Goddard

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Navajo and Hopi Indian Relocation Commissioners - Claim for Compensation and Benefits

File: B-236241

Date: February 25, 1991

DIGEST

Commissioners whose compensation was set by law at an amount equal to the daily rate paid a GS-18 under the General Schedule for each day or portion thereof during which they ar engaged in the actual performance of Commission duties are in effect per diem employees whose scheme of compensation is different from regular employees. Commissioners' service mus be considered as intermittent regardless of the number of hours worked and accordingly their only entitlement to compensation is their per diem payment for those days they were engaged in Commission business. As intermittent employees they are not entitled to annual and sick leave or health and life insurance benefits.

DECISION

BACKGROUND

The Navajo and Hopi Indian Relocation Commission (NHIRC) has requested an advance decision concerning the appropriate compensation and benefits of its three former Commissioners.

The Commission was created pursuant to Public Law 93-531 December 22, 1974, 88 Stat. 1712, and its function was the relocation of Navajo and Hopi families living on land partitioned to the other tribe. The Commission was recently abolished and succeeded by the Office of Navajo and Hopi Indian Relocation and the three Commissioners were replaced by a single Commissioner. Section 4(a) of Public Law 100-666 Nov. 16, 1988, 102 Stat. 3929.1/

The Commission states that to provide for an orderly transition to a new office with a single Commissioner, the three

---

1/ The new Commissioner is a full time employee paid at the rate of grade GS-18 of the General Schedule. 25 U.S.C. § 640d-11(b)(3) (Supp. I 1989).

Commissioners directed their staff to conduct a thorough audit of all the Commissioners' activities during their tenure. The Commission states that the audit revealed that the Commissioners, Chairman Hawley Atkinson and Commissioners Sandra Massetto and Ralph Watkins, had worked a substantial number of days for which they had not previously claimed compensation. The additional uncompensated days of work had been discovered through the review of documents including desk calendars, telephone billings, telephone logs and time cards. The Commission reports that telephone numbers were analyzed and a determination made whether the call was placed to Commission or to other government offices with which the Commission does business. Apparently if the then determined business call was made on a day for which the Commissioners had not received pay, that day was listed as worked but not paid and is now being claimed.

The three Commissioners have each submitted claims for compensation for those days which they state they have worked but for which they have not been paid, and the total amount of the claims is $370,000.28. They also contend that the designation of their status as intermittent employees by the Department of the Interior is erroneous and has deprived them of annual and sick leave, health and life insurance, and retirement benefits to which other regular employees are entitled.

Originally, these claims were forwarded to the General Services Administration (GSA) which had an agreement with the Commission to provide reimbursable payroll services, but GSA declined to process the claims for payment.

OPINION

The method of compensating NHIRC Commissioners was provided for in section 12(e) of Public Law 93-531, supra, and is stated as follows:

> "Each member of the Commission who is not otherwise employed by the United States Government shall receive an amount equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332 of title 5, United States Code, for each day (including time in travel) or portion thereof during which such member is engaged in the actual performance of his duties as a member of the Commission. . . ."

What the above statutory scheme for compensating these Commissioners contemplates is that they will be paid only for those days that they are engaged in the actual performance of their duties. We have described this typical method of

compensating employees of boards and commissions as being per diem compensation. 45 Comp. Gen. 131 (1965). Moreover, we have recognized the distinction between the compensation of members of boards and commissions from the general compensation laws pertaining to government employment. 45 Comp. Gen. at 132. The basis for this distinct method of compensation is that the Commissioner's own personal schedule of work dictates if and when he is to be compensated.

In addition, there is no requirement that commissioners work a full 8-hour day to be compensated. Mere performance of some duties for the Commission is sufficient to provide the Commissioners with compensation for that day regardless of the number of hours they work. Federal Retirement Thrift Investment Board, B-230685, Oct. 6, 1988; 45 Comp. Gen. 131, supra. Thus, whether a Commissioner performs work in excess of 8 hours a day or less than 8 hours, the Commissioner would still be entitled to a full per diem payment. 45 Comp Gen. 131, supra.

We have also held that Commission members may be compensated for performing work relating to the duties of the Commission at homes or other places of business and that time spent in travel related to Commission business is also to be considered work for which a Commission member may be compensated. Wiretap Commission, B-182851, Feb. 11, 1975. The above scheme of compensation, therefore, is to be distinguished from that in which an employee is required to put in a standard workweek under generally stricter supervision and constraints.

The Commissioners argue, however, that they were actually part time instead of intermittent employees and that their personnel papers variously describing them as when actually employed or intermittent are incorrect. In this connection the Commissioners state that their responsibilities under Public Law 93-531, supra, were such that it is evident their jobs would be anything but intermittent. They argue that they were required to create a new federal agency, prepare a report and plan for Congress, conduct a survey of the disputed area and complete the relocation of the families within 5 years from the date on which the relocation plan went into effect. Thus, they argue that the tremendous workload compels a finding that their employment was not intermittent. The Commissioners argue that they had regularly scheduled requirements on a repetitive basis, such as monthly meetings, and that the designation of their status as intermittent was improper.

The Commissioners' claim that they were not intermittent employees is squarely contradicted by their appointment papers, by the work records the NHIRC has produced, and by the organic act establishing the NHIRC. The records before us

indicate that each Commissioner was appointed by the Secretary of the Interior and that the documentation clearly indicated the appointment was intermittent (or WAE - when actually employed) with no eligibility for insurance and no coverage under the retirement plan.

With regard to the work records, the Commission's Chairman, Hawley Atkinson, claims to have worked the following percentages of the work year from 1975 to 1988.

1975	31.8%	1982	56.5%
1976	47.7%	1983	48.7%
1977	71.2%	1984	55.6%
1978	56.5%	1985	98.5%
1979	49.2%	1986	81.6%
1980	36.9%	1987	95.8%
1981	44.6%	1988	98.9%

Commissioner Sandra Massetto claims to have worked the following percentages of the work year from 1979 to 1988.

1979	32.2%	1984	69.3%
1980	39.2%	1985	88.9%
1981	37.7%	1986	99.6%
1982	53.1%	1987	84.7%
1983	64.4%	1988	71.6%

Commissioner Ralph Watkins claims to have worked the following percentages of the work year from 1982 to 1988.

1982	65.5%	1986	78.5%
1983	72.4%	1987	76.6%
1984	65.5%	1988	93.5%
1985	77.4%		

The amount of work performed, therefore, varied significantly, both from year to year and by Commissioners, from a low of 31.8% of the work year to a high of 99.6%. A review of the specific days claimed to have been worked also shows that no particular pattern of work is apparent. There is no evidence that any Commissioner kept regular work hours or that any regularly scheduled workweek was ever assigned. This, of course, is quite in keeping with the nature of a Commissioner's per diem compensation scheme. The above records also bear out that whatever the urgency of the Commission's mission may have been, it is not reflected in the number of days the Commissioners worked until 1985. Even after 1985, the pattern of work, although greater than prior years, is not consistently sustained.

Moreover, as noted above, the Commissioners had their compensation set on a per diem basis by section 12(e) of

Public Law 93-531, supra. The Congress typically uses this type of language to provide for a compensation scheme for members of boards and commissions who, because of their varying or sporadic workload, often do not need to work regular hours over a standard workweek. In fact they work as little or as much as they themselves feel is required. This type of work simply does not lend itself to a set schedule and is best accomplished and compensated for on a daily basis. At times a Commissioner may work heavily and consistently but at other times his work may, depending on the commissioner's own view of his workload and what needs to be done, be more sporadic. The fact that, over an extended period of time a Commissioner may work a large number of days, does not in itself establish that he does not have an intermittent or when actually employed status.

It must be remembered that the legal status the Commissioner has been placed in grants to him certain entitlements, such as a full day's pay for a partial day's work, to which other regular employees are not entitled. 45 Comp. Gen. 131, supra. In this regard, it is not known how many of the days of work shown above were for full 8 hour days or were for less than 8 hours of work. That a workday may be more or less than 8 hours makes no difference for the compensation of a per diem employee but were these Commissioners to be compensated as regular federal employees, their entitlement to compensation would be based on actual hours of work only.

Accordingly, we think it would be incompatible to provide per diem employees the status of regular per annum employees even if they did work full workweeks or even if someone purported to establish a regular 40-hour workweek for them.2/ It is our view therefore that the Commissioners were appropriately described as having an intermittent status and their only entitlement to compensation is their per diem payment for those days they were engaged in Commission business.

Nor do we think that the Commissioners intermittent status was changed when the Department of the Interior placed them in the Senior Executive Service (SES) by administrative action after the passage of the Civil Service Reform Act of 1978. The Commissioners contend that intermittent status is somehow incompatible with the SES status.

Whatever the merit of placing the Commissioners in the SES may have been, we do not think that such action had any effect on the status and method of the Commissioners' compensation as set out in section 12(e) of Public Law 93-531, supra. That

---

2/ We note that there is no evidence that a regularly scheduled workweek had been established for the Commissioners.

law clearly provided that the Commissioners should receive a per diem rate of compensation and we see nothing in Title IV of the Civil Service Reform Act, 5 U.S.C. §§ 3131 et seq., which changed or was intended to change the specifically set per diem method of compensating members of boards and commissions.3/

The Commissioners point out that SES members are exempt from 5 U.S.C. § 6101(a)(2), which requires the establishment of a tour of duty for government employees. The Commissioners reason that they have been called intermittent since they have no established tour of duty. They conclude that since SES employees are exempted from the above tour of duty requirement, they cannot come within the purview of the regulations dealing with intermittent employees and, thus, by definition, they cannot be intermittent employees.

Whether or not SES employees are exempt from tour of duty requirements in 5 U.S.C. § 6101 is not dispositive of whether these Commissioners are entitled to be treated as regular employees with all of the attendant benefits provided under Title 5, United States Code.4/ These Commissioners' statutorily mandated status is as per diem employees. As stated above, their status confers a distinct compensation scheme from that applicable to regular employees. We think that the per diem compensation scheme is incompatible with that applying to regular employees and that the Commissioners' only entitlement to compensation and benefits comes from section 12(e) of Public Law 93-951.

The Commissioners' status as set by this law is one of when actually employed or intermittent. As such the Commissioners are not entitled to annual and sick leave coverage by virtue of their exclusion under 5 U.S.C. § 6301(2)(b)(ii) which excludes part-time employees who do not have an established tour of duty during the administrative workweek. With respect to the Commissioners' claim for coverage under the health insurance provisions, intermittent employees are not eligible for health benefits coverage. 5 CFR § 831.201(b). The claim

---

3/ We note that the Commissioners' rate of pay was set at ES level IV, a rate comparable to grade GS-18, and that the SES rate was never changed.

4/ See Federal Personnel Manual (FPM) Supplement 920-1, Subchapter S12-1a. "The CSRA did not remove SES members from the normal provisions of law governing leave and hours of work. Therefore, as a general rule, it is necessary to establish a 40-hour basic administrative workweek under 5 U.S.C. 6101 (a) in the same way agencies must for other employees who are subject to the leave system."

for life insurance coverage is in any event moot although a similar result would obtain. The Commissioners claim for coverage under the retirement laws is a matter for Office of Personnel Management (OPM) determination. 5 U.S.C. § 8347(b).5/

In regards to the Commissioners' claim for days worked but not compensated, we have held that a former member of a commission may not waive his statutory entitlement to per diem compensation; thus, a claim for uncompensated work performed at some time in the past may be paid. 54 Comp. Gen. 393 (1974). However, we also held in that decision that in view of the length of time which had lapsed since the duties were performed, the claim should be paid only if GSA, the successor to the Commission in question, was completely satisfied on the basis of the documents and supporting data submitted to it, that the claimant was engaged in the actual performance of Commission duties for each of the days he claimed per diem. 54 Comp. Gen. at 395.

The Commissioners have already been paid for the work originally recorded on their time sheets but they are now claiming a substantial number of additional days from the start of their appointments up to 1988. The Commissioners do not state why they did not claim these specific days of work when their payroll papers were originally processed. The Commission's personnel officer merely states that for personal reasons the Commissioners had worked additional days which they had not reported for purposes of compensation.

We have carefully reviewed the extensive documentation provided by the Commissioners and NHIRC, but find that these claims cannot be paid without further explanation from the Commissioners as to why they did not see fit to claim the days allegedly worked at the time they were worked combined with further specific substantiation as to what work was in fact performed on the days claimed. In other words, the Commissioners should show why these days are now compensable.

We note that in 1977 the Chairman of the NHIRC, Mr. Atkinson, stated in response to our audit of the NHIRC that "the Commissioners had some philosophical differences with the requirement that they be paid for a full day's work regardless of the length of time spent working on Commission business. This problem has been corrected since as we pointed out in the

---

5/ OPM advised Interior by letter dated July 28, 1989, that these Commissioners were not covered under the Civil Service Retirement System.

review, the volume of Commission work is significantly increasing and the Commissioners are scheduling their activities in a manner which concentrates their work. This minimizes the number of days when only a small amount of time is spent on Commission activities."6/

Our audit report found at that time that Commissioners would accumulate hours worked each day until 8 hours was reached whereupon one day was claimed for compensation purposes. We noted that the Commissioners were thus being undercompensated under the per diem method of compensation and correction to the record and back payments to the Commissioners were being made. GAO FGMSD 77-13, at 4-7. It would appear from the Chairman's letter that the Commissioners stopped this practice of accumulating work hours and so the undercompensation should have ceased in 1977.7/

Accordingly, we hold that these claims cannot be paid on the present record alone. To the extent the Commissioners can themselves document what Commission business was being transacted for each day claimed, they may be paid therefor. However, we note that a number of the claimed days involve telephone conversations which lasted one minute or a few minutes at most. While the compensation of per diem employees is not prorated according to the number of hours worked, we think it appropriate that on days when a commissioner's only work was just a few minutes, such as a short telephone call, the work may properly be considered de minimis and claims for those days may be properly denied. See Wiretap Commission, B-182851, supra; Charles F. Callis, B-205118, Mar. 8, 1982 (1 minute telephone call by a Customs Service employee is de minimis and is not compensable as overtime).

For those days the Commissioners cannot state what Commission business was being performed, we think that such days claimed are too doubtful for any payment to be made. Since we are not in the best position to verify the performance of Commission business, we suggest that if the Commissioners submit further documentation of their records, the claims should be forwarded to the new Commissioner for his review and approval if he

---

6/ GAO FGMSD 77-13, Aug. 5, 1977.

7/ We also noted in 1977 that the Commissioners were improperly accruing annual leave. The Commission Chairman agreed with our conclusion. GAO FGMSD 77-13, at 7-8.

determines the work was performed for the Commission and was more than de minimis. See 25 U.S.C. § 640d-11(e) (Supp. I 1989).

for Milton J. Socolar
Comptroller General
of the United States