DECISION

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

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FILE: B-206658 DATE: November 10, 1982

MATTER OF: Retention of Time and Attendance Records

DIGEST: 1. FAA questions whether time and attendance (T&A) reports should be retained more than 3 years in order to adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years.

2. Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from GAO. See 44 U.S.C. § 3309.

3. Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies.

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The issues in this decision are (1) whether time and attendance (T&A) reports should be retained 6 years instead of the present 3 years in order to adjudicate claims such as overtime under the Fair Labor Standards Act (FLSA), and (2) if such records are kept only 3 years, whether claims beyond 3 years may be denied due to the absence of official records. We hold that (1) T&A reports need not be kept more than 3 years except where claims have been filed, but that (2) claims beyond 3 years may not be dismissed because T&A reports are no longer available.

This decision is in response to a request from George B. Fineberg, Chief, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA). The request states that according to the General Records Schedule 2 issued by the General Services Administration (GSA), T&A reports are to be destroyed after General Accounting Office (GAO) audit or 3 years, whichever is sooner. However, since T&A reports are used in adjudicating claims such as retroactive entitlement to overtime under the FLSA, the FAA notes that such information would be unavailable for claims extending beyond 3 years. See, for example, B-200112, December 21, 1981, involving retroactive coverage under the FLSA for certain FAA employees subject to a 6-year statute of limitations. Therefore, the FAA questions (1) whether T&A files should be destroyed in accordance with the GSA schedule without regard to claims which have or may be submitted for up to a 6-year period, and (2) if such records are destroyed, whether claims for more than 3 years may be denied because official files to adjudicate the claim are no longer available.

Under the provisions of 44 U.S.C. Chapter 31, Federal agencies shall maintain adequate records of its activities, and under the provisions of 44 U.S.C. Chapter 33, certain records shall be disposed of according to schedules agreed to by the Administrator of General Services. See 44 U.S.C. § 3303a (1976); and 41 C.F.R. Part 101, Subpart 101-11.4 (1981). The General Records Schedule 2

(Payrolling and Pay Administration Records) issued pursuant to 41 C.F.R. § 101-11.404-2 provides the disposition schedule for certain types of records common to many or all agencies including T&A report files (Standard Form 1130 or equivalent) which, under the Schedule, are to be destroyed after GAO audit or when 3 years old, whichever is sooner.

These records disposition schedules are developed by the National Archives and Records Service (NARS) of GSA following consultation with GAO and other appropriate agencies (41 C.F.R. § 101-11.404-2(b)), and, in fact, the question of the retention of T&A reports for 6 years, instead of 3 years because of claims under the FLSA, has been the subject of recent inquiries by NARS to our Office in 1979 and 1981. In our response to the 1979 inquiry from NARS, we recommended that it issue specific exemptions to those agencies which had requested a 6-year retention period for T&A reports, and that it monitor the experience to determine the usefulness of retaining T&A reports an additional 3 years. In 1981, NARS again requested extension of the T&A reports retention period to 6 years but without providing any information on the usefulness of T&A reports in adjudicating claims and the usefulness of the longer retention period. We advised NARS that without that additional information we could not determine whether T&A reports should be retained an additional 3 years.

In some situations T&A reports may not be determinative of an employee's entitlement to overtime under the FLSA in prior years since generally T&A reports will reflect only the regular and overtime hours for which the employee is being paid. Thus, if an employee claims overtime under the FLSA for hours of work not compensable under title 5, United States Code, such hours probably will not be reflected on prior T&A reports, and these reports would have limited usefulness in adjudicating these claims. Other considerations in determining whether to retain T&A reports an additional 3 years are the cost of storage and/or microfilming the T&A reports

and whether the cost is justified in view of the questionable value of using such records in adjudicating claims.

As we advised NARS in 1979 and 1981, we have no objection to permitting agencies which request extensions to retain T&A reports for 6 years, but in the absence of additional information justifying the need for a permanent extension to 6 years, we would not recommend any change in the General Records Schedule 2 with regard to the retention of T&A reports at this time. If the FAA or any other agency wishes to experiment with a 6-year retention period, they should request an extension of time from NARS. See 41 C.F.R. § 101-11.406-8.

We should point out that the requirement to destroy T&A reports after 3 years pursuant to the schedule does not apply to situations where claims have been filed by or against the Government. Such records must be retained until the claims have been settled, unless written approval is received from our Office. 44 U.S.C. § 3309 (1976).

A second question posed by the FAA is, if T&A reports are retained only 3 years, may an agency reject a claim more than 3 years old on the basis that agency records are no longer available? For the reasons stated below, we hold that agencies may not treat claims in this manner.

First, if agencies are permitted to deny claims filed more than 3 years after the claim accrues based on the absence of official records, the effect will be to reduce the statute of limitations from 6 years to 3 years. See 31 U.S.C. § 71a (1976). In addition, agencies cannot argue that no records are available since the Individual Pay Card (Form 1127), which is kept 56 years, indicates earnings and deductions in dollar amounts on a pay period basis.

Finally, the Fair Labor Standards Act imposes on an employer the requirement to keep adequate records. 29 U.S.C. § 211(c); and 29 C.F.R. Part 516 (1981). The FLSA regulations issued by the Office of

Personnel Management (5 C.F.R. Part 551 (1982)) do not impose upon Federal agencies any specific recordkeeping requirements, but our decisions have applied the burden of proof recognized in Federal courts where the employer has failed to meet his statutory duty to keep accurate records. See Civilian Nurses, B-200354, December 31, 1981 (61 Comp. Gen. _____ (1981)); 60 Comp. Gen. 523 (1981); and Christine D. Taliaferro, B-199783, March 9, 1981. In those decisions we have held that where the employee presents acceptable evidence that he worked the overtime and was not compensated, the burden of proof shifts to the employer. Where the agency has failed to keep accurate records, the employee's claim must be paid. Taliaferro, supra.

We note that in the proposed regulations issued by OPM, agencies would have been required to keep "complete and accurate records of all hours worked by its employees" for a period of 6 years. 45 Fed. Reg. 49580, 49582, July 25, 1980. However, when the final regulations were issued, this recordkeeping requirement was removed based, in part, on advice from our Office that the present records retention schedule was sufficient for our use in settling pay claims. 45 Fed. Reg. 85659, 85660, December 30, 1980. However, in view of our recent decisions, OPM may wish to reconsider and impose a specific record-keeping requirement on Federal agencies. See also our report HRD-81-60, May 28, 1981, recommending statutory and administrative changes to strengthen employer recordkeeping in private sector FLSA cases.

Milton J. Socolar

Acting Comptroller General
of the United States