

# DECISION



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30668  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-216640

DATE: March 13, 1985

MATTER OF: Frederick Evans, Jr. - Computation of  
Pay for Firefighters

## DIGEST:

1. Union of federal firefighters claims that their basic pay should be computed on the basis of their 144-hour tour of duty times their hourly wage. However, under the statutes and regulations, federal firefighters are entitled to basic pay for 80 hours biweekly plus premium pay for standby duty under title 5, United States Code. Decisions of our Office and the courts recognize that part of these 144-hour tours of duty involve noncompensable eating and sleeping time.
2. Union of federal firefighters seeks extension of our decision involving Fair Labor Standards Act (FLSA) overtime and court leave to apply also to annual and sick leave. Our decision in 62 Comp. Gen. 216 (1983) held that FLSA overtime may not be reduced during periods of court leave, but that rationale does not extend to annual or sick leave.

## ISSUES

The first issue in this decision involves the computation of basic pay for federal firefighters who work a 144-hour tour of duty biweekly. We hold that such firefighters may not be compensated on the basis of 144 hours times their hourly wage since the existing statutes provide for compensation on the basis of 80 hours times the hourly wage plus premium pay for standby duty.

The second issue involves whether annual and sick leave may be treated the same as court leave for the purposes of overtime under the Fair Labor Standards Act (FLSA). Although we held that FLSA overtime may not be reduced

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during periods of court leave, that same rationale does not apply to annual or sick leave which are not considered "hours of work" under the FLSA.

#### BACKGROUND

This decision is in response to a request from Frederick Evans, Jr., President, Local F-100, International Association of Fire Fighters, Newport Naval Base, Newport, Rhode Island. The request was processed under our labor-management procedures contained in 4 C.F.R. Part 22 (1984), and while we received no comments from the Department of the Navy, we requested and received comments on this matter from the Office of Personnel Management (OPM).

#### Union argument

Mr. Evans states that firefighters at the Newport Naval Base work a regularly scheduled 144-hour tour of duty every 2 weeks. However, he argues that the Navy computes basic pay on the basis of an 80-hour biweekly pay period, and thus firefighters are not compensated for the additional 64 hours (144-80) they work every 2 weeks. He contends that basic pay should be computed on the basis of 144 hours times the employee's hourly rate, instead of the agency's method of 80 hours times the hourly rate.

#### OPM position

The report from OPM states that federal firefighters are entitled to overtime under two laws, title 5, United States Code, and the FLSA. The report continues that under title 5, firefighters are compensated in a manner different than most General Schedule employees who work a 40-hour workweek. As noted by Mr. Evans, firefighters have a 72-hour per week tour of duty, consisting of three 24-hour shifts, and OPM points out that during each 24-hour shift, 8 hours are considered actual work and 16 hours are treated as standby. The OPM report continues by stating that firefighters receive basic pay and annual premium pay for regularly scheduled standby duty (normally 25 percent) under section 5545(c)(1) of title 5, United States Code. This standby pay is in lieu of premium pay for regularly scheduled night, Sunday, and holiday work, except for irregular, unscheduled overtime duty in excess of the employee's regularly scheduled weekly tour. In addition, the OPM report points out that the standby pay is considered to be basic pay for the purposes of severance pay, compensation for work injuries, and life insurance.

OPINION

We know of no basis to allow the union's claim. Under the provisions of 5 U.S.C. § 6101 (1982), heads of agencies may establish the administrative workweek, which permits the establishment of this 72-hour workweek. See also 5 C.F.R. Part 610 (1984). In addition, under subchapter V of chapter 55, title 5, United States Code, the Congress has provided for the payment of overtime or premium pay for work in excess of 40 hours in an administrative workweek.

As noted in the OPM report, 5 U.S.C. § 5545(c)(1) provides premium pay up to 25 percent to 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 \* \* \*." This method of compensating federal firefighters has long been recognized in decisions of this Office<sup>1/</sup> and the courts<sup>2/</sup>. For an example of the calculation of overtime pay for firefighters, see 55 Comp. Gen. 908, 910.

As we pointed out in our decision in 25 Comp. Gen. 161 (1945), we recognized the adoption of the so-called "two-thirds rule;" that is, for assignments of 24 hours or more, one-third of the time represents time for eating and sleeping and need not be regarded as hours of employment for the purposes of title 5, United States Code. See Thomas A. Donohue, B-213886, October 2, 1984, 64 Comp. Gen. 1.

A change in the 72-hour workweek for federal firefighters was passed by the Congress in 1978 but vetoed by the President. The bill, H.R. 3161, would have amended chapter 61 of title 5 to reduce the workweek of federal firefighters from 72 hours to 56 hours, and in its consideration of the bill, the Congress took no exception to the then-existing and still-current method of compensating federal firefighters under title 5, United States Code.<sup>3/</sup>

<sup>1/</sup> See 62 Comp. Gen. 216 (1983); 55 Comp. Gen. 908 (1976); and 25 Comp. Gen. 161 (1945).

<sup>2/</sup> See Bean v. United States, 175 F. Supp. 166 (Ct. Cl. 1959); and Collins v. United States, 141 Ct. Cl. 573 (1958).

<sup>3/</sup> Cong. Rec. 9915-22 (daily ed. April 12, 1978); Cong. Rec. 16242-43 (daily ed. June 5, 1978); and Cong. Rec. 18311-12 (daily ed. June 21, 1978).

We note that federal firefighters are also entitled to overtime under the FLSA for duty hours in excess of 106 hours in a biweekly work period. See 62 Comp. Gen. 216, cited above, and 55 Comp. Gen. 908 (1976). See also Federal Personnel Manual Letter 551-20, September 22, 1983. However, Mr. Evans has not objected to the computation of overtime under the FLSA, so we need not discuss this entitlement further.

In view of the above discussion, we hold that the basic pay of federal firefighters is properly computed, and we deny the union's claim that basic pay should be computed on the basis of 144 hours times the employee's hourly rate.

#### FLSA Overtime for Leave

##### Union position

In his second contention, Mr. Evans points out that under our decision in 62 Comp. Gen. 216 (B-207710), federal firefighters who are on court leave continue to receive overtime pay under the FLSA. He argues that this decision should be extended to include annual leave and sick leave since 5 U.S.C. § 6302(a) provides that days of leave are days on which an employee would otherwise work and receive pay, exclusive of holidays and nonworkdays.

##### OPM position

The report from OPM points out that periods of nonwork (leave, holidays, or excused absences) are not hours of work for the purposes of the FLSA. 5 C.F.R. § 551.401(b); Louis Pohopek, 60 Comp. Gen. 493 (1981); and R. Elizabeth Rew, 55 Comp. Gen. 1035 (1976). As to the issue of FLSA overtime for periods of court leave or military leave, the OPM report notes that this issue is currently being litigated in federal court.<sup>4/</sup>

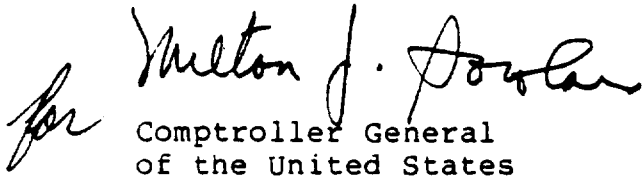
##### Opinion

As noted by the OPM report, we have held that periods of nonwork such as annual leave or sick leave are not considered to be "hours of work" for the purposes of the FLSA. Pohopek and Rew, cited above. Furthermore, our decision in 62 Comp. Gen. 216 regarding court leave did not

<sup>4/</sup> Lanehart v. Devine, C.A. No. Y-83-3543 (D. Md.); and Davila v. Weinberger, C.A. No. 83-3910 (D.D.C.).

treat such leave as "hours of work" under the FLSA. Rather, we pointed out that section 6322 of title 5, United States Code, provides leave for jury duty without reduction or loss of pay to which otherwise entitled. Therefore, we held that the FLSA overtime entitlement of firefighters may not be reduced during absences for court leave.

We know of no basis to extend this decision to apply to annual leave or sick leave since those sections of title 5 (6303, 6304, and 6307) do not contain the same language protecting against loss or reduction in pay as is contained in section 6322 (court leave) and 6323 (military leave). Therefore, we hold that absences for annual or sick leave do not constitute "hours of work" for the purposes of the FLSA.

  
Comptroller General  
of the United States