

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20542

FILE: D-178084

DATE: MAY 1 1974

MATTER OF: Night shift differential for prevailing rate employees

DIGEST: The provisions of 5 U.S.C. 5343(f), as added by Public Law 92-392, state that shift differential is payable when prevailing rate employee works a majority of hours during certain hours of the day. Under that language, employee may be paid differential only when 5 or more hours of his regularly scheduled 8-hour shift occur during the hours specified since the phrase "majority of hours" must be given its obvious meaning--a number of whole hours greater than one-half.

In determining whether prevailing rate employee works majority of hours during periods covered by night shift differential as provided in 5 U.S.C. 5343(f) meal breaks of one hour or less will be included. Employee's entitlement to differential and his entitlement to 7-1/2 percent or 10 percent differential will be based on hours of his assigned shift including such breaks.

The Chairman, United States Civil Service Commission, has requested a decision concerning the entitlement of prevailing rate employees to night differential authorized by 5 U.S.C. 5343(f), as enacted by Public Law 92-392, approved August 19, 1972, 86 Stat. 568.

Section 5343(f) of title 5, United States Code, provides:

"(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential--

"(1) amounting to 7-1/2 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

"(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

"A night differential under this subsection is part of basic pay."

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The following specific questions are asked:

"Question 1—Is a prevailing rate employee, regularly assigned to a night shift, entitled to a night shift differential for any period during which he is temporarily assigned to work a day shift? Also, would a prevailing rate employee who is regularly assigned to the 3rd shift be entitled to continue to receive a 10 percent differential when temporarily assigned to the second shift?

"Question 2(a)—Which night shift differential rate, 7-1/2 percent or 10 percent, would you pay an employee whose regularly scheduled hours of work do not constitute a majority of hours in either the 3 p.m. to midnight or 11 p.m. to 8 a.m. shift—i.e., a situation where four of the employee's eight regular working hours fall between 3 p.m. and midnight and four of his regular working hours fall between 11 p.m. and 8 a.m.?

"Question 2(b)—In a similar vein, is a night differential payable in the following situation?

"Hours of work 11:00 a.m. to 7:30 p.m.

"Meal Break 3:00 p.m. to 3:30 p.m."

The Chairman refers to decision E-178084, April 17, 1973, 52 Comp. Gen. 716 (1973), which held that in view of long-established pay practices and congressional intent, night differential should be included in basic pay of a prevailing rate employee for annual and sick leave purposes and that it is proper to include night differential in an employee's rate of pay for the purposes of computing his overtime pay. With respect to question 1 it is stated that a similar pay practice was followed under the Coordinated Federal Wage System (CFWS), i.e., a prevailing rate employee regularly assigned to a night shift continued to receive his regular night shift differential during a temporary assignment to the day shift or to another night shift having a lower night shift differential, including overtime hours of work. In accordance with the decision of April 17, 1973, the answer to both parts of question 1 is in the affirmative.

With respect to question 2, under previous instructions payment of a night differential was dependent upon whether "half or more of the regular scheduled hours" fall between specified hours rather than whether a "majority" of the hours fall between specified times. In this connection the night shift differential was paid for the entire shift when half or more of the regularly scheduled hours fell between 6 p.m. and 6 a.m. The Chairman indicates that it is assumed that the Congress' use of the term "majority" was deliberate. Accordingly, he feels that the most equitable and reasonable approach in answer to question 2(a) is to pay the employee a 7-1/2 percent differential for the first 4 hours of work, and a 10 percent differential for the last 4 hours of work. On the same basis, in answer to question 2(b), he would pay the employee a 7-1/2 percent differential for the last 4 hours worked. In this connection he notes that, since overtime pay is paid for fractional hours worked in excess of 8 in a day or 40 in a week and since a night differential was paid for fractional hours worked under CFWS, it was apparently not the intent of Congress that "majority" should be construed in terms of full hours, i.e., require 5 hours of work in an 8-hour shift in order to be eligible for a differential.

Regarding the rate of differential to be paid, we find no authority in section 5343(f) nor its legislative history that would permit splitting the amount of differential. On the contrary the Senate report on the legislation, S. Rept. No. 92-791, 92d Congress, 2d Session, contains the following statement on pages 4 and 5:

"Shift Differential

"Section 5343(f) authorizes the payment of uniform shift differentials to prevailing rate employees assigned to second or third shifts. A differential of 7.5 percent of the employees scheduled rate will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime work hours are between 3 p.m. and midnight. A differential of 10 percent will be paid when a majority of the regularly scheduled nonovertime work hours are between 11 p.m. and 8 a.m."

Identical language is found in the House of Representatives report on the legislation, H. Rept. 92-339, 92d Congress, 1st session, pages 15 and 16. Federal Personnel Manual Supplement 532-1, subchapter SS-4, paragraph c, states:

"c. Night shift differential. A prevailing rate employee is entitled to pay at his scheduled rate plus a differential of seven and one-half percent of his scheduled rate for regularly scheduled nonovertime work when a majority of his work hours occur between 3 p.m. and midnight; or ten percent of his scheduled rate if the majority of his work hours occur between 11 p.m. and 8 a.m.

"(1) Shifts for which night shift differentials are payable.

--"An authorized night shift differential of seven and one-half percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 3 p.m. and midnight.

--"An authorized night shift differential of ten percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 11 p.m. and 8 a.m."

Thus when entitlement occurs the applicable differential rate is payable for the entire shift.

With respect to the use of the term "majority" by the Congress, we concur that such use was deliberate. However, we believe that the phrase "majority of the hours" means whole hours. Under CPWS night differential was payable for work performed during the hours of 6 p.m. to 6 a.m. Under 5 U.S.C. 5343(f) night differential is payable for work performed during a longer period of time--3 p.m. to 8 a.m.--and there is an overlap of the 7-1/2 percent period of 3 p.m. to midnight and the 10 percent period of 11 p.m. to 8 a.m. This results in a substantially different night differential system from that established under the instructions applicable to CPWS. In view of the substantial liberalization of night shift differential in Public Law 92-392 we see no persuasive basis for giving a meaning to the phrase "majority of the hours" other than its obvious meaning in order to preserve one feature of CPWS which would have, if continued, afforded even greater benefits. Therefore, we conclude that a prevailing rate employee must work 5 hours of a

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scheduled 8-hour shift during the period covered by night differential in order to qualify for payment.

With reference to question 2(a) the hours of work are not shown; however, it would appear that the question contemplates a schedule where work is performed during the evening and early morning with a break of one hour taking place between 11 p.m. and midnight, the overlap hour. Thus, all hours of work would fall in the time period when a night differential is payable. We do not believe it reasonable to conclude that no night shift differential would be payable in such a situation even though a majority of hours would not be worked in either shift. For purposes of determining the applicable night differential rate, the meal period will be included in determining whether the majority of hours of the duty shift occur before or after the 11 p.m. breakpoint. Therefore, we believe for the situation described in 2(a) as amplified above the employee is entitled to the night differential of 7-1/2 percent for the entire shift unless 5 of his scheduled hours including any meal break occur between 11 p.m. and 8 a.m. in which case he would be entitled to the 10 percent rate for the entire shift. Question 2(a) is answered accordingly.

As a general rule we believe that meal breaks of one hour or less should be included for purposes of determining a prevailing rate employee's entitlement to night shift differential. This is considered reasonable because a meal break given during night shift differential hours does not allow the employee to complete or begin his work shift at an earlier or later hour, respectively. It is also considered appropriate in order to allow reasonable scheduling of breaks and to prevent administrative scheduling of breaks for the purpose of paying or denying night differential. Thus, using this rule and the majority of hours rule as stated above, an employee whose shift includes at least the 5 hours between 3 p.m. and midnight, e.g., 3 p.m. to 8 p.m., would be entitled to a 7-1/2 percent night differential and an employee whose shift includes at least 5 hours between 11 p.m. and 8 a.m., e.g., 3 a.m. to 8 a.m., would be entitled to a 10 percent night differential regardless of scheduled breaks of one hour or less. Question 2(b) is answered in the negative since the majority of the hours scheduled does not occur between the hours of 3 p.m. to 11 p.m.

If in the application of the above rules specific situations arise in which employees appear to be denied appropriate night shift

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differential, the matter should be presented to us for consideration.

R.F.KELLER

Deputy Comptroller General
of the United States