



United States  
General Accounting Office  
Washington, D.C. 20548

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Office of the General Counsel

B-246567

June 9, 1992

Mr. John R. Vaughn  
Comptroller  
Defense Mapping Agency  
8613 Lee Highway  
Fairfax, Virginia 22031-2137

Dear Mr. Vaughn:

This is in response to your letter of November 4, 1991, asking for our opinion on whether certain prevailing rate (wage board) employees are entitled to night differential and Sunday premium pay. We note that this case concerns members of two collective bargaining units covered by grievance procedures under a negotiated agreement that does not specifically exclude the issues presented here from its coverage. Under our decision in B-222926.3, Apr. 23, 1992 (copy enclosed), we no longer accept such cases for decision. However, since this case was submitted to us prior to issuance of the decision, we are providing the following views for the information of the parties.

BACKGROUND

The claimants are employees of the Defense Mapping Agency (DMA) Hydrographic/Topographic Center, Graphic Arts Department, Brookmont, Maryland, who work a regularly scheduled tour of duty from 6:30 a.m. to 3:00 p.m. (with 30 minutes for lunch), Monday through Friday.

When Operation Desert Shield began in August 1990, DMA management made the decision to operate the presses within the Graphic Arts Department 24 hours a day, 7 days a week. The claimants were required to report at 2:45 a.m., approximately 4 hours before the start of their normal work shift. The DMA treated the first 4 hours of the shift (2:45 a.m. to 6:45 a.m.) as overtime hours and paid the claimants overtime pay as provided for under 5 U.S.C. § 5544(a) (1988).

The claimants contend that they should have been paid a night-shift differential as provided for under 5 U.S.C. § 5343(f) for the period of August 1990 through February 1991. Subchapter S8-4c of the Federal Personnel Manual

Supplement 532-1 (Inst. 23, June 29, 1984), implementing section 5343(f), provides for the payment of a night-shift differential for the entire shift when the majority of an employee's regularly scheduled nonovertime work hours occur between 11:00 p.m. and 8:00 a.m. The claimants believe that they are entitled to night differential because they were required to report to work at 2:45 a.m. and perform a 12-hour day of work on a regularly scheduled basis during the time in question. They contend that the assignment of the scheduled overtime hours had the effect of changing their workday and the first 8 hours worked each day should be treated as the regularly scheduled workday and the hours worked in excess of the first 8 should have been treated as overtime. If the employees are correct, then payment of night-shift differential would be required since 5 hours and 15 minutes, a majority of the 8-hour regularly scheduled nonovertime workday, would have occurred between 11:00 p.m. and 8:00 a.m. The claimants also contend that they are entitled to Sunday premium pay under 5 U.S.C. § 5544(a), even though the work they performed on Sundays did not fall within their scheduled administrative workweek.

The DMA contends that no change to the 8-hour per day basic workweek occurred and, therefore, no authority exists to authorize night-shift differential or Sunday premium pay, for the following reasons: (1) the DMA did not notify either union representing the affected employees of any change to the hours of the administrative workweek as required by the collective bargaining agreements when such a change is effectuated; (2) when the employees were not required to work overtime, they signed in and out at the same work hours as before Desert Shield overtime was instituted; (3) when employees assigned to the 12-hour shift were absent, they were charged 8-hours of leave for the period 6:30 a.m. to 3:00 p.m. only; (4) pressroom lineup schedules for the period in question identified the hours of the basic workweek shift as from 6:30 a.m. to 3:00 p.m.; and (5) the affected employees were paid overtime for any hours worked in excess of 8 hours per day and in excess of 40 hours per week, whereas if the regularly scheduled administrative workweek had been changed as alleged (e.g., 12 hours on Monday, Tuesday and Wednesday, and 4 hours on Thursday), the employees would not have been entitled to overtime unless they worked in excess of 12 hours per day or until they reached a total of 40 hours of compensable time.

#### DISCUSSION

The authority for the payment of night differential as a part of basic pay to prevailing rate employees is contained in 5 U.S.C. § 5343(f) (1988), which authorizes such differential for "regularly scheduled nonovertime work" a majority of the hours of which occur between 3:00 p.m. and

8:00 a.m. See also 5 C.F.R. § 532.501 (1990). Similarly, Sunday premium pay, authorized by 5 U.S.C. § 5544(a), is payable to an employee whose regular work schedule includes an 8-hour period of service "which is not overtime work," a part of which is on Sunday. 5 C.F.R. § 532.509. See 63 Comp. Gen. 316 (1984).

The term "regularly scheduled" is not defined in the statute, but the implementing regulations define "regularly scheduled administrative workweek" as an administrative workweek scheduled in advance and corresponding to the employee's actual work requirements. 5 C.F.R. §§ 550.103(n) and 610.121(b)(1). The regulations further provide that each regularly scheduled administrative workweek shall consist of a 40-hour "basic workweek", plus the period of regular overtime work if any, required of each employee. 5 C.F.R. § 610.111(2).

Under the work schedules set by the agency in this case, the Sunday work and night work were performed as overtime and compensated as such. Accordingly, those periods would not qualify for Sunday premium pay or night differential.<sup>1</sup>

The claimants argue, however, that the administrative workweek had to have changed since the agency is required to schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements. 5 C.F.R. § 610.121(b), supra. While that is true, as noted above, each agency is responsible for fixing the hours of work of its employees, subject to applicable laws and regulations, to accomplish the mission of the agency. See 5 U.S.C. § 6101(a)(2) and 5 C.F.R. §§ 610.111, 610.121(b). The DMA had the discretion to establish work schedules and order and approve overtime.

Based on the record before us, we do not find that DMA knowingly failed to schedule the claimant's administrative workweeks in accordance with regulatory requirements. The agency states that it did not change the basic workweek, and it is clear that the employees ordinarily worked their regular 8-hour scheduled shifts and, in addition worked 4 hours of regularly scheduled preshift overtime for which

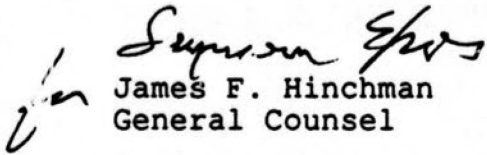
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<sup>1</sup>The union refers to our decision at 59 Comp. Gen. 101 (1979), where under limited circumstances we allowed night differential for periods for which employees also received overtime pay. However, that case concerned occasional or irregular overtime, and the regulations under which it was decided were superseded by the regulations applicable in the present case which specifically preclude night differential for the overtime worked in the present circumstances. See 63 Comp. Gen. 316, 319-320 (1984).

they were paid overtime pay. In view of the emergency situation that existed in connection with Operation Desert Shield and the uncertainty as to the extent of the required extra work, the agency appears to have acted within its authority to retain the existing basic workweek and schedule the overtime at the beginning of each day. See 5 C.F.R. §§ 550.103(n) and 610.111(a)(2), supra.

As noted above, the affected employees are represented by unions and covered by collective bargaining agreements which deal with the issue of hours of work and provide for grievance procedures which do not exclude the issue of work schedules. If the unions believed that DMA was failing to properly schedule the workweek or overtime, the issue could be more appropriately addressed by the initiation of a grievance under the collective bargaining agreement.<sup>2</sup>

Sincerely yours,

  
James F. Hinchman  
General Counsel

Enclosure

cc: Honorable Tom McMillen  
Member, U.S. House of Representatives

Mr. James D. White  
Member, AFGE Local 3407

Mr. Richard F. Dove  
President, Graphic Communications  
International Union 98-L

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<sup>2</sup>We have been advised that to date no grievances relating to work schedules or night differential have been filed.