

DECISION

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

FILE:

DATE: JUL 27 1976

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MATTER OF: **B-134864****Edward E. Herrington - Overtime Compensation****DIGEST:**

1. Wage board general mechanic claims overtime compensation for 30 minutes a day since he was not scheduled lunch break and since he allegedly was on call during lunch. Agency states employees were allowed to fix their own 30 minute lunch break for their convenience and employees were specifically told they could leave building for lunch. Moreover claimant admits he took time off for his lunch breaks. Even assuming employee was on call during lunch breaks, under 5 U.S.C. § 5544 there is no entitlement to overtime compensation for merely being on call during lunch break where no duties are performed.
2. Employee claims overtime compensation for having worked 10 days straight on back to back shifts. Employee had Sunday and Monday off and then worked Tuesday through Saturday. The following week he worked Sunday through Thursday and had Friday and Saturday off. Although employee has worked 10 straight days, since applicable regulations state employee's administrative workweek is Sunday through Saturday, only 5 days work was performed in any one administrative workweek and employee is thus not entitled to overtime compensation.

This action is in response to Mr. Edward E. Herrington's appeal of our Transportation and Claims Division Settlement Certificate, Z-2552994, dated April 4, 1975, which disallowed his claim for overtime compensation believed due incident to his employment with the General Services Administration's Public Buildings Service.

Mr. Herrington is employed as a Wage Board, WG-9, general mechanic at the Dallas Federal Building, 1100 Commerce Street, Dallas, Texas. The record shows that general mechanics such as

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Mr. Herrington are assigned to work 8-1/2 hour daily shifts. It is the practice of the building's management not to schedule a fixed 30 minute lunch break during the shift but rather to allow the general mechanic on duty to take his 30 minute lunch break at whatever time he deems fit. It is stated that this practice is for the convenience of the employee.

Mr. Herrington states that on shifts during which only one general mechanic is on duty, the general mechanic on duty is subject to call throughout his lunch break in case a piece of equipment breaks down. Accordingly, Mr. Herrington claimed overtime compensation for 30 minutes a day, retroactive to October 1972, on the grounds that he was not given a scheduled lunch break of 30 minutes a day and since he claims he was on standby for emergency duty during his lunch break.

Mr. Herrington also believes he is entitled to overtime compensation for having worked 10 straight days without a break on several occasions. Since the building in which Mr. Herrington worked required 24-hour maintenance, Mr. Herrington was required to work each of three daily shifts in rotation with other general mechanics assigned to the building. Incident to this shift rotation general mechanics may have been required to work 10 days in a row.

The General Services Administration has stated with respect to the first of Mr. Herrington's above claims that his supervisor had specifically told him he could leave the building for his 30 minute lunch break. Moreover, Mr. Herrington has admitted that in any event he always managed to take time for his lunch break. Since Mr. Herrington admits he took time for his lunch break the only question remaining is whether his allegedly being subject to call entitles him to overtime compensation.

Section 5544 of title 5, United States Code (1972 Supp.), entitles wage board employees to overtime compensation as follows:

"(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in

excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. * * *

It is quite clear from the above that a wage board employee is not entitled to overtime compensation for being on call during a lunch break. In Bennett v. United States, 194 Ct. Cl. 889 (1971), a case in which the court construed 5 U.S.C. § 673c (1964), now 5 U.S.C. § 5544, *supra*, the court quoted Bowling v. United States, 181 Ct. Cl. 968 (1967), as follows:

"It is settled that the mere fact that an employee is required to eat lunch on the employer's premises and to be in a duty status and subject to call during such period, does not automatically make such period 'overtime'. The actual performance of substantial duties during such period is a prerequisite to recovery. * * *"

Bennett, supra, also distinguished Albright v. United States, 161 Ct. Cl. 356 (1963), in which employees were awarded overtime for nonscheduled lunch breaks because in Albright the guards "were walking post while they were eating." Accordingly, since Mr. Herrington did not perform work during his lunch breaks, and since he was allowed to leave his building for lunch, he is not entitled to overtime compensation.

With respect to Mr. Herrington's claim for overtime compensation for having worked back to back shifts, the record shows that on one occasion Mr. Herrington did work for 10 days straight, from December 7, 1971, to December 16, 1971. During the week of December 5 to 11, as in the weeks immediately preceding, Mr. Herrington had Sunday and Monday, December 5 and 6, off, and he then worked the day shift, 7:30 a.m. to 4 p.m., from December 7 to 11, Tuesday through Saturday. The following week of December 12 to 18 Mr. Herrington rotated to the swing shift 3:30 p.m. to midnight and he worked December 12 to 16, Sunday through Thursday, with December 17 and 18, Friday and Saturday, off.

The General Services Administration's regulation establishing the administrative workweek provides that:

"(1) The administrative workweek will consist of 7 consecutive calendar days, Sunday through Saturday. The basic workweek will consist of 5 calendar days of 8 hours each within the administrative workweek; the days constituting the basic workweek will be consecutive (usually Monday through Friday) except in service operations where such scheduling would seriously handicap required functions or substantially increase costs.

"(2) For an employee whose entire 8-hour workday falls approximately in the middle of the calendar day (i.e., between 6 a.m. and 6 p.m.) the administrative workday is the midnight to midnight calendar day.

"(3) For an employee whose 8-hour workday begins earlier than 6 a.m. or ends later than 6 p.m., the administrative workday is the 24-hour period commencing 8 hours prior to the beginning of his 8-hour workday." DOA P 6010.5 Change 10, November 24, 1971.

It is quite clear from the above that even though Mr. Herrington worked 10 days straight, from December 7, 1971, to December 16, 1971, he only worked 5 days in each of the two administrative workweeks. In decision B-173779, November 22, 1971, we held concerning a wage board employee's claim to overtime compensation under similar circumstances that "The number of 8 hour days worked consecutively is immaterial unless more than 40 hours are worked within a single workweek." Since it has not been shown that Mr. Herrington worked more than 40 hours in one administrative workweek, Mr. Herrington is not entitled to overtime compensation under 5 U.S.C. § 5544, supra.

Accordingly, the action taken in the Transportation and Claims Division settlement of April 4, 1975, disallowing Mr. Herrington's claim is sustained.

R. F. Keller

Deputy Comptroller General
of the United States