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

FILE: B-190369 DATE: February 23, 1978

MATTER OF: John T. Teske - Premium Pay For Standby Duty At Home

DIGEST:

1. Claimant, a radiology technician employed by Veterans Administration, may not receive premium pay for "on-call" duty performed at his home or within 25 miles of hospital because Veterans Administration had not designated his home as his duty station and his activities were not so narrowly restricted as to bring him within the purview of 5 U.S.C. § 5545(c)(1) as implemented by 5 C.F.R. § 550.143.

2. Radiology technician who while on call was required to be available by telephone or paging device with range of 25 miles, either at his residence or elsewhere within 1 hour's drive to work, is not entitled to overtime compensation for standby duty under 5 U.S.C. § 5542 since, in view of relative freedom of location and activity, time spent on call was not spent predominately for his employer's benefit.

This decision is issued in response to a request for reconsideration of the action taken August 25, 1977, by our Claims Division disallowing the claim of Mr. John T. Teske for premium pay for standby duty covering the period from October 18, 1970, through April 27, 1975, as a special procedure technician employed by the Veterans Administration (VA) Hospital at Birmingham, Alabama.

The record reveals that during the period in question, the claimant was periodically scheduled to remain "on-call" to perform special radiological procedures during

other than regularly scheduled work hours. These periods of "on-call" duty were rotated among claimant and three other radiology technicians. While on call, the claimant was required to keep the medical administrative assistant advised of where he could be reached. During the weeks that the claimant was scheduled for on-call duty, he was required to maintain a 1-hour response time between notification that a special procedure was required and reporting to the hospital. For most of the period covered by the claim special procedure technicians were provided with summoning devices which they could use at their option. When the technician's services were required and he could not be reached by telephone, the device signaled the technician on call who was then required to contact the medical administrative assistant for instructions. The paging device had an effective range of up to 25 miles.

Anytime the technician called was unable to respond, he was to notify one of two designated individuals who would determine whether the reason was emergent. Where the reason for the technician's inability to respond was determined nonemergent, he was advised to obtain his own relief and to inform the medical administrative assistant. If an emergency situation was determined to exist, the predesignated individual would arrange for a replacement and then notify other interested persons.

Effective April 27, 1975, claimant's status was changed from "on-call" to "standby" and his residence designated as his standby duty station. Incident to that action, annual premium pay of 25 percent was authorized under 5 U.S.C. § 5545(c)(1) (1970). In requesting review of the Claims Division disallowance, Settlement Certificate Z-2616549, August 25, 1977, the claimant contends in effect that he is entitled to retroactive premium pay for standby duty because the restrictions placed on him incident to his "on-call status" were no less restrictive than those later imposed in connection with standby duty for which premium pay was authorized.

Section 5545(c)(1) of title 5, United States Code (1970), authorizes the head of an agency to pay premium

pay on an annual basis to an employee in a position "requiring him regularly to remain at, or within the confines of his duty station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work." Regulations in effect during the period of Mr. Teske's claim (5 C.F.R. § 550.143(b)) provide the following guidance as to when "on-call" time spent by an employee at his residence qualifies as time spent "at or within the confines of his station:"

> "(b) The words at, or within the confines of, his station, in section 550.141 mean one of the following:
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> "(1) At an employee's regular duty station.
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> "(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel required to stand by in readiness to perform actual work when the need arises or when called.
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> "(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his

> tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

The record reveals no directive or instruction restricting the claimant to his residence during the times when he was on call. Indeed, on at least two occasions, September 23, 1970, and September 10, 1973, he received written instructions to the effect that he need only keep the medical administrative assistant advised of where he could be reached. The September 10, 1973, letter expressly stated that if he left his home without the paging device, the claimant must advise the medical administrative assistant of a phone number where he can be reached.

Our Office has consistently held that where an employee is not restricted to his residence and his residence is not designated as his duty station, he is not entitled to compensation by virtue of being on call. See Matter of Glen W. Sellers, B-182207, January 16, 1975; Matter of Claude M. Schonberger, B-173783, April 1, 1975; B-167742, September 9, 1969.

Neither do we think that the restrictions placed on Mr. Teske while on call during the period in question qualify him for overtime compensation under 5 U.S.C. § 5542 (Supp. I, 1971) which provides in pertinent part as follows:

> "(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty

> in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates * * *."

In order to qualify for overtime compensation under this provision, the claimant must establish that the "on-call" time at home constituted "hours of work" within the meaning of those words as used in the law. In Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964) and in Moss v. United States, 173 Ct. Cl. 1169 (1965), the U.S. Court of Claims, in defining "hours of work," concluded that where an employee is allowed to stand by in his own home with no duties to perform for his employer except to be available to answer the telephone, the time spent in such capacity does not amount to "hours of work" under the above-cited statute and is not compensable. The Rapp case involved an employee who was required once or twice a month to remain at home from the end of work in the afternoon until the following morning to answer the telephone for any emergency calls received during that time. He was free to leave his residence whenever necessary, provided he notified his supervisor so that calls could be diverted in his absence. The Court of Claims held that the employee was not entitled to overtime compensation under those circumstances inasmuch as the time so spent was not predominately for his employer's benefit. Those cases are to be distinguished from Matter of Hugh J. Hyde, 55 Comp. Gen. 1314 (1976), in which claimant was held to be entitled to overtime compensation for performing the duty security officer function during which he was confined to the 10-acre area of the Navy installation on which his residence was located, within hearing distance of a loudspeaker. The decision in that case turned upon the substantial degree to which the employee's activities were restricted and his whereabouts limited and the additional fact that he was required to hold himself in a pronounced degree of readiness, being called upon to respond to emergencies as often as 50 times a year. To the same effect see Matter of Ralph E. Conway, B-176924, September 20, 1976.

In B-182207, supra, we considered a claim substantially identical to Mr. Teske's. Here, as in that case, it appears that the claimant was allowed even greater freedom to engage in personal activity than were the employees in the Moss and Rapp decisions, since by use of the paging device, he was freed of the necessity to always be available by telephone and he could thereby exercise a greater degree of personal mobility. Therefore, we are unable to conclude from the facts presented that the time Mr. Teske spent on call is compensable under 5 U.S.C. § 5542.

The situation as it existed after April 27, 1975, would appear to be distinguishable from that during the period for which Mr. Teske claims retroactive standby pay. Subsequent to that date his home was designated as his official duty station and premium compensation for standby duty was authorized by the proper official. The April 23, 1975, memorandum so designating the residences of the four technicians would appear to require them to remain at their residences while on standby duty. This requirement would meet the conditions for compensation imposed by 5 C.F.R. § 550.143(b)(3) quoted above.

Accordingly, the settlement disallowing Mr. Teske's claim is sustained.

Mr. Teske has also requested information as to his recourse in the event his claim is denied. The decisions of our Office are final and conclusive upon the executive branch of the Government. Therefore, if Mr. Teske desires to pursue the matter further, he should consult sections 1346 and 1491 of title 28, United States Code, pertaining to matters cognizable in the District Courts of the United States and the United States Court of Claims.

Deputy Comptroller General
of the United States