (1943). They suggest, however, that these decisions do not resolve the present case because the bases set out for determining the overtime for the employees in those cases are not applicable to the hostages.

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, for the period he is in that status, the "same pay and allowances to which he was entitled at the beginning of the period." See 5 U.S.C. § 5562(a). Included in the pay and allowances a missing person is entitled to receive is pay for overtime he would have performed ordinarily during the period of internment. See 55 Comp. Gen. 147 (1975).

Although the Department personnel recognize the above general principle of paying overtime, they are unsure as to how to apply it here since none of our decisions regarding the general principle appear to specifically apply to the hostages' situation. For example, in 22 Comp. Gen. 745 (1943), which concerned some employees who were interned in the Philippines during World War II, we indicated that the interned employees could receive overtime pay if the remaining employees of the office concerned were entitled to overtime pay, consistent with law, after the office was reestablished in the United States. 22 Comp. Gen. at 750. And, in 54 Comp. Gen. 934 (1975) concerning an employee who was a prisoner of war in Vietnam, we ruled that to compute

*Missing status includes when an employee is interned in a foreign country, captured by a hostile force or detained in a foreign country against his will. 5 U.S.C. § 5561(5)(C)(D), and (E).

his entitlement to overtime, the best method would be to ascertain the amount of overtime earned by his replacement. We went on to add that if there were no available records to do this, the agency could use a constructive figure for overtime by averaging the number of overtime hours worked by other employees performing similar duties in the same office where the missing person had been employed. Finally, we indicated that since it appeared that the employee's office was disestablished after his capture, his constructive overtime should cease as of the date of the disestablishment unless it could be shown he would have been reassigned to an office where he would have worked overtime.

In 55 Comp. Gen. 147, to clarify the entitlements in this area, we indicated that the first question to be determined is whether the missing person's overtime hours prior to his becoming missing were part of his regularly scheduled workweek, or were temporary allowances, not regularly scheduled. This determination is to be made by the employing agency under 5 U.S.C. § 5566(c), which authorizes the head of the agency concerned to make certain determinations as to a missing employee's entitlements to pay and allowances. See 55 Comp. Gen. at 148-149. Apparently in the hostages' case, the overtime in question is not regularly scheduled since the computation method for regularly scheduled overtime is relatively clear. That is, the missing person is entitled to the continuation, for the period of his captivity, of overtime which was a part of his regularly scheduled workweek.

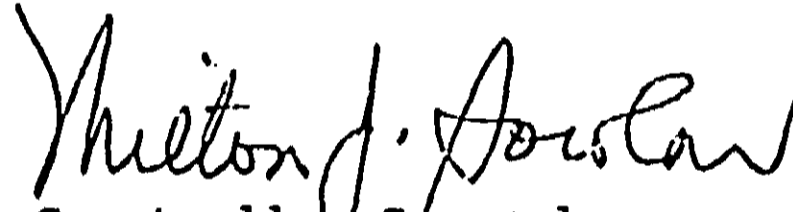
Where the overtime was not a part of the regularly scheduled workweek, it was in the nature of a temporary allowance. In such a case our view has been that the employee's entitlement to overtime while interned should be based on overtime earned by his replacement or other similarly situated person. That is, it would not necessarily have continued but for his internment as would his regularly scheduled overtime. Therefore, for this overtime the basis of payment depends on a showing that, but for his internment, the employee would have performed additional unscheduled overtime which was to be evidenced by the work done by the interned employee's replacement or others similarly situated within his office.

As discussed above, we have provided certain rules to determine a missing person's overtime if the overtime

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was not regularly scheduled. These rules, however, were applied to a situation where one individual from an office was interned but his office continued in existence for a time thereafter, and upon the office being disestablished, the employees were transferred. Clearly, as the Department has indicated, this situation is distinguishable from the takeover of the Tehran Embassy where all employees of the Embassy were interned.

Since the entire Embassy was taken over (there were no replacements to use for a guide) and since the overtime worked by employees in other embassies is not considered a reasonable guide by the Department in this case, it will be necessary for the State Department to determine what would have transpired at the Embassy but for its seizure. If the Department determines that the skeleton force would have continued in existence and worked the average amount of overtime being worked for the pay periods immediately prior to the takeover of the Embassy, we would not object to computing the employees' entitlement on that basis.



Acting Comptroller General
of the United States