

DECISION

21661 Pool
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

118240

FILE: B-206035

DATE: April 26, 1982

MATTER OF: James P. Wendel--Intermittent Employee--
Retroactive Change in Appointment

DIGEST: Department of the Army civilian employee who was appointed as a commissary store worker on an intermittent basis may not be retroactively granted a regular part-time appointment, with accompanying fringe benefits, in the absence of evidence establishing that he worked a pre-scheduled, continuous, regular tour of duty. Since the claimant has not produced evidence sufficient to counter the administrative determination that he was not provided specific duty hours in advance, we cannot authorize a retroactive change in status on the basis of his claimed continuous regular tour of duty.

Mr. James P. Wendel has requested "reinvestigation and reconsideration" of our Claims Group's determination that as an intermittent employee he was not entitled to earn leave and other fringe benefits as a part-time employee having a regular tour of duty. Absent convincing evidence establishing that Mr. Wendel worked an administratively prescribed regular tour of duty, there remains no legal basis upon which this Office can authorize his retroactive conversion from an intermittent appointment to a regular part-time appointment with accompanying fringe benefits.

BACKGROUND

Mr. Wendel's claim for retroactive accrual of annual and sick leave and holiday pay arises in connection with his "intermittent appointment" as a Store Worker (WG-7602-4) with the Midwest Commissary Field Office, Fort Bliss, Texas. In essence, Mr. Wendel contends that although his appointment was designated "intermittent," he in fact worked regularly scheduled tours of duty during the period from May 10, 1979, through September 20, 1980. Thus, Mr. Wendel contends that he should have been entitled to earn leave and other fringe benefits associated with such actual part-time employment.

the Commissary Officer, which includes statements of Mr. Wendel's immediate supervisors, concludes as follows:

"* * * Mr. Wendel was never employed, expressed or implied, as a scheduled employee. He was utilized on an 'as required basis' which did at times consist of hours in excess of that normally required of an intermittent employee--but consistent with the intent of intermittent usage wherein employees are utilized when needed to supplement scheduled employees during other than normal workloads. The period of time Mr. Wendel was utilized for excessive hours was during the time prior to the opening of the new store and the period after its opening when the normal organization could not cope with the workload generated. * * *"

In bringing his claim before our Claims Group, Mr. Wendel offered as evidence a "work schedule" and a listing of hours he actually worked which purported to show that his services were required on a regular repetitive basis on an average of 3 days of each administrative workweek which constituted a part-time tour of duty.

By settlement dated July 2, 1981, our Claims Group disallowed Mr. Wendel's claim, dismissing the evidence he offered by concluding as follows:

"Your work schedule is insufficient evidence that you had a regular, established tour of duty. It merely states that the Night Shift Stocking Crew were authorized to work between the hours of 1900 and 0330. There is no indication of the time you were to report each day of an administrative workweek and how long you were to work.

"Also, your listing of the number of hours you worked each pay period has no bearing on your claim, because in 58 Comp. Gen. 167, we held that an employee who worked 80 hours a pay period is not entitled to accrue annual leave as a part-time or full-time employee,

LEGAL AUTHORITY

Intermittent or when-actually-employed (WAE) duty is defined in Department of the Army Civilian Personnel Regulation (CPR) 990-2 (C13), Book 610, paragraph S1-2b(3), which provides that:

"Intermittent (WAE) services are those rendered by employees for whom no tour of duty can feasibly be established on a continuing basis. It applies to those employees who are expected to respond to requests for duty in connection with some unscheduled activity * * *."

The right to leave of such employees is governed by 5 U.S.C. § 6301(2)(B)(ii) which requires that an employee work a "regular tour of duty during the administrative workweek" to be entitled to leave benefits. In 31 Comp. Gen. 581 (1952), we interpreted this provision as contemplating "a definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." Unless a specific time is established in advance during an administrative workweek when an employee is regularly required to perform duty, he cannot earn leave. Thus, intermittent employees are not eligible for annual and sick leave benefits.

CLAIM DEVELOPMENT

Mr. Wendel filed his claim with his agency contending that he was not being utilized as an intermittent employee in accordance with the regulatory provision set out above. Rather, Mr. Wendel alleged that his services were required on a regular repetitive basis on an average of 3 days of each administrative workweek. Since, as Mr. Wendel claimed, he was scheduled in advance to perform all services on one or more workdays of each administrative workweek on a regular repetitive basis, he lost his identity as an intermittent employee and became a part-time employee under Army CPR 990-2(C18), Book 610, paragraph S1-2.

The agency denied Mr. Wendel's claim finding that he was never utilized other than as an intermittent employee. The Administrative Report provided to our Claims Group by

unless he also has a regular, established tour of duty."

RECONSIDERATION

In requesting reinvestigation and reconsideration of his claim, Mr. Wendel reasserts that he had certain times during his workweeks when he was regularly required to perform duty. Mr. Wendel states that he had a reporting time for duty of 1900 to 2100 hours (7 p.m. to 9 p.m.) of each business day due to the Commissary Sales Store hours terminating at 1800 (6 p.m.) and 2000 (8 p.m.) hours. Mr. Wendel states that the scheduling and amount of his working hours were determined by the volume of business, and his reporting time for duty was "rendered in advance due to military pay days, absence of full-time and/or part-time employees due to annual leave, sick leave, and leave without pay caused by military pay days, days preceding holidays, and days preceding days the Commissary was closed." In addition, concerning specific periods when he was absent, Mr. Wendel states that before he left on these occasions he was given a specific reporting time for the next day he would work.

However, the record before us demonstrates that Mr. Wendel's hours of work were not prescheduled within the meaning of 5 U.S.C. § 6301(2)(B)(ii), and our decision 31 Comp. Gen. 581 (1952). There is no clear indication that responsible officials established in advance a specific time during an administrative workweek when Mr. Wendel was regularly required to perform duties. On the contrary, Mr. Wendel was given a schedule of authorized hours from 1900 to 0330 (7 p.m. to 3:30 a.m.) during which his required duties would be performed on those days when he was actually employed. There is no indication that Mr. Wendel was prescheduled to work all or any specific number of hours within the inclusive period of authorized hours. There is no indication of the time he was to report on those days he was employed, or how long he was to work. Rather, our review of Mr. Wendel's listing of hours worked shows that the daily hours of work he was required to perform varied during each week.

In our decision, John W. Matrau, et al. B-191915, September 29, 1978, we ruled that commissary cashiers at

Fort George Meade, Maryland, who were appointed on an intermittent basis, may not be retroactively granted regular part-time appointments, with accompanying fringe benefits, in the absence of evidence establishing that they worked prescheduled, continuous, regular tours of duty. In that case claimants based their contention that they did actually work prescheduled tours of duty upon the fact that they were given each Saturday a schedule for the following week. Yet, the agency stressed that these schedules were tentative ones, and varied from week to week. Claimants were informed that these tentative work schedules were subject to change, and in fact the schedules did change frequently during each week. We held that a schedule arranged on a weekly basis for the convenience of an employee does not constitute an "administratively prescribed regular tour of duty in advance" so as to justify a change in status from intermittent to regular part-time worker.

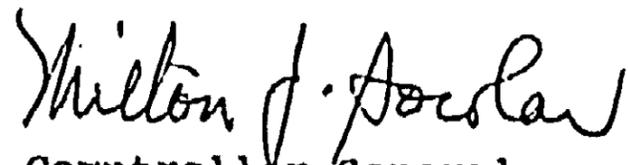
The facts presented in the record of Mr. Wendel's case bring it within this ruling. Accordingly, the listing of authorized hours in the instant case, like the tentative schedules prepared for the workers in the Matrau case, provides no basis upon which we can authorize Mr. Wendel's retroactive conversion to regular part-time status.

The facts as presented by the agency and those presented by Mr. Wendel are contentious. Mr. Wendel asserts that he was a prescheduled part-time employee; the agency counters that he was appointed and utilized as an intermittent employee. As we stated in 31 Comp. Gen. 215 (1951), unless a regular tour of duty has been established for them in advance, intermittent employees "would be without the benefit of the leave act even though they might actually work full-time for long periods." While the nature of the actual work performed, not the official job status designation, is the decisive factor, an employee will not be granted the benefits available to regular part-time employees unless he works hours set under a regularly scheduled tour of duty. See Kenneth L. Nash, 57 Comp. Gen. 82 (1977). About the existing factual dispute, this Office must base our decisions on the factual information furnished by the claimants and the reports obtained from agencies. Our Office has no duty to refute a claim or to refute the allegations underlying a claim. On the contrary one who asserts a claim has the burden of furnishing sufficient

evidence to clearly establish his right to receive payment. Alfred W. Cahman, B-185736, December 23, 1976. Since Mr. Wendel has not produced evidence sufficient to counter the administrative determination that he was not provided specific duty hours in advance, we cannot authorize a retro-active change in status on the basis of his claimed continuous regular tours of duty.

Accordingly, on the basis of the record before us we must sustain the action of our Claims Group in disallowing Mr. Wendel's claim.

Finally, Mr. Wendel's request for reconsideration includes allegations of employment discrimination at his activity in connection with his intermittent employment status. The complaint alleging discrimination is for resolution under the agency's procedures for Equal Employment Opportunity cases rather than by the Comptroller General. See Martha B. Potrat, B-196019, April 23, 1980; Clem. H. Gifford, B-193834, June 13, 1979.

for 
Comptroller General
of the United States