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DECISION



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

10,498

FILE: B-193384/B-193544/B-194035 DATE: June 18, 1979

MATTER OF: Professional Air Traffic Controllers - *CNG 00171*
Organization--Overtime--Sunday and Holiday
Premium Pay

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- DIGEST:
1. Employee worked 5 consecutive 8-hour days, Tuesday through Saturday. On Wednesday his schedule was changed and the next week he worked Sunday and Tuesday through Friday with Monday and Saturday off. Although he worked 6 consecutive 8-hour days, he is not entitled to overtime under 5 U.S.C. § 5542 or the Fair Labor Standards Act since he did not work more than 40 hours in an administrative workweek or in a workweek of 7 consecutive 24-hour periods as required by the respective statutes and regulations.
 2. Employees whose basic workweek consisted of 5 8-hour days between Monday and Saturday worked on Sunday. *They are* They are entitled to 8 hours of overtime pay and not to 8 hours of Sunday premium pay and 8 hours of overtime pay. Sunday premium pay under ~~5 U.S.C. § 5546(a)~~ is payable only for work within the basic workweek and an agency is not required to designate Sunday as part of the basic workweek.
 3. Employees worked 8-hour shifts beginning at 2306 and 2300, respectively, immediately preceding work on holiday. They were properly paid only 7.1 and 7 hours of holiday premium pay, respectively. ~~Under 5 U.S.C. § 5546(b)~~ an employee may be paid holiday premium pay only for work performed on a holiday. There is no requirement that an agency schedule work for an employee on a holiday. Also, purpose of establishing holidays such as set forth in 5 U.S.C. § 6103 is to give employees the benefit of time off without loss of regular compensation and not to establish an additional form of compensation represented by premium pay for holidays worked.

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This action is in response to three requests for decisions from William B. Peer, General Counsel of the Professional Air Traffic Controllers Organization, concerning the [entitlement of air traffic controllers to premium pay for overtime work, and work on Sundays and holidays]. Although the facts in each of the grieyances presented differ, the issues raised are similar, and, therefore, the three requests are being treated together.

Pursuant to section 21.5 of our Procedures for Decisions on Appropriated Fund Expenditures in the Federal Labor-Management Relations Program, Part 21, title 4, Code of Federal Regulations (1979), 43 Fed. Reg. 32395-97 (July 27, 1978), copies of the requests were served on the management representative of the Federal Aviation Administration (FAA). The agency has informally advised us that it will not file a written response or comments.

AGC 00030

Premium Pay for Overtime and Work on Sundays

The questions relating to premium pay for overtime work and work on Sundays are based upon the following three situations. In each instance, we understand that the employees involved are covered by the Fair Labor Standards Act (FLSA) 29 U.S.C. §§ 203 and 207 (1976). Therefore, premium pay for overtime work is payable under 5 U.S.C. § 5542 (1976) or 29 U.S.C. § 207 (1976), whichever gives the employees the greater benefit. Attachment 5 to Federal Personnel Manual Letter No. 551-1, May 15, 1974. Premium pay for Sunday work is payable pursuant to 5 U.S.C. § 5546(a) (1976) at the rate of base pay plus 25 percent.

1. An employee worked 5 consecutive 8-hour days, Tuesday through Saturday, with Sunday and Monday as regular days off. On Wednesday he was advised that his normally assigned schedule would be changed and he would work on Sunday, and would have Monday and Saturday off. Thus, his schedule for the 2-week period was as follows:

S	M	T	W	T	F	S	Total
		8	8	8	8	8	40
8		8	8	8	8		40

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He received no overtime pay. The union asks why he did not receive overtime pay for work on Sunday since he worked 6 consecutive 8-hour days.

2. Employees who normally worked 5 consecutive 8-hour days--Monday through Friday with Saturday and Sunday off, or Tuesday through Saturday with Sunday and Monday off--were scheduled in advance to work 8 additional hours on Sunday. They were paid overtime for the 8 hours worked on Sunday, and received no other premium pay. The union asks why Sunday, the first day of the week was designated as the overtime day. It argues that the overtime day should have been the last day of the week, not the first day. If this were so, the employees would have received Sunday premium pay for work on Sunday, plus overtime pay for the last 8 hours worked on Friday or Saturday.

3. The third situation involves the same questions posed above. An employee worked 5 consecutive 8-hour days, Tuesday through Saturday with Sunday and Monday as regular days off. He was assigned in advance to work overtime on Sunday, so that his schedule was as follows:

S	M	T	W	T	F	S	Total
		8	8	8	8	8	40
8		8	8	8	8	8	48

He was paid overtime for the 8 hours worked on Sunday, and received no other premium pay. The union asks if his entitlement to 8 hours of overtime pay was based upon the fact that he worked 6 consecutive 8-hour days. Further, as in the second situation described above, the union asks why the employee did not receive premium pay for Sunday work, and overtime pay for the last 8 hours worked on Saturday.

The first issue is whether or not employees are entitled to overtime compensation for work in excess of 5 consecutive 8-hour days. Under the provisions of section 5542, title 5, of the United States Code, overtime work means each hour of work in excess of 8 hours in a day or in excess of 40 hours in an administrative

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workweek. 5 C.F.R. § 550.111(a). An administrative workweek consists of 7 consecutive calendar days. 5 C.F.R. § 610.102(a) (1978). Overtime is payable only if the sixth or seventh day is within the same administrative workweek as the first 5 days. In other words, the fact that an employee may be required to work more than 5 consecutive 8-hour days does not, in itself, give rise to an entitlement to overtime compensation. It is possible, in fact, for an employee to work 10 consecutive 8-hour days--5 in each of 2 administrative workweeks--and not be entitled to overtime compensation. B-166794, May 23, 1969.

Similarly, under the FLSA entitlement to overtime compensation is based upon the number of hours an employee works in a workweek. To compute overtime, the employer must total all the hours worked by an employee in 1 workweek and pay overtime compensation for each hour in excess of 40. 29 C.F.R. § 778.103 (1978). As under title 5, the workweek consists of 7 consecutive 24-hour periods. It may coincide with the calendar week, but need not, and may begin on any day at any hour. Once established, however, it remains fixed regardless of the schedule worked by the employee. 29 C.F.R. § 778.105 (1978). The fact that an employee may be required to work more than 5 consecutive 8-hour days does not give rise to an entitlement to overtime compensation unless more than 5 such days are worked in the same workweek. As under title 5, an employee could work 10 consecutive days--5 in each 2 workweeks--and not be entitled to overtime compensation under the FLSA. We are not aware of any provision in the FLSA which requires an employer to give employees 2 consecutive days off, or requires payment of overtime compensation for work not in excess of 40 hours in 1 workweek.

The administrative workweek in FAA begins at 0000 Sunday and ends at 2400 Saturday. Assuming the FLSA workweek established by FAA is the same as its administrative workweek, the employee who worked the schedule described in situation 1 above would not be entitled to overtime compensation because the hours of work in neither workweek exceeded 40. Similarly, overtime compensation paid to the employee who worked the schedule described in situation 3 above, would be based upon the fact that hours worked in the second workweek exceeded 40 hours, not upon the fact that the employee worked more than 5 consecutive 8-hour days.

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The second issue raised by the union is which hours in excess of 40 hours in a workweek are to be designated as overtime. An employee is not entitled to Sunday premium pay for overtime work on Sunday. 5 U.S.C. § 5546(a) (1976); 5 C.F.R. § 550.113(c) (1978). Accordingly, if work on Sunday is designated as overtime, the employees who worked the schedules described in situations 2 and 3 above would receive only 8 hours of overtime compensation. However, if the last hours worked in a 48-hour workweek should have been designated as overtime hours, as the union alleges, then the employees would be entitled to receive Sunday premium pay for the 8 hours worked on Sunday, plus overtime pay for the last 8 hours worked on Friday or Saturday.

The law and regulations also provide that the head of an agency shall establish a basic workweek of 40 hours within the administrative workweek, and require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days. 5 U.S.C. § 6101(a)(2) (1976); 5 C.F.R. §§ 610.102, 610.111 (1978). For purposes of overtime pay administration, agencies are required to specify by calendar days and number of hours a day the periods which do not constitute a part of the basic workweek. 5 C.F.R. § 610.111(a)(2) (1978). In the examples presented by the union, the agency has complied with this administrative requirement by specifying that the employees will be given either Saturday and Sunday or Sunday and Monday off; therefore, their basic workweek is the 5 days in the week that they are scheduled to be on duty.

In Acuna v. United States, 202 Ct. Cl. 206 (1973), cert. denied 416 U.S. 905 (1974), the Court of Claims, in a similar situation, construed 5 C.F.R. § 610.111(a) at page 218 as follows:

"* * * There is no requirement in the Civil Service Commission's regulation that work regularly scheduled beyond the 40-hour basic workweek be scheduled at the end of the administrative workweek, after the basic workweek has been completed. The requirement is simply that, once the agency has selected such period, its regulations specify the period by calendar day, etc., regardless of where in the administrative workweek it occurs.* * *"

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In 58 Comp. Gen. ___ (B-189197, May 16, 1979) we cited the Acuna case and held that employees with a regularly scheduled workweek from Monday through Friday, midnight to 8 a.m., were not entitled to Sunday premium pay for time worked immediately preceding the claimant's Monday shift. We also held that the fact that the employee was entitled to overtime under the FLSA did not operate to change the employee's normal workweek as established under 5 U.S.C. § 6101 (1976) and implementing regulations.

In view of the above the FAA did not have to designate Sunday as part of the employees' basic workweeks and payment of overtime pay only was proper.

Holiday Premium Pay

The union has also asked questions concerning employees' entitlement to holiday premium pay in the two situations below.

1. An employee worked a shift commencing at 2306 on the 3rd of July, 1978. The employee ended his shift at 0706 on the 4th of July, 1978, a Federal holiday. This employee, and others working the same shift, were paid 8 hours of regular pay plus normal night differential, and 7.1 hours of holiday premium pay. Regulations provide for holiday premium pay only for the hours actually worked on the holiday or a day established in lieu of the holiday. On this premise, the employees were paid correctly. However, the union states that other regulations provide for Federal employees to receive nine paid holidays per year. The union apparently believes that the employees should receive 72 hours of holiday premium pay each year. However, as the employees were working the last shift of a normal 5-day workweek, they were unable to obtain the other .9 hours of holiday premium pay on the following day. Since the employees were denied .9 hours of holiday premium pay through scheduling, rather than through a fault of their own, the union asks if the employees are entitled to 8 hours of holiday premium pay, and if so, how is it paid.

2. An employee at the Kansas City Air Traffic Control Tower worked an 8-hour shift from 0700 to 1500. The same employee was then scheduled to work the mid-watch from 2300 of that same

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day to 0700 of the following day, which was a holiday. It is the facility's contention that the employee is only entitled to 7 hours of holiday premium pay and 1 hour of overtime for the mid-watch. However, the union states that the facility also takes the position that an employee who took off the first hour of the mid-watch should be charged with holiday leave rather than annual leave. The union asks whether the agency could reconcile this inconsistency by paying the employee holiday premium pay for the full 8 hours without violating any Federal prohibitions against paying holiday premium pay for overtime work. According to the union the applicable statutes and regulations do not appear to address this specific problem.

Regarding the rate of compensation for work performed on a holiday, 5 U.S.C. § 5546(b) (1976) provides, in pertinent part:

"An employee who performs work on a holiday designated by Federal statute, [or] Executive order * * * is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not--

"(1) in excess of 8 hours; or

"(2) overtime work as defined by section 5542(a) of this title."

Regulations implementing the statute appear in 5 C.F.R. § 550.131 (1978).

In decision 37 Comp. Gen. 1 (1957), in which we dealt with the same question arising under 5 U.S.C. § 922, now codified in 5 U.S.C. § 5546(b), we stated the following concerning the legislative history of that provision:


"The conference report * * * makes it clear that the premium rate for holiday work was intended to apply to work on a holiday within the 40-hour basic workweek of an employee (House Report No. 2665, 83d Congress, at page 22); and section 302(c), 5 U.S.C. 922(c), provides specifically that compensation for

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overtime work on a holiday is to be paid under section 201, as amended, 5 U.S.C. 911 [now codified in 5 U.S.C. 5542(a) * * *."

The statute has been interpreted to permit payment of premium pay only for those hours of work actually performed on holidays during an employee's regular tour of duty, i. e., the hours of his regular shift of duty. Since the employees in situation one were only scheduled to work 7.1 hours within their regular tour of duty on the holiday, they would only be entitled to 7.1 hours of holiday premium pay for that date. B-191561, October 3, 1978; 50 Comp. Gen. 519, 524 (1971); 38 id. 560 (1959). In this connection we are not aware of any law or regulation which would require an agency to work employees on holidays when their weekly schedules of work include such a holiday. Also, the purpose of establishing holidays such as set forth in 5 U.S.C. § 6103 (1976) is to give employees the benefit of time off on such days without loss of regular compensation and not to establish an additional form of compensation represented by premium pay for holidays worked. B-172920, August 11, 1971. The union's question regarding situation one above is answered accordingly.

The cited statute also specifically precludes holiday premium pay for work in excess of 8 hours. Since the 1 hour on the 3rd of July was in excess of 8 hours and was not worked on the holiday it could not qualify as holiday premium pay. Therefore, in situation two the employee would be entitled to 1 hour overtime in excess of 8 hours worked and to 7 hours of holiday premium pay for the hours actually worked on the holiday. As previously stated, the agency has failed to respond to the union's allegations. In view of this and since the union has not identified the employee who was charged "holiday leave" at the beginning of the shift which covered the holiday, we cannot explain the alleged discrepancy. However, since we are not aware of any leave designated "holiday leave," it would appear that the employee should have been charged an hour of annual leave in the mid-watch shift.


Acting Comptroller General
of the United States