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

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FILE: B-163450.12 DATE: September 20, 1978

MATTER OF: Department of Agriculture Meat Graders--Travel Time Under Fair Labor Standards Act

DIGEST: 1. Since the Civil Service Commission is designated by law to administer the Fair Labor Standards Act (FLSA) with respect to most Federal employees, great weight will be accorded the Commission's administrative determinations as to employees' entitlements under the FLSA. However, since the Commission was not given authority to settle or adjudicate claims arising under the FLSA, the General Accounting Office retains jurisdiction to finally decide the propriety of payment on such claims. 29 U.S.C. § 204(f) (Supp. IV, 1974) and 31 U.S.C. § 71 (1970).

2. The Civil Service Commission made an initial determination on May 15, 1974, that Department of Agriculture meat graders in grade levels GS-7 through 9 were employed in an "administrative" capacity and were therefore exempt from the overtime employment provisions of the FLSA, but subsequently reversed that initial determination on July 6, 1976, after a careful reevaluation of the matter. The meat graders are entitled to the benefits of the FLSA overtime provisions from and after July 6, 1976, but are not entitled to retroactive coverage for prior periods when they were classified as exempt from those provisions by the Commission. 29 U.S.C. § 213 (Supp. IV, 1974).

3. Civil Service Commission's determination that meat graders employed by the Department of Agriculture are entitled to compensation under the FLSA for their time expended in having to transport 94 pounds of essential work implements between their homes and work sites before and after their regular duty hours, but that the carrying of 20 pounds of hand tools in like circumstances would be noncompensable, is neither erroneous in fact nor contrary to law.

4. Payment may issue on claim submitted by a Department of Agriculture meat grader for compensation under the FLSA for time expended after July 6, 1976,

transporting necessary equipment between home and work, even though neither the distance traveled nor the equipment transported is described by him, since the claimant's supervisor and an agency administrative officer approved the claim and it may therefore be presumed that the travel time claimed properly represents time spent transporting substantial amounts of equipment over a direct route at a reasonable rate of speed to and from the work site.

This action is in response to a letter of August 25, 1977, from Mr. John Balog, Certifying Officer of the Food Safety and Quality Service, Department of Agriculture, requesting a decision as to the propriety of paying the claim of Gordon E. Rutsch for overtime pay. Mr. Rutsch's claim is representative of many claims based on the determination by the Civil Service Commission that time spent by meat graders transporting equipment and supplies to and from work constitutes compensable "hours of work" under the Fair Labor Standards Act. Mr. Kenneth T. Blaylock, National President, American Federation of Government Employees, has written to us about this matter, and we have considered the points raised in his letter in rendering our decision.

Background

The Fair Labor Standards Act of 1938 (FLSA), as amended, and as codified in 29 U.S.C. §§ 201-219, contains overtime employment provisions generally directing that no one covered by the Act shall be employed for a workweek longer than 40 hours unless the employee receives compensation for the excess hours at a rate not less than 1-1/2 times the regular rate. Section 6 of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 55, expanded coverage of the FLSA to include Federal employees, effective May 1, 1974. Section 6 also authorized the Civil Service Commission (CSC) "to administer the provisions of this Act with respect to any individual employed by the United States," with certain exceptions not material here. This authorization, as codified, is now contained in 29 U.S.C. § 204(f) (Supp. IV, 1974).

After FLSA coverage was expanded to include Federal employees, CSC published Federal Personnel Manual System Letter No. 551-1,

dated May 15, 1974, containing interim administrative instructions on the subject. Paragraph D of attachment 2 to that letter categorized Federal employees with the occupational code GS-1980, "Agricultural Commodity Grading," in grade levels GS-7 and above as being in "administrative occupations" and therefore "exempted" from the overtime provisions of the FLSA by 29 U.S.C. § 213 (Supp. IV, 1974).

Subsequently, Attachment 2 to FPM Ltr. 551-1 was superseded by FPM Ltr. 551-7, dated July 1, 1975. The latter does not specifically list those GS occupational code series and grade levels determined to be exempt, but rather provides "detailed guidelines for identifying the executive, administrative and professional employees who are exempt from the minimum wage and overtime provisions of the FLSA." Paragraph 3, FPM Ltr. 551-7 further provides in pertinent part that:

> "b. The * * * exemption criteria are essentially the same as those reflected in FPM Ltr. 551-1. However, they are presented in substantially greater detail and have been extended to cover problem areas that were not adequately treated in the interim instructions. Exemption determinations resulting from application of the attached instructions * * * are effective as of May 1, 1974."

On July 6, 1976, CSC's Bureau of Personnel Management Evaluation issued a letter opinion wherein it was concluded that, under the guidelines of FPM Ltr. 551-7, the work of agricultural commodity graders with the occupational code GS-1980 in grade levels GS-7 through 9 "does not include discretion and judgment characteristic of exempt work" and that the employees' positions were "nonexempt and therefore covered by the pertinent provisions of the Fair Labor Standards Act." No reference was made in the opinion to the contrary determination contained in FPM Ltr. 551-1.

Following the issuance of the July 6, 1976 opinion, questions arose concerning the compensability of travel time of meat graders with the occupational code GS-1980 in grade levels GS-9 and below, who had then been administratively determined to be covered by the overtime provisions of the FLSA. At the time, those meat graders were required by the provisions of section 53.20, title 7, Code of Federal

Regulations (1976 and 1977 editions) to keep certain grading tools and supplies in their possession or control at all times. These implements included stamps, rollers, grade bands, certificate books and other items used in grading meat. Such implements must be safeguarded against improper or unauthorized use since the grades applied to meat determine the dollar worth of the product. It was primarily for this reason that the meat graders were required to keep the items in their personal custody. The implements and carrying cases had a total weight of about 94 pounds and were ordinarily kept in the graders' privately owned automobiles.

In letter opinions dated March 8 and March 30, 1977, CSC's Bureau of Personnel Management Evaluation concluded that the time spent by the meat graders in transporting some 90 pounds of necessary equipment from home to work (and back) constituted "hours or work" under the FLSA for which they were entitled to compensation. However, the carrying of 10 to 20 pounds of equipment in like circumstances would be noncompensable because the situation most nearly fit the FLSA concept of carrying hand tools. The opinions said that a distinction was to be made between the carrying of hand tools (not compensable time) and the transportation of equipment (compensable time). They also stated that these general determinations would not be binding if a different set of facts were to be presented by an employee in a particular case.

As a result of these determinations, 7 C.F.R. 53.20 was amended in July 1977 to provide for the storage of the meat grading equipment in locked metal cabinets at or near the work site. See 42 Fed. Reg. 36,462 (1977). The Department of Agriculture then issued instructions requiring in-plant, overnight storage of the equipment in lockers, or, where that would be impracticable, for storage of the equipment in a centralized location within the area serviced. Thus, the meat graders are apparently no longer required to keep the grading equipment in their personal possession overnight or to transport the equipment between home and work.

As a further result of CSC's administrative determinations, the meat graders submitted claims to the Department of Agriculture for retroactive payment of overtime compensation for time previously expended in transporting grading equipment between home and work. One representative claim, that of Mr. Gordon E. Rutsch, has been

forwarded for our consideration, Mr. Rutsch claims payment for an additional 42-1/2 hours of work performed during the period November 1 through 20, 1976, and he states, "I did not receive pay for time actually spent traveling, which is counted as work under FLSA but was not counted as work under Title 5." During this period he was a GS-9 and his duty station was Greeley, Colorado. The basis for the claim is not explained in detail, and neither the distance traveled nor the equipment transported is described. However, the claim was approved by Mr. Rutsch's supervisor and an administrative officer, and in the submission the certifying officer states that all 42-1/2 hours represent time expended by Mr. Rutsch in commuting between his home and work site while carrying some 90 pounds of meat grading implements in his automobile. The certifying officer also states that Mr. Rutsch will make similar claims for retroactive payment for all other pay periods since May 1, 1974.

In the submission, the certifying officer does not specifically question the correctness of CSC's July 6, 1976 determination that most agricultural commodity graders, GS-9 and below, are covered by the overtime provisions of the FLSA, nor does he specifically question the propriety of applying that determination retroactively to May 1, 1974. He does, however, in effect ask whether there is any rational basis for CSC's distinction between the carrying of hand tools and the transportation of equipment as constituting noncompensable and compensable activities, respectively, in the performance of travel between home and work. He also questions the propriety of making payment on the representative claim of Mr. Rutsch.

Mr. Blaylock, in presenting his position, states that CSC thoroughly reviewed this entire issue and based on such review rendered a sound decision. He states further that CSC is vested with the authority to administer the FLSA for Federal employees and that such authority is rendered meaningless if agencies are permitted to challenge decisions made by CSC in this respect. He also contends that whether or not a distinction is made between "tools" and "equipment" there can be no question that carrying 90 pounds of "tools" or "equipment" for the convenience of the Government is compensable under the Act.

I. Jurisdiction of the General Accounting Office to Settle Claims of Federal Employees Arising Under the FLSA

The comprehensive jurisdiction of the General Accounting Office to settle claims made by or against the United States is set forth in 31 U.S.C. § 71 (1970), which states that:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

In cases where this general authority to adjudicate claims has been limited, it has been accomplished by a specific statutory grant of such authority to another agency. CSC, for example, has specific statutory authority to adjudicate claims and settle accounts under the classification and retirement laws. See 5 U.S.C. § 5112(a) and § 8347(b) (1976). However, while CSC is given the authority to administer the FLSA with respect to most Federal employees by 29 U.S.C. § 204(f), it has not been given the authority to adjudicate claims or settle accounts under the FLSA. Therefore, the authority to finally settle whether the expenditure of public funds under the FLSA is appropriate or not is left by law to the decisions of this Office. See Matter of Claims Representatives and Examiners, B-51325, October 7, 1976. See also Matter of Transportation Systems Center, 57 Comp. Gen. 441 (1978).

Since CSC is the administrator of the FLSA as to most Federal employees, great weight will be accorded its determinations. If, however, we find CSC's factual conclusions to be clearly erroneous, or the legal conclusions to be contrary to the law or regulations set out thereunder, we would have no option but to so rule.

II. Civil Service Commission's Determinations as to the Exemption Status of Meat Graders under the FLSA

Under 20 U.S.C. § 213, certain employees, including those "employed in a bona fide executive, administrative, or professional

capacity," are made exempt from the overtime employment provisions of the FLSA. We consider that the role granted to CSC to administer the FLSA with respect to Federal employees necessarily carries with it the authority to make final determinations as to whether employees are covered by the various provisions of the Act. Accordingly, this Office will not ordinarily review CSC's determinations as to an employee's exemption status. Matter of Claims Representatives and Examiners, B-51325, supra.

As was previously noted, however, CSC has made two contrary determinations with respect to the exemption status of meat graders, GS-7 through 9, in the matter now presented for our consideration, and such circumstances dictate that we review the contrary determinations made.

Paragraph D of attachment 2 to FPM Ltr. 551-1, May 15, 1974, defined exempt "administrative occupations" in pertinent part as follows:

> "Administrative occupations are occupations, other than professional occupations that require the kind of knowledge, evaluation judgment and breadth of outlook expected of competent college graduates. Employees are required to apply this breadth of knowledge and perspective in solving problems for which guides, precedents, and instructions are not fully controlling. Quality of judgment required at the full performance levels depends primarily on reasoning ability and perceptiveness rather than on knowledge, gained through first hand experience or otherwise, of how prior similar cases, problems, etc., have been treated or decided upon."

The meat graders in grade levels GS-7 and above were categorized as meeting these criteria and were therefore listed as being exempt from the overtime provisions of the FLSA.

Attachment 2 to FPM Letter 551-1 was superseded by FPM Letter 551-7, July 1, 1975. Although the latter directive does not specifically list the GS occupational code series and grade levels determined to be exempt, as has been mentioned, it does state that the "exemption criteria are essentially the same as those reflected

in FPM Ltr. 551-1." The record indicates that the Department of Agriculture therefore continued to regard the meat graders as being exempt from the overtime provisions of the FLSA.

Upon a careful reevaluation of the occupational duties of agricultural meat graders, CSC's Bureau of Personnel Management later reversed the initial determination, concluding in its July 6, 1976 opinion that the work of commodity graders in grade levels GS-7 through 9 did not require frequent exercise of discretion or independent judgment and was not otherwise of such nature as to warrant exemption from the FLSA overtime provisions. CSC authorities advised the Department of Agriculture that the contrary determination was retroactive and effective as of May 1, 1974 (the date FLSA coverage was expanded to include Federal employees by Public Law 93-259), in accordance with paragraph 3, FPM Letter 551-7.

Administrative directives or regulations required by statute may, when first issued, be made retroactive in proper cases to the date contemplated by the statute. However, when such initial administrative directives are properly issued, rights thereunder become fixed, and, although the directives may be amended prospectively by administrative policy revisions to increase or decrease rights given thereby, they may not be amended retroactively except to correct obvious errors. See 32 Comp. Gen. 315 (1953); 32 id. 527 (1953); 33 id. 174 (1953); 40 id. 242 (1960); 47 id. 127 (1967); 53 id. 364 (1973); 56 id. 1015 (1977). Compare by analogy, with respect to FLSA entitlements, Wirtz v. Marino, 405 F. 2d 938 (1st Cir. 1968).

In the present case, it does not appear that CSC's initial determination of May 15, 1974, which exempted the meat graders from the FLSA overtime provisions, was clearly wrong or based on obviously erroneous information. It is evident that their classification under the FLSA is not a simple, clear-cut matter, but is instead dependent upon a careful and elaborate evaluation of their work duties. Also, it appears that the employing agency reasonably relied on the initial determination in formulating its management policies. Until that determination was reversed by CSC on July 6, 1976, the agency had no notice that it might be liable to pay the meat graders FLSA overtime wages for their time spent in transporting grading equipment to and from work, which equipment could have been and now is kept in storage at or near the work site.

It is therefore our view that while it may have been proper for CSC, upon a careful reevaluation of the occupational duties of the meat graders, to change their classification from exempt to nonexempt with respect to the overtime provisions of the FLSA, such administrative policy revision may only be applied prospectively. It may not properly be applied retroactively to authorize FLSA compensation to the meat graders from May 1, 1974, through July 5, 1976, when they were administratively classified by CSC as exempt from the FLSA overtime provisions. Hence, the meat graders, grades GS-7 through 9, are entitled to the benefits of the overtime provisions of the FLSA only from and after July 6, 1976, the date of their reclassification to nonexempt.

III. Civil Service Commission's Determinations as to the Entitlement of Meat Graders to Compensation for Travel Between Home and Work

As previously indicated, in March 1977 CSC also determined that time spent by the meat graders in carrying some 90 pounds of equipment from home to work (and back) constituted "hours of work" under the FLSA for which they were entitled to compensation, but that the carrying of 10 to 20 pounds of tools in like circumstances would be noncompensable.

With respect to this determination, we note that while the FLSA provides no definition as to what may constitute "hours of work" in particular situations, the Portal-to-Portal Act of 1947, now codified as 29 U.S.C. §§ 251-262, does expressly exclude ordinary commuting time from consideration, 29 U.S.C. § 254(a) (1970) providing in pertinent part that:

"(a) * * * no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee* * *

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> "(2) activities which are preliminary to or post-liminary to said principal activity or activities.

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

Thus, according to statutory law, ordinary commuting time between home and work is not compensable under the overtime provisions of the FLSA.

Published directives issued on the subject by CSC in an attachment to FPM Ltr. 551-10, April 30, 1976, entitled "Travel Time as 'Hours of Work' under FLSA," provide in pertinent part as follows:

> "C. HOME TO WORK TRAVEL (SEE TABLE 1.)
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> "Travel by an employee to and from work before and after the regular workday is a normal incident of employment. Normal travel from home to work is not counted as hours worked. However, there are certain situations where an employee may perform an activity as a requirement of his/her employing agency while traveling from home to work that could result in such travel time being considered hours worked. * * *"

The published directives do not cover the situation presented here involving the transportation of equipment from home to work. However, in their report to us on the matter, CSC officials note that while the FLSA does not require employers to compensate employees for ordinary home to work travel, a different situation arises when in the course of such travel the employee performs some work related activity at the direction of his employer. The question then becomes whether the travel time continues to be uncompensable ordinary home to work travel, or whether it becomes "an integral part of and

indispensable to" the employee's principal activity or activities. In support of this general proposition, CSC cites Steiner v. Mitchell, 350 U.S. 247, 255 (1956); Dunlop v. City Electric, Inc., 527 F. 2d 394, 398-399 (5th Cir. 1976); Secretary of Labor v. Field, 495 F. 2d 749, 751 (1st Cir. 1974); and D A & S Oil Well Servicing, Inc., v. Mitchell, 262 F. 2d 552, 554-555 (10th Cir. 1958). CSC officials also note that this Office, in 55 Comp. Gen. 1009 (1976), held that a Federal employee may be entitled to compensation for travel time under the FLSA in instances where he is regularly required to transport supplies and equipment between home and work before and after scheduled working hours.

With respect to the distinction made between the carrying of hand tools and the transportation of equipment, it is suggested that while there may be judicial precedent establishing a rule that time spent by an employee carrying personal hand tools to and from work is noncompensable under the FLSA, such rule is not for application in the present case. The CSC authorities conclude:

> "We do not view the items transported by the meat graders as constituting personal hand tools which, as the term implies, may be carried without difficulty, either by hand or in a tool box or an attache type case. Rather, what the meat graders are transporting is 94 pounds of equipment. The fact that the meat graders, upon arriving at a plant location, select for use a few tools and carry them into the plant, cannot be employed to obscure what has already occurred."

In our view, such determination is neither erroneous in fact nor contrary to law. Accordingly, payment may issue on proper claims submitted by the meat graders for their time expended in transporting some 90 pounds of equipment between their homes and work sites, as directed and required by the employing agency, during the period beginning on July 6, 1976, and ending on that date the particular employee was authorized to store his grading equipment overnight in a locker at or near his work site.

IV. The Claim of Mr. Gordon E. Rutsch

As previously indicated, in the representative claim of Mr. Gordon E. Rutsch forwarded for consideration, payment is requested for 42-1/2 hours of additional compensation for travel performed during the period November 1 through 20, 1976. In the claim documents submitted by him, Mr. Rutsch does not describe the distance traveled, and he provides no information as to the locations of his home and work site. Also, the equipment he may have carried between his home and the work site is not mentioned or described. Hence, we are unable to ascertain from the claim documents whether Mr. Rutsch transported the required amount of equipment or whether he traveled between his home and work site on a direct route and at a reasonable rate of speed.

Nevertheless, the claim was approved by Mr. Rutsch's supervisor and a Department of Agriculture administrative officer, and we therefore presume that the travel time claimed properly represents time expended in transporting 94 pounds of equipment over a direct route at a reasonable rate of speed between home and the work site each workday.

Accordingly, payment may issue on the claim, if otherwise correct. However, if doubt arises as to the validity or sufficiency of this or any other claim of this nature presented for payment with respect to the amount of travel time claimed, the claim should be forwarded to the Claims Division of this Office for further consideration. The claim forms are returned for further action consistent with the views expressed herein.

R.F. Keller

Deputy Comptroller General
of the United States