

**DECISION**



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

7898

**FILE: B-191915**

**DATE: September 25, 1978**

**MATTER OF: John W. Matrau, et al. - Retroactive Change in Appointment, With Fringe Benefits**

**DIGEST: Employees appointed on an intermittent basis may not be retroactively granted regular part-time appointments, with accompanying fringe benefits, in the absence of evidence establishing that they worked prescheduled, continuous, regular tours of duty.**

This action results from the appeal by Mr. James M. Peirce, President of the National Federation of Federal Employees (NFFE), of the settlement dated January 30, 1978, by our Claims Division which denied the claims of nineteen commissary cashiers employed at Fort George Meade, Maryland.

The employees' claims for conversion from intermittent to regular part-time status, with associated fringe benefits were disallowed on the ground that they were appointed as intermittent employees and as such were not entitled to certain of the benefits claimed. In the settlement of January 30, 1978, the employees were advised that any claim for credit to the Civil Service Retirement and Disability Fund should be directed to the United States Civil Service Commission as they have exclusive jurisdiction in such matters. They were also advised of what action to take if they had not been paid for overtime or holiday pay.

The nineteen claimants were all designated intermittent employees until offered the opportunity to change to either full or part-time status. They contend, however, that on the basis of the work they actually performed they should be retroactively granted regular part-time employee status and all accompanying benefits, effective from the first day of employment. We note that five of the nineteen claimants were first employed prior to 1970. Since the claims were not received in our Claims Division until April 16, 1976, we cannot, under the terms of 31 U. S. C. § 71a, consider any portion of their claims arising before April 16, 1970.

Intermittent or when-actually-employed (WAE) duty is defined in Department of the Army CPR 990-2 (C1), Book 610, paragraph S1-2b(3), which provides in part as follows:

"Intermittent (WAE) services are those rendered by employees for whom no tour of duty can feasibly be established on a continuing basis. It applies to those employees who are expected

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to respond to requests for duty in connection with some un-scheduled activity \* \* \*."

The right to leave of such employees is governed by 5 U.S.C. § 6301(2)(B)(i) which requires that an employee work a "regular tour of duty during the administrative workweek" to be entitled to leave benefits. In 31 Comp. Gen. 581 (1952) we interpreted this provision as contemplating "a definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." Unless there be established in advance a specific time during an administrative workweek when an employee is regularly required to perform duty, he cannot earn leave. Thus, intermittent employees are not eligible for annual and sick leave benefits.

Mr. Peirce contends that the claimants in the present case were not intermittent employees, but worked a pre-scheduled regular 40-hour tour of duty "each week almost continuously." Chief, Management-Employee Relations, Tippie J. Vargo asserts, however, that claimants' work hours and days varied each week. Civilian Personnel Officer B. L. McKitrick states that all employees hired as intermittent workers were in fact so utilized since they did not work on a set schedule, but only when actually needed.

Claimants base their contention that they did actually work pre-scheduled tours of duty upon the fact that they were given each Saturday a schedule for the following week. Yet Mr. McKitrick stresses in his letter of March 1, 1977, that these schedules were tentative ones, and varied from week to week. Claimants were informed that these tentative work schedules were subject to change, and in fact the schedules did change frequently during each week. Mr. McKitrick also states that these tentative work schedules were provided for the convenience of the intermittent employees, to allow them to "plan for baby sitters, preparation of meals at home, etc." We ruled in our decision B-150467, February 28, 1963, that a schedule arranged on a weekly basis for the convenience of an employee does not constitute an "administratively prescribed regular tour of duty in advance" so as to justify a change in status from intermittent to regular part-time worker. The facts presented in the record of the instant case bring it within this ruling. Accordingly, the tentative schedules prepared for these workers provide no basis upon which we can authorize their retroactive conversion to regular part-time status.

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Claimants further contend that on the basis of their alleged continuous performance of full-time tours of duty they should be granted retroactive part-time status. However, we held in 31 Comp. Gen. 215, supra, that, unless a regular tour of duty has been established for them in advance, intermittent employees "would be without the benefit of the leave act even though they might actually work full-time for long periods." While the nature of the actual work performed, not the official job status designation, is the decisive factor, an employee will not be granted the benefits available to regular part-time employees unless he works hours set under a regular scheduled tour of duty. See Matter of Kenneth L. Nash, 57 Comp. Gen. 82 (1977). Given that claimants have not produced evidence sufficient to counter the administrative determination that they were not provided specific duty hours in advance, we cannot authorize a retroactive change in status on the basis of their claimed continuous regular tours of duty.

The facts as presented by the agency and those presented by the employees are in direct conflict. This Office does not conduct adversary hearings in adjudicating claims but must decide them on the basis of the written record presented to us by the parties. Where the record contains a dispute of fact which cannot be resolved without an adversary proceeding it is a long-standing practice of this Office to resolve the matter in favor of the Government. See Matter of Ambrose W. Clay et al., B-188461, December 20, 1977.

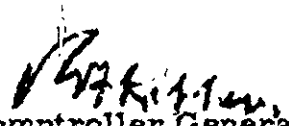
Mr. Peirce has included with his letter of appeal a memorandum from Frank Borowitz, Director of the Northeast Commissary Field Office, located at Fort Meade, with an attached basic letter from Captain David D. Cline (AG) for the U. S. Army Troop Support Agency headquarters, Fort Lee, Virginia. In his letter, Captain Cline notes two instances of improper use of intermittent employees, and cautions the directors of the Commissary Field Offices to insure that employees on WAE appointments actually work on an intermittent basis. The memorandum from Mr. Borowitz simply states that "[s]upervisors at all levels must insure that WAE workers are used in accordance with the intents and purposes of CPR Supplement 690-2, 610(C-1) and 610-51." Mr. Peirce believes these communications "show that management now recognized the fact that their WAE employees actually worked on a regular part-time basis rather than on an intermittent basis." We disagree. It is our considered opinion that these letters evidence only an effort to reiterate the applicable standards, to ensure that agency policy continues to be properly

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carried out, and that it be corrected in those instances in which it has not been properly implemented. We believe it would be improper for us to infer from the statements made in these communications an admission of improper practices at Fort Meade. We note in this connection that we have been assured by Lieutenant Colonel Mangram, Chief Resource Management Personnel Officer at Fort Meade, that neither of the instances of WAE employee misuse recounted by Captain Cline occurred at Fort Meade.

Intermittent employees are excluded by regulation from eligibility for life insurance and health benefits. See FPM Supplements 870-1, S2-2b(3) and 890-1 S4-3c.

Accordingly, on the basis of the record before us we must sustain the action of our Claims Division in disallowing the claims.

  
Acting Comptroller General  
of the United States