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Lupton C.P.

DECISION

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

FILE: B-189782 DATE: February 3, 1978

MATTER OF: Department of Interior - Overtime Pay for Prevailing Rate Employees Who Negotiate Their Wages

DIGEST:

1. Section 9(b) of Pub. L. 92-392, August 19, 1972, 5 U.S.C. § 5343 note, governing prevailing rate employees, exempts certain wage setting provisions of certain bargaining agreements from the operation of that law. However, Section 9(b) does not exempt agreement provisions from the operation of other laws or provide independent authorization for agreement provisions requiring expenditure of appropriated funds not authorized by any law.

2. Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. § 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work.

3. Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on top of overtime" which is not authorized by 5 U.S.C. § 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. Luria v. United States, 231 U.S. 9, 24 (1913). Hence, it may not be paid.

4. Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages overtime compensation at rates more than one and

one-half of the basic hourly rate. Although computation provision (1) of 5 U.S.C. § 5544(a) states that overtime pay is to be computed at "not less than" one and one-half the basic hourly rate, computation provisions (2) and (3) of 5 U.S.C. § 5544(a) state that overtime pay is to be computed at one and one-half the basic hourly rate. Since provisions (2) and (3) were enacted by statute amending original statute enacting provision (1), 5 U.S.C. § 5544 is construed as establishing the overtime pay rate at one and one-half the basic rate and a greater figure may not be used.

This action involves a request from the Honorable Richard R. Hite, Assistant Secretary, United States Department of the Interior, for an advance decision on the legality of certain pay provisions that have been negotiated or proposed for hourly paid employees whose wages have been established through collective bargaining pursuant to section 9(b) of Pub. L. 92-392, August 19, 1972, 5 U.S.C. § 5343 note. Employee organizations including the American Federation of Government Employees (AFGE), the International Brotherhood of Electrical Workers (IBEW), and the National Federation of Federal Employees (NFFE) have submitted legal briefs in this case setting forth their respective views on the issues raised by Interior.

The Department of the Interior has requested this Office to rule on the legality of collective bargaining provisions that require:

1) overtime compensation to apply to time spent on meals during or attributable to such overtime and during which meal period no substantial official duties are performed or, alternatively, where the overtime work precluded consumption of a meal until the completion of the work when the employee was released from duty but paid for the 30-minute meal time that should have been taken;

2) a higher rate of pay than the basic rate or in addition to overtime pay where a scheduled meal period during or attributable to overtime hours is either delayed or missed when management determines the exigencies of work require an uninterrupted continuation of operations; or

3) the payment for overtime work to be at rates more than time and one-half of the basic rate of pay.

We shall discuss each of these issues seriatum. However, at the outset, it is essential that we put the exclusionary provisions of section 9(b) of Pub. L. 92-392 in proper perspective. That section reads in pertinent part as follows:

"(b) The amendments made by this Act shall not be construed to--

"(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

"(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or

"(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date."

The legislative history of section 9(b) contained in H. R. Rep. No. 339, 92d Cong., 1st Sess. 22 (1971) is set forth below:

"Savings clause for existing agreements

"Section 9(b)(1) of the bill, with the committee amendment, provides that the amendments made by the Act shall not be construed to abrogate, modify, or otherwise affect the provisions of any existing contract pertaining to the wages, conditions of employment, and other employment benefits of Government employees, which contract resulted from negotiations between agencies and employee organizations. Paragraph (2) of section 9(b) states that the provisions of any contract in effect on the date of enactment of the Act may be renewed, extended, modified or improved through negotiation after the enactment date of the Act. Paragraph (3) of section 9(b) provides that the Act shall not affect any existing agreement between agencies and employee organizations regarding the various items which are negotiable, nor shall the Act preclude the inclusion of new items in connection with the renegotiation of any contract.

"The provisions of section 9(b) are directed at those groups of Federal employees whose wages and other terms or benefits of employment are fixed in accordance with contracts resulting from negotiations between their agencies and employee organizations. * * * It is not this committee's intent to affect, in any way, the status of such contracts or to impair the authority of the parties concerned to renegotiate existing contracts or enter into new agreements. However, the prevailing rate employees who are now covered by such contracts will be subject to the provisions of this Act when such contracts expire and are not renewed or replaced by new contracts."

Certain of the employee organizations have contended that section 9(b) must be construed as meaning that the amendments made by Pub. L. 92-392 shall not affect any collective bargaining agreement provisions negotiated by Federal prevailing rate employees with their agencies that were in effect on the date of enactment of the Public Law.

The employee organizations point out that agreement provisions covering such issues as overtime pay for meal periods were in effect at the time Pub. L. 92-392 was enacted into law and hence may be legally continued so long as the parties continue to include such provisions in their bargaining agreement. We do not disagree with the position advanced by the employee organizations, assuming a priori that the provisions of such agreements were and continue to be legally proper. However, the legislative history indicates that section 9(b) was designed to preserve only those provisions that were properly negotiable in the first instance. Thus, section 9(b) would not operate to cure a provision that was contrary to law and regulations when negotiated.

It is clear that agreement provisions, excluded from operation of the provisions of Pub. L. 92-392 by section 9(b) of that law, need not conform to the requirements of the provisions of Pub. L. 92-392. On the other hand, it is equally clear that agreement provisions concerning matters governed by other laws must be consistent with these other laws, notwithstanding the fact that other provisions of the agreement are covered by section 9(b). Similarly, we do not construe section 9(b) as providing independent authority for agreement provisions that involve the expenditure of appropriated funds not authorized by any other law. Amell v. United States, 182 Ct. Cl. 604 (1968).

We turn now to the issue of whether an agency has authority to pay overtime compensation to prevailing rate employees, who negotiate their wages pursuant to section 9(b) of Pub. L. 92-392, for meal periods during or attributable to overtime duty when no substantial duties are performed during the meal periods, or alternatively where a meal period was preempted by overtime work and the employees are paid for an additional 30 minutes after they are released from duty.

Overtime pay for prevailing rate employees, whether or not they are covered by a section 9(b) agreement, is governed by 5 U.S.C. § 5544, which provides in part as follows:

"§ 5544. Wage-board overtime and Sunday rates; computation

"(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. The overtime hourly rate of pay is computed as follows:

> "(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.
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> "(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.
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> "(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless 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."

A careful reading of the provisions of the above-quoted statute indicates that, with the exception of certain specified situations, overtime compensation is authorized only for periods of work as

opposed to periods of duty. Moreover, the above-quoted statute has been construed on several occasions by the Court of Claims as precluding overtime pay for meal periods unless substantial duties are performed during such meal periods. For example, in Ayres v. United States, 186 Ct. Cl. 350, 355 (1968), the Court held that:

> "Wage board employees are not entitled to be paid for periods set aside for eating purposes, provided that this noncompensated time meets the standard succinctly stated in Bantom v. United States, 165 Ct. Cl. 312, 320 (1964), cert. denied, 379 U.S. 890, as follows:
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> > "* * * [A]n employee is not entitled under the Federal Employees Pay Act to compensation for time set aside for eating, even where the employee is on a duty status and such time is, therefore, subject to possible interruption. Compensation is available only if it is shown that substantial official duties were performed during that period. * * *"

See also Bennett v. United States, 194 Ct. Cl. 889 (1971); Armstrong v. United States, 144 Ct. Cl. 659 (1959), and B-166304, April 7, 1969.

We therefore hold that agencies have no authority to pay overtime compensation for employee meal periods unless such employees perform substantial duties during the meal periods. Similarly, agencies have no authority to pay overtime compensation to employees after they have been released from duty, notwithstanding the fact that a scheduled meal period was preempted by work for which the employees received compensation.

Next, we shall address the issue of whether agencies have authority to pay employees, who negotiate their wages under section 9(b) of Pub. L. 92-392, a higher rate of pay than the normal basic rate during overtime hours where a scheduled meal period during or attributable to overtime hours is either delayed or preempted, when management determines the exigencies of work require an uninterrupted continuation of operations.

In a sample agreement provision provided by Interior, this added increment of overtime compensation is referred to as penalty pay presumably to penalize the employer for delaying employee meals.

In this connection, one of the purposes of overtime compensation is to discourage the employer from unnecessarily requiring overtime work while providing the employee with an incentive to tolerate the added inconvenience. Kelly v. United States, 119 Ct. Cl. 197, 211 (1951), affirmed 342 U.S. 193 (1952). Hence, the penalty pay is in effect a special type of overtime or "overtime on top of overtime." As stated above, the authority for prevailing rate employee overtime compensation, regardless of whether they are covered by a section 9(b) agreement, is contained in 5 U.S.C. § 5544, supra. That statute does not authorize added increments of overtime compensation for any purpose. In this connection, it has been held that an act which is contrary to the plain implication of a statute is unlawful, although neither expressly forbidden nor authorized. Luria v. United States, 231 U.S. 9, 24 (1913). Therefore, authorization of an added increment of overtime compensation for delayed or preempted meal periods may not be implied from the provisions of the statute. Hence, agencies have no authority to make such payments.

We deal next with the issue of whether an agency may pay prevailing rate employees who negotiate their wages pursuant to section 9(b) of Pub. L. 92-392 overtime compensation at rates more than time and one-half of their basic rates of pay.

The statutory provision governing the rate of overtime compensation for prevailing rate employees is contained in 5 U.S.C. § 5544(a) and states that the overtime hourly rate of pay is to be computed as follows:

> "(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.
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> "(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.
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> "(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and mutiply the quotient by one and one-half."

The labor organizations and Interior argue that the term "not less than" contained in (1) provides discretionary authority for agency heads to establish overtime pay rates at more than one and one-half the basic hourly rate for prevailing rate employees whose pay is fixed on a basis other than an annual or monthly basis.

We do not agree with this contention. The above-quoted statutory provisions must be read as a whole. When read in this manner it is clear that the purpose of these provisions is to establish formulae for computing overtime pay for prevailing rate employees paid at different intervals. The obvious intention of Congress was to fix a single overtime pay rate of time and one-half for all prevailing rate employees notwithstanding the intervals in which they were paid.

Computation provision (1) of 5 U.S.C. § 5544(a) was originally enacted into law as section 23 of the Independent Offices Appropriation Act, 1935 (Act of March 28, 1934, chapter 102, 48 Stat. 509, 522). The United States Supreme Court analyzed the legislative history of section 23 in United States v. Townsley, 323 U.S. 557 (1945). There the Court construed the provisions of section 23 as requiring overtime pay "* * * at one and one-half straight time pay for the extra hours worked," and not at a rate of "not less than" one and one-half straight time pay. United States v. Townsley, 323 U.S. 557, 565-6, supra.

Moreover, if there remained any doubt as to the meaning of the overtime rate established by section 23, those doubts were resolved when Congress amended section 23 by enacting section 203 of the Federal Employees Pay Act of 1945 (chapter 212, 59 Stat. 295, 297) which was subsequently codified as computation provisions (2) and (3) of 5 U.S.C. § 5544(a) as follows:

> "Sec. 203. Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 (U.S.C., 1940 edition, title 5, sec. 673c). The rate of compensation for each hour of overtime employment of any such employee shall be computed as follows:

> "(a) If the basic rate of compensation of the employee is fixed on an annual basis, divide such basic rate of compensation by two thousand and eighty and multiply the quotient by one and one-half; and
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> "(b) If the basic rate of compensation of the employee is fixed on a monthly basis, multiply such basic rate of compensation by twelve to derive a basic annual rate of compensation, divide such basic annual rate of compensation by two thousand and eighty, and multiply the quotient by one and one-half."

In the above provisions Congress construed section 23 as establishing the overtime pay rate for prevailing rate employees at one and one-half the basic hourly rate and did not provide agency heads with discretion to establish a higher rate.

Accordingly, we hold that there is no authority under 5 U.S.C. § 5544 to establish overtime pay rates at a figure greater than one and one-half the basic hourly pay rate for prevailing rate employees.

As a result of our holding in this decision, it appears that Interior has made erroneous overpayments of overtime pay to certain employees for: (1) meal periods during which no substantial duties were performed; (2) short periods of time after employees were released from work to compensate such employees for preempted meal periods; (3) short periods of time when meal periods were delayed or preempted during overtime work where employees were already receiving overtime pay; and (4) overtime pay for prevailing rate employees at rates greater than one and one-half their basic hourly rates of pay. Under the provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-953, 4 C.F.R. Part 104, and 4 GAO Manual § 55.3 regarding the termination of collection action, we hold that Interior may forego collection action on the aforementioned overpayments that have been made or that are made during the additional period permitted below. We base our holding on the belief that administrative costs of identifying and collecting overpayments would be excessive, the possibility of collections from former employees is doubtful, and all of the overpayments would be eligible for and likely receive favorable waiver consideration under 5 U.S.C. § 5584. See B-181467, July 29, 1976.

Although the contract provisions here involved have been negotiated over a long period, this decision is the first one stating such provisions are illegal. In view thereof and in order to cushion the impact of this decision, the Department of the Interior is hereby authorized to delay its implementation until the earliest expiration date of each agreement which contains any provision inconsistent with this decision or a period of 3 years, whichever occurs first.

It may well be that the Bureau of Reclamation is in need of and should consider requesting special legislative authority to pay overtime compensation to prevailing rate employees in excess of that permitted under 5 U.S.C. § 5544 in order to remain competitive in the labor market. We note that Bonneville Power Administration (BPA) found itself in such a situation shortly after it was organized in 1937. It experienced problems in recruiting and retaining skilled employees because it lacked authority to make many premium pay payments that had become standard practice among private sector utilities. In 1945, BPA petitioned Congress to grant it extraordinary authority to enable it to successfully compete within the utility industry in the Pacific Northwest. Congress responded by enacting H.R. 2690, Pub. L. 201, 79th Cong., 1st Sess. (1945), 59 Stat. 546, which among other things empowered the Administrator, BPA, to fix the compensation of laborers, mechanics and workmen employed by the BPA "* * * without regard to the Classification Act of 1923, as amended, and any other laws, rules or regulations relating to the payment of employees of the United States * * *." Hence, since 1945, BPA has been vested with authority necessary to provide its hourly rate employees with compensation consistent with that paid by private sector utilities in its area of operation even when such compensation would not have been authorized under the general Federal statutes governing employee compensation. Abell v. United States, 207 Ct. Cl. 307 (1975).

R. F. Keller

Deputy Comptroller General
of the United States