

RELEASED

UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

347



IN REPLY  
REFER TO: B-191623

May 10, 1978

OFFICE OF GENERAL COUNSEL

James M. Peirce, President  
National Federation of Federal  
Employees  
1016 16th Street, N.W.  
Washington, D.C. 20036

Dear Mr. Peirce:

This Office has received your letter dated April 4, 1978, inquiring as to the propriety of certain pay practices which you state have been proposed by the United States Forest Service. We infer from the attachment to your letter that the Forest Service is considering the possible use of a first-40-hour tour of duty for certain employees. You have inquired whether the proposed action would violate any law inasmuch as the affected employees may be required to work more than 8 hours in a day without being paid overtime therefor.

We are unable at this time to render a formal decision on the question you have raised. Your inquiry relates to a proposed pay practice and, without a specific case or example, any decision now would be speculative on our part. However, the following information is provided in order to be of assistance to you.

The basic statutory authority to establish workweeks for Federal employees is contained in 5 U.S.C. 6101 (1970). That authority is implemented by Part 610 of chapter 1, title 5, Code of Federal Regulations. Specifically, 5 C.F.R. 610.11(b) provides:

"When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek as the basic workweek, and additional hours of officially ordered or approved duty within the administrative workweek are overtime work."

We have held that these regulations permit an agency to place any employee on a first-40-hour workweek upon a determination that it is impracticable to prescribe a regular schedule of definite hours of

B-191623

duty for each workday.  
1976, copy enclosed.

et al., B-171947.78, July 9,

With respect to the payment of overtime compensation, 5 U.S.C. 5542(a) provides, in pertinent part:

"For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates \* \* \*."

Regulations implementing this authority are contained in 5 C.F.R. 550.111, which provide in relevant part as follows:

"(a) Except as provided by paragraph (d) of this section, overtime work means each hour of work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek. \* \* \*"

\* \* \* \* \*

"(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under 610.111(b) of this chapter, overtime work means each hour of work in excess of 40 hours in an administrative workweek that is:

"(1) Officially ordered or approved, and

"(2) Performed by an employee,

when the employee's basic pay exceeds the minimum rate for GS-10 or when the employee is engaged in

B-191623

professional or technical engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture."

The above-quoted statute and regulations thus provide that all employees are to receive overtime pay when they perform officially ordered or approved work in excess of 40 hours in an administrative workweek or 8 hours in a day, except for employees who are on a first-40-hour workweek and whose basic pay is above the rate for grade GS-10, step 1, or who are engaged in professional, technical engineering, or scientific activities. Thus, while any employee may be placed on a first-40-hour workweek, the overtime regulations are clear in their requirement of overtime pay for employees working more than 8 hours in a day, unless they come within the excepted classes. Bobo, supra.

In addition to the above provisions of title 5, United States Code, pursuant to Public Law No. 93-259, the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-209, was made applicable to employees of the Federal Government. In 54 Comp. Gen. 371 (1974), we held that the FLSA is to be harmonized with title 5, and that Federal employees are to be paid in accordance with those provisions of law most beneficial in the circumstances. Section 207(a) of title 29 of the United States Code states that no employer shall employ any of his employees for a workweek longer than 40 hours unless the employee receives compensation not less than one and one-half times his regular rate of pay. Since the FLSA does not provide for premium pay for work in excess of 8 hours in a day, the proposal that employees be assigned to a first-40-hour workweek would not violate the FLSA.

Accordingly, it does not appear from the information you have furnished us that the proposed practice would violate the law or Civil Service Commission regulations. However, if a dispute arises as to the application of the proposed practice to an employee or group of employees, we will be glad to give the matter further consideration.

B-191623

In that eventuality, it would be helpful if the issue could be presented as a joint request for decision with agreed upon facts.

Sincerely yours,

*Robert L. Higgins*

Robert L. Higgins  
Assistant General Counsel

Enclosure