

8741 J. Goddard



DECISION

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

PLM I

Compensation for Forest Service Employees

FILE: B-189742 *General Schedule for* DATE: December 27, 1978

MATTER OF: Forest Service Dispatchers ^{on} Standby Duty
At Home } ~~General Schedule~~

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- DIGEST:
1. Forest Service dispatchers required to remain on standby duty at their homes during fire season may be allowed premium pay under 5 U.S.C. 5545(c)(1) and regulations issued thereunder by Civil Service Commission (5 C.F.R. 550.141, et. seq.) for hours of standby duty at home.
 2. Forest Service employees in standby status at their residences and compensated under General Schedule are not entitled to regular overtime compensation under 5 U.S.C. 5542 for hours of standby duty at home.

The Forest Service has requested our decision as to an equitable method of compensating Forest Service employees in their Pacific Northwest Region, who work as dispatchers during the fire season, which normally runs from June 15 to October 20, while in a standby status at their homes.

The Forest Service states that it is essential to have dispatching service available during the fire season on a 24-hour a day basis and that such service requires experienced people and cannot be done with temporary hires. Because of budget and ceiling restrictions, two or three qualified employees at each protection unit rotate duty schedules after regular work hours and on nonworkdays to insure this service. When fire potential is high, but there is no going fire, the employees perform the dispatcher service at their homes. Their homes are equipped with Government telephones, fire order forms, manifests, and mobilization plans. These employees are essentially free to pursue their normal at-home activities, but their whereabouts are narrowly restricted and they are not free to leave as they must be within hearing distance of the telephone. In the past they have been paid for actual work performed at home as a result of a call, but not for other time spent at home on standby.

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Specifically, two questions are presented. The first of these is whether the Forest Service has authority to require employees to remain on call at their homes under the circumstances described. Secondly, the Forest Service asks how it can compensate the employees for the time that they are on call but not actually engaged in work. The agency indicates that payment of overtime rather than standby differential may be appropriate under Hyde v. United States, 209 Ct. Cl. 746 (No. 322-73), April 16, 1976; 55 Comp. Gen. 1314 (1976).

Authority to Allow Overtime Compensation

We will first address the issue of whether the payment of overtime under 5 U.S.C. 5542 is appropriate. The situation of the fire dispatchers in this case, who are General Schedule employees, is to be distinguished from that of the employee in Hyde v. United States, *supra*. In Hyde, a Wage Board employee who served as a duty security officer at a naval research station was held to be entitled to overtime compensation under 5 U.S.C. 5544 for time spent in a standby or on-call status, during which he was confined to the 10-acre area of the Navy installation on which his residence was located. The court found that under the facts presented the plaintiff met the stringent criteria established by the Civil Service Commission and the Navy regulation. Our 1976 decision on Hyde, *supra*, applied the court decision for the period not covered by the judgment "under the facts as found" by the court.

Hyde is to be distinguished from the present case because of the difference between the statutory provisions covering pay for Wage Board employees and General Schedule employees. There is no provision for standby premium pay for Wage Board employees comparable to that of 5 U.S.C. 5545(c)(1), which applies to General Schedule employees. Therefore, in order to compensate Hyde for time spent in a standby status, the judge in that case had to rely on the regular overtime provisions applicable to Wage Board employees contained in 5 U.S.C. 5544(a) (1976). A similar situation was involved in the other case to which the agency refers, Matter of Ralph F. Conway, B-176924, September 20, 1976.

In contrast, General Schedule employees may be compensated for standby duty under the premium pay provisions of 5 U.S.C. 5545(c)(1). Indeed, 5 U.S.C. 5545(c)(1) was enacted for the express purpose of allowing additional annual pay in lieu of overtime, night, and holiday pay for employees who are required to remain at or within the confines

of their stations during longer than ordinary periods of duty, but who spend a substantial part of their time on duty in a standby status rather than actually performing work. See Conference Rep. No. 2665, 83d Cong., 2d Sess. (1954).

Accordingly, we find no basis under the facts presented for payment of regular overtime compensation under 5 U.S.C. 5542 for General Schedule employees' standby duty at their residences. See Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), and Moss v. United States, 173 Ct. Cl. 1169 (1965).

Authority to Require Standby Duty at Home

The authority to fix the hours of work of employees, including the authority to fix basic workweeks and work schedules, is vested in the heads of agencies. This authority may be delegated to subordinate officials and must be exercised in accordance with applicable laws. See 5 U.S.C. 302, 6101(a); 5 C.F.R. 610.111; FPM chapter 610, subchapter 1. In addition, 5 C.F.R. 550.161 (1978), which pertains to payments of premium pay on an annual basis, provides as follows:

"The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for:

"(a) Fixing tours of duty; ordering employees to remain at their stations in a standby status; and placing responsibility on employees for remaining on duty when required by circumstances."

Further, under 5 C.F.R. 550.143(b)(3) (1978), quoted below, an employee's living quarters may be designated as a duty station for standby duty purposes. Also see generally Rapp v. United States 167 Ct. Cl. 852 (1964) and Moss v. United States, 173 Ct. Cl. 1169 (1965), wherein the court implicitly recognized such authority.

Accordingly, your first question is answered in the affirmative.

Compensation for Standby Duty at Home

In regard to the second question, 5 U.S.C. 5545(c)(1) (1976), contains the following provision:

"(c) The head of an agency, with the approval of the Civil Service Commission, may provide that -

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 * * *, by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors."

The implementing regulation of the Civil Service Commission, at 5 C.F.R. 550.143(b)(3) (1978), specifies that "at, or within the confines, of his station" includes

"In an employee's living quarters when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject

to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

Thus, the provisions of 5 U.S.C. 5545(c)(1), coupled with the quoted regulation at 5 C.F.R. 550.143(b)(3), supra, would seem to provide for the type of working situation described here. The Forest Service has, however, expressed a concern that standby differential may be inappropriate in this case because the fire season during which the dispatcher service is required to be performed extends only from June 15 to October 20. However, we note that 5 C.F.R. 550.143(a)(2) (1978) provides that the "tour of duty must be established on a regularly recurring basis over a substantial period of time, generally at least a few months." In addition, 5 C.F.R. 550.162(b) provides that when an employee is in a position in which conditions warranting premium pay on an annual basis exist only during a certain period of the year, such as during a given season, an agency may pay the employee premium pay on an annual basis only during the period he is subject to these conditions. Those provisions would appear to recognize that premium pay under 5 U.S.C. 5545(c)(1) may be used in the circumstances here in question, if otherwise proper.

The Forest Service has also indicated a concern that standby premium pay may not be feasible in this case since there is a considerable variation in worktime required depending upon the degree of fire danger and the availability of qualified dispatchers. We believe that this is a situation which should be taken into account as a factor when determining the proper percentage to be used in calculating premium pay. See 5 C.F.R. 550.144. More specifically, section 550.144(b) provides that, if an employee is eligible for premium pay under 550.141 but none of the percentages in section 550.144(a) is applicable or unusual conditions are present which seem to make the applicable rate unsuitable, the agency may propose an annual rate of compensation for the Commission's approval.


A final doubt about the use of premium pay under 5 U.S.C. 5545(c)(1) was expressed because, in order to make use of the standby premium pay provisions in this case, it would be necessary to designate the employee's home as his duty station in accordance with 5 C.F.R. 550.143(b)(3) (1978), supra. The problem perceived was that this would result in the employee having two duty stations, his home and his regular place of work, and that the agency might then be required to pay for travel from one work site to another.

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We are aware of no prohibition on an employee having both a regular place of work and his home designated as his duty station for purposes of 5 U.S.C. 5545(c)(1). The employee still has only one permanent duty station, which is his regular place of work. Thus, no entitlement exists for travel between home and permanent duty station by reason of the designation of the employee's living quarters as a duty station for standby duty purposes.

Accordingly, we believe that premium pay for standby duty under 5 U.S.C. 5545(c)(1) may be used to compensate those Forest Service employees who act as dispatchers during the fire season if otherwise proper.

Although the issue was not raised in the request submitted to us, we would point out that the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., may also be for application. In this regard the record does not state whether the dispatchers are covered by FLSA and if so whether the circumstances in which they perform standby duty would make such duty compensable under the standards in Federal Personnel Manual (FPM) Letter No. 551-14, May 15, 1978. The Forest Service, therefore, should make the appropriate determinations in light of the above.


Acting Comptroller General
of the United States