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DECISION



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

FILE: B-181237

DATE: November 1, 1977

MATTER OF: Nathaniel R. Ragsdale - Diplomatic Courier -
Hours of Employment in Travel Status

DIGEST:

1. Diplomatic couriers have a basic workweek consisting of the first 40 hours of duty performed. Consequently they do not have a regularly scheduled administrative workweek within the meaning of 5 U.S.C. 5542(b)(2)(A) and their time spent in travel status away from their official duty station does not qualify as hours of employment or work by virtue of that provision.
2. Diplomatic couriers' travel with pouch-in-hand is travel involving the performance of work while traveling and is, therefore, hours of employment or work under 5 U.S.C. 5542(b)(2)(B). But their travel is not carried out under arduous conditions within the meaning of that provision since such travel is that imposed by unusually adverse terrain, severe weather, etc., and does not include travel by common carriers, including airlines.
3. On and after the effective date of the amendment to 5 U.S.C. 5542(b), January 15, 1968, diplomatic couriers' officially ordered or approved "dead head" travel qualifies as hours of employment or work as travel incident to travel that involves the performance of work while traveling. It is not necessary to determine whether their travel results from an event which could not be scheduled or controlled administratively because they are being credited with all officially ordered and approved actual travel time as pouch-in-hand time or "dead head" time.
4. The addition of up to 6 hours of layover time on split work days to the definition of hours of employment or work for diplomatic couriers,

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while not specifically authorized by statute or Civil Service Commission regulation, does not appear to be an unreasonable exercise of administrative discretion since the "usual waiting time" which interrupts travel has been held to be compensable. Accordingly this Office interposes no objection to the inclusion of this layover time in hours of employment from the date it was added to the definition of hours of work on May 24, 1971.

5. The workweek of diplomatic couriers consists of the first 40 hours of employment or work in an administrative workweek beginning on Sunday. Therefore, work performed by them on Sunday falls within their basic workweek and although not regularly scheduled in the usual sense, may be compensated at Sunday premium rates up to 8 hours on and after the first day of the first pay period beginning after July 18, 1966, the effective date of the law authorizing such premium pay.

Mr. Nathaniel R. Ragsdale, a diplomatic courier employed by the Department of State, by a letter received here on May 28, 1975, has requested reconsideration of our decision Matter of Nathaniel R. Ragsdale, B-181237, April 15, 1975. That decision reconsidered and modified the December 18, 1967, disallowance of his im, 2-2344983, for overtime and night differential for the period July 24, 1966, to March 17, 1967. Mr. Ragsdale specifically appeals for a modification of the term "hours of work" as applied to his case.

After the decision was rendered Mr. Ragsdale filed two additional claims. The first claim, received on April 22, 1975, is for overtime and night differential for the period July 4, 1965, to July 2, 1966, which had been originally filed with the Department on September 7, 1966. The second claim, received on April 30, 1975, is for Sunday premium pay for the period November 18, 1973, to January 13, 1974. Our Claims Division referred the second claim to the Department on May 16, 1975. The Department advises that the claimant has not furnished sufficient information for it to act on that claim. Subsequently, Mr. Ragsdale filed his request for reconsideration of Ragsdale, supra, and a claim for overtime, night differential, and Sunday premium pay since 1955.

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The facts and circumstances giving rise to this case are set forth in the earlier decision and will be repeated here only to the extent required for our decision. Prior to January 1, 1967, couriers' time and attendance was recorded on the basis of a "workweek" of 5 8-hour days which did not reflect the irregular hours they actually worked. Some weeks they worked more than 40 hours, more often they worked less than 40 hours. They did not receive premium compensation because the Department considered that they received compensatory time off in the weeks they worked less than 40 hours and that such time off compensated them for the hours in excess of 40 which they worked in other weeks. Moreover they were given two additional pay grades to compensate for their irregular hours and extensive travel.

Effective January 1, 1967, the Department established the first 40 hours of work performed within 6 consecutive days of the administrative workweek as the basic workweek for couriers, applied the previously adopted definition of "hours of work" as pouch-in-hand time plus time spent on administrative duties, and began paying overtime on this basis. Their administrative workweek has been established as Sunday through Saturday. Work performed on the seventh day is treated as overtime.

Insofar as is here pertinent the prior Ragsdale decision held in substance that: (1) the Department's definition of "hours of work" was proper for the time in question, July 24, 1966, to March 17, 1977, because time spent in travel status other than with pouch-in-hand or in the performance of administrative duties did not meet the requirement of the governing statute for hours of employment; (2) that practices of the Department prior to January 1, 1967, relating to a "regularly scheduled 5-day 40 hour basic workweek" without regard to actual hours worked and compensatory time off were improper and that Mr. Ragsdale was entitled to be compensated at overtime rates for hours of work in excess of 40 in a week less the value of the compensatory time off he received in lieu of that overtime; and (3) that since Mr. Ragsdale was required on a habitual and recurrent basis to perform work at night he was entitled to night differential for hours of work between 6 p.m. and 6 a.m.

Subsequently the Department modified the definition of "hours of employment or work" to include, in addition to pouch-in-hand time and time spent on administrative duties, "dead head" flight

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time without pouch when officially ordered or approved, and, effective May 24, 1971, layover time of not to exceed 6 hours between arrival and departure on split work days, i.e., when two separate trips or two separate segments of the same trip are scheduled within a single calendar day. Since couriers are full time employees, they are paid for at least 40 hours each week even though they may not actually accumulate that many hours of work.

The file indicates that the Department is presently paying properly documented overtime, night differential, and Sunday premium pay on the basis of this definition. Further it has expressed its willingness to pay claims for this premium compensation for prior periods, if they are adequately supported and otherwise proper, on the basis of whatever definition is found to be applicable.

Mr. Ragsdale takes exception to both the original and revised definitions. It appears to be his contention, based primarily on his interpretation of the governing statutes, with their implementing regulations, and 47 Comp. Gen. 607 (1968), that all hours spent by diplomatic couriers in travel status away from their official posts of duty, or at least 16 hours per day, are hours of employment or hours of work and are, therefore, compensable at regular or premium rates of pay. Moreover, he appears to view the changes in the definition as indications that the prior determinations were erroneous.

Before proceeding further it should be pointed out that, since Mr. Ragsdale's claim reaching back to 1955 was received in the General Accounting Office on May 28, 1975, that portion which accrued before May 28, 1965, is forever barred even if otherwise valid. None of his earlier claims covered periods prior to this latter date. See section 71a of title 31, United States Code, which during the period herein involved, provided in pertinent part as follows:

"(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized

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agent or attorney, shall be received in said office within ten full years after the date such claim first accrued * * *."

As to that portion of the claim not barred by statute, the central issue is, as previously indicated, what constitutes "hours of employment or work" while in travel status. The law governing this issue, first enacted by the Federal Employees Pay Act Amendments of 1954, September 1, 1954, ch. 1208, 68 Stat. 1110, and reenacted without substantive change by Public Law 89-554, September 6, 1966, 80 Stat. 486, as section 5542(b)(2) of title 5, United States Code, originally read as follows:

"time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

"(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

"(B) the travel involves the performance of work while traveling or is carried out under arduous conditions." (Emphasis added.)

Effective January 15, 1968, item (B) of the foregoing provision was amended by section 222(a) of Public Law 90-206, December 16, 1967, 81 Stat. 641, so that it now reads as follows:

"(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

To construe 5 U.S.C. 5542(b)(2) it is necessary to refer to some of the provisions of 5 U.S.C. 6101 which are as follows:

"(a) (2) The head of each Executive agency, military department, and of the government of the District of Columbia shall—

"(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

"(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

"(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that—

"(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

"(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 day outside the basic workweek are consecutive;

"(C) the working hours in each day in the basic workweek are the same; * * *

* * * * *

"(b) (2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

Implementing regulations and instructions issued by the Civil Service Commission pursuant to 5 U.S.C. 5548 and 6101(c) are published in books 550 and 610 of Federal Personnel Manual Supplement 990-2. The regulations also appear in parts 550 and 610 of title 5, Code of Federal Regulations. These regulations provide in pertinent part as follows:

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"5 C.F.R. 610.102 Definitions.

"In this subpart:

"(a) Administrative workweek means a period of 7 consecutive calendar days designated in advance by the head of an agency under section 6101 of title 5, United States Code.

"(b) Regularly scheduled administrative workweek, for full-time employees, means the period within an administrative workweek, established in accordance with section 610.111, within which these employees are required to be on duty regularly. For part-time employees, it means the officially prescribed days and hours within an administrative workweek during which these employees are required to be on duty regularly.

"(c) Basic workweek, for full-time employees, means the 40-hour workweek established in accordance with section 610.111.

"5 C.F.R. 610.111 Establishment of workweeks.

"(a) The head of each agency, with respect to each group of full-time employees to whom this subpart applies, shall establish by regulation:

"(1) A basic workweek of 40 hours which does not extend over more than six of any seven consecutive days. Except as provided in paragraphs (b) and (c) of this section, the regulation shall specify the calendar days constituting the basic workweek and the number of hours of employment for each calendar day included within the basic workweek.

"(2) A regularly scheduled administrative workweek which consists of the 40-hour basic workweek established in accordance with subparagraph (1) of this paragraph, plus the period of overtime work, if any, regularly required of each group of employees.

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Except as provided in paragraphs (b) and (c) of this section, the regulation, for purposes of leave and overtime pay administration, shall specify by calendar days and number of hours a day the periods included in the regularly scheduled administrative workweek which do not constitute a part of the basic workweek.

"(b) 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."

The first question to be answered is whether, as Mr. Ragsdale contends, all diplomatic couriers' time in travel status, with the exception of 8 hours per day for eating and sleeping, qualifies as hours of employment or work, without regard to whether they are actually traveling or performing duties, because it is time spent within the days and hours of the regularly scheduled administrative workweek within the meaning of 5 U.S.C. 5542(b)(2)(A). In other words, it appears to be Mr. Ragsdale's view that diplomatic couriers have a regularly scheduled administrative workweek which is one and the same as their 7 day administrative workweek of Sunday through Saturday. We are unable to find support for this position.

It is evident from the foregoing that diplomatic couriers now have and, in fact, always have had a basic workweek consisting of the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek, although it may not have been identified as such prior to January 1, 1967. See earlier Ragsdale decision. A first 40 hour workweek is established when it is impracticable to prescribe a regular schedule of definite hours of duty for each work day of a regularly scheduled administrative workweek. 5 C.F.R. 610.111(b). Consequently couriers do not have a regularly scheduled administrative workweek within the meaning of 5 U.S.C. 5542(b)(2)(A) and their time spent in travel

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status away from their official duty station is not hours of employment or work by virtue of that provision. Similarly, they do not fall within the purview of 5 U.S.C. 6101(b)(2) which provides that to the maximum extent practicable time to be spent in travel status shall be scheduled within the regularly scheduled workweek.

Next there must be considered 5 U.S.C. 5542(b)(2)(B). This provision applies only to officially ordered or approved travel and only to actual travel time plus the usual waiting time which interrupts the travel--not to all time in travel status for which per diem may be payable. See 47 Comp. Gen. 607, 610 (1968), Federal Personnel Manual Supplement 990-2, Book 550, subchapter S1-3b(2)(c)(ii) and (iii). Prior to January 15, 1968, as previously indicated, this provision of law permitted only those hours spent in actual travel involving the performance of work while traveling or those spent in actual travel carried out under arduous conditions to be counted as hours of employment. Couriers' travel with pouch-in-hand qualifies as travel involving the performance of work while traveling and it appears they have been given full credit for this time.

Arduous conditions, as used in the statute, are conditions which impose a substantial burden on the traveler beyond that normally associated with travel, such as those imposed by unusually adverse terrain, severe weather conditions, and remote sites inaccessible by the ordinary means of transportation. Absent some very unusual circumstances, travel by motor vehicle over hard surfaced roads or by common carrier, including airlines, is not travel under arduous conditions, even though it may occur at night, continue over an extended period of time, and involve some risks. 52 Comp. Gen. 702 (1973), 41 id. 82 (1961), B-179003, August 24, 1973. Therefore diplomatic couriers' travel is not travel under arduous conditions within the meaning of 5 U.S.C. 5542(b)(2)(B).

In view of the foregoing it is our opinion that the earlier definition of hours of work employed by the Department and adopted in our prior Ragsdale decision--pouch-in-hand time plus time spent in the performance of administrative duties--complied with the law prior to its amendment and credited couriers with all hours of work for which they were entitled to receive regular or premium pay, although they may have been entitled to receive per diem in lieu of subsistence for additional periods.

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The amendment effective January 15, 1968, provided two additional situations in which actual traveltime is to be construed as hours of employment or hours of work--travel incident to travel that involves the performance of work while traveling and travel resulting from an event which could not be scheduled or controlled administratively, 5 U.S.C. 5542(b)(2)(B)(ii) and (iv). However, it should be emphasized that the added provisions, like (i) and (iii), apply only to actual traveltime and not to all time during which an employee may be in a travel status away from his official station. The "off duty" periods of Atomic Energy Commission escorts, the personnel involved in 47 Comp. Gen. 607, supra, which were held to be compensable as hours of employment or work because they were incident to travel which involved the performance of work while traveling, were "off duty" periods while traveling in especially equipped motor, rail, or air vehicles. They were "captive" with the shipment on the vehicle. 41 Comp. Gen. 8, 10 (1961). Their time spent not working and not traveling was held to be noncompensable. Similarly, diplomatic couriers' officially ordered or approved actual traveltime without pouch-in-hand, "dead head" time, to pick up or to return after delivery of a pouch appears to be compensable under 5 U.S.C. 5542(b)(2)(B)(ii). See B-178452, June 22, 1973, and Federal Personnel Manual Supplement 990-2, Book 550, subchapter S1-3b(2)(c)(iv).

Concerning 5 U.S.C. 5542(b)(2)(B)(iv)--travel resulting from an event which could not be scheduled or controlled administratively--it was for the very reason that couriers' travel was difficult or impractical to schedule and control that a first 40 hours of employment or work basic workweek was established for them. However, the phrase "could not be scheduled" in the statute contemplates more than mere difficulty and impracticality. 51 Comp. Gen. 727 (1972). Moreover, we may not generalize as to the applicability of this provision because whether travel time qualifies as hours of work depends upon the specific facts and circumstances of a given situation. See Federal Personnel Manual Supplement 990-2, Book 550, subchapter S1-3b(2)(c)(iv). Furthermore, it is not necessary to resolve this issue since, insofar as we can determine, all officially ordered or approved actual traveltime is already being counted as hours of work as pouch-in-hand time or as "dead head" time.

Accordingly, it is our opinion that the definition of hours of employment or work as time spent with pouch-in-hand, plus time

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spent in officially ordered or approved "dead head" travel, plus time spent on administrative duties complies with the law from the effective date of the amendment, January 15, 1968.

As has been indicated above, there was added to this definition, effective May 24, 1971, layover time of not to exceed 6 hours between arrival and departure on split work days when two separate trips or two segments of the same trip are scheduled within a single calendar day. This includes the usually established 3 hours of pouch-in-hand time attached to the beginning and end of scheduled travel time. While we have been unable to find a specific statute or Civil Service Commission regulation construing such time as hours of employment or work, we have held that the "usual waiting time" which interrupts travel, up to 3 hours in unusually adverse conditions, may be compensable. 50 Comp. Gen. 519, 523 (1971), B-175082, April 20, 1972. Moreover, the Department indicates that the Civil Service Commission, which is authorized by statute to regulate in this area, has concurred in the inclusion of this layover time in hours of employment or work. This appears to be a reasonable exercise of administrative discretion and this Office will interpose no objection to it.

In summary we conclude that diplomatic couriers may be compensated, at regular or premium rates as appropriate, only for those hours which fall within the foregoing definitions of hours of employment or work. The Congress has not seen fit to provide compensation for all time spent in travel status. See 51 Comp. Gen. 727, 733 (1972), B-172671, April 21, 1976, and B-163654, January 21, 1974.

There remains to be addressed the question of whether diplomatic couriers are entitled to Sunday premium pay since the earlier Ragsdale decision did not involve that issue. The law authorizing Sunday premium pay was originally enacted by section 405(c) of the Federal Salary and Fringe Benefits Act of 1966, Public Law 89-504, July 18, 1966, 80 Stat. 197, effective the first day of the first pay period after July 18, 1966. Section 1 (29) of Public Law 90-83, September 11, 1967, 81 Stat. 201, restated and reenacted this provision as section 5542(a) of title 5, United States Code, which reads as follows:

"An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part

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of which is performed on Sunday is entitled to pay, for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay."

The language in the foregoing provision relating to "regularly scheduled" is not identical to that in 5 U.S.C. 5545(a) authorizing premium pay for night work. However we think it is sufficiently similar to permit application of the same criteria as that used for night differential in the earlier Ragsdale decision to determine whether couriers are entitled to Sunday premium pay. See cases cited therein. The Department has established a first 40 hour workweek for couriers in an administrative workweek beginning on Sunday. Therefore, any work performed by couriers on Sunday falls within their basic workweek and although it is not regularly scheduled in the usual sense, it may be compensated at Sunday premium rates up to 8 hours.

Accordingly, we hereby affirm our prior decision in the Matter of Nathaniel R. Ragsdale, B-181237, April 15, 1975, and the settlement of Mr. Ragsdale's claim for overtime and night differential during the period July 24, 1966, to March 17, 1967. Mr. Ragsdale's additional claims will be settled in accordance with the provisions of our prior Ragsdale decision and this decision.


Acting Comptroller General
of the United States

DOCUMENT RESUME

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[Diplomatic Courier: Hours of Employment in Travel Status].
B-161237. November 1, 1977. 12 pp.

Decision re: Nathaniel R. Ragsdale; by Robert F. Keller, Acting
Comptroller General.

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Stat. 1110). Federal Salary and Fringe Benefits Act of 1966
(P.L. 89-504; 80 Stat. 297). (P.L. 90-206, sec. 222(a); 81
Stat. 641). (P.L. 89-554; 80 Stat. 486; 5 U.S.C.
5542(b)(2)). P.L. 90-83. 81 Stat. 201. 5 U.S.C. 5545. 5
U.S.C. 5548. 5 U.S.C. 6101. 31 U.S.C. 71a. 47 Comp. Gen.
607. 47 Comp. Gen. 610. 52 Comp. Gen. 720. 41 Comp. Gen. 82.
41 Comp. Gen. 8. 41 Comp. Gen. 10. 51 Comp. Gen. 727. 50
Comp. Gen. 519. 50 Comp. Gen. 523. 51 Comp. Gen. 733.
B-172671 (1976). B-163654 (1974). E-175082 (1972).

A diplomatic courier requested reconsideration of a
decision which modified the disallowance of his claim for
overtime and night differential pay for the period July 24,
1966, through March 17, 1967. He specifically appealed for a
modification of the term "hours of work" as applied to his case.
The prior decision and settlement of the courier's claim were
affirmed. The additional claim made for Sunday premium pay for
the period November 18, 1973 through January 13, 1974, may be
paid. (SC)