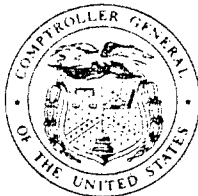


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DECISION

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

FILE: B-196563

DATE: September 3, 1980

MATTER OF: Customs Special Agents - Overtime Compensation
for Surveillance Activity

DIGEST: Surveillance operation performed by Special Agents of U.S. Customs Service was authorized, assigned in advance, and scheduled to recur on successive days, but time intervals were not predictable and the hours worked did not follow any discernible pattern. Thus, the overtime was not "regularly scheduled" and the agents may not be compensated for regularly scheduled overtime under 5 U.S.C. § 5542 in addition to annual premium pay for administratively uncontrollable overtime pursuant to 5 U.S.C. § 5545(c)(2) (1976).

This action is in response to a request from Alexander Faison, Director of the Office of Human Resources, U.S. Customs Service, for a decision concerning a grievance filed by three Special Agents of the U.S. Customs Service in which they seek additional overtime compensation for surveillance work. The central issue is whether these Special Agents are entitled to compensation for regularly scheduled overtime in addition to their annual premium pay for administratively uncontrollable overtime. In deciding this question, we are asked to consider whether scheduled overtime must occur within the same time period on successive days.

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The record indicates that the office to which the Special Agents were assigned decided to conduct a 4-day surveillance operation. Soon thereafter, a work schedule was established and provided to each one of the agents. The schedule was subsequently revised and the agents received notification of the changes prior to commencement of the surveillance operation. Once the surveillance was underway, it became necessary to amend the schedule again. During the period in which the overtime was worked, all three agents were being compensated under the provisions of 5 U.S.C. § 5545(c)(2) (1976) for administrative uncontrollable overtime. Generally, surveillance work has been viewed as uncontrollable since, by nature, it

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depends upon the actions of the suspect. See, e.g., Matter of Werner F. Michel, B-196276, April 15, 1980; Matter of Customs Special Agents, B-191512, October 27, 1978. In this case, the agents contend that the overtime they performed was "regularly scheduled" and that they are entitled to overtime compensation under 5 U.S.C. § 5542 in addition to the premium pay authorized by section 5545(c)(2).

The authority for administratively uncontrollable overtime as set forth in 5 U.S.C. § 5545(c)(2) provides:

"(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position." (Emphasis added.)

Thus, the Special Agents may receive additional overtime compensation only if it is determined that the overtime work was "regularly scheduled."

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This Office has held that the term "regularly scheduled" refers to overtime work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. 52 Comp. Gen. 319 (1972). This must be distinguished from work which is scheduled on a day-to-day or hour-to-hour basis, where the amount of overtime varies with no discernible pattern. B-191512, supra, and decisions cited therein. Overtime which is to be performed every other week or 1 or 2 days each month has been considered to be regularly scheduled. 59 Comp. Gen. 101 (1979). The test is that the overtime must recur so frequently and at such regular intervals as to fall into a predictable and discernible pattern. Matter of William C. Rogers, B-196550, June 5, 1980.

In the instant case, the overtime at issue was clearly authorized in advance and an attempt was made to schedule individual assignments in advance to recur on successive days. However, the schedules worked by the Special Agents were very irregular, and the time intervals of their overtime were not predictable nor did they establish a discernible pattern. It appears that the overtime was in fact assigned according to a day-by-day evaluation of the needs of the surveillance operation. Therefore, we conclude that the overtime was not "regularly scheduled" within the meaning of section 5545(c)(2), and the Special Agents were not entitled to the additional compensation sought. We note that the schedule of work actually performed bears little resemblance to either the initial schedule or the schedule as revised prior to the beginning of the surveillance operation. This, together with the fact that the schedule had to be revised during surveillance, suggests that an effort was made to schedule work that by its nature was not susceptible of scheduling in advance.

In response to the Director's specific question concerning the recurring nature of regularly scheduled overtime, we point out that it is not mandatory that

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scheduled overtime occur within the same time period on successive days for it to be considered as "regularly scheduled overtime."] As long as the overtime is predictable or has some discernible pattern, it is not required that the overtime fall within the same time frame.

The Director has also requested clarification of another situation which occurred in the Customs Service involving a regularly scheduled overtime assignment that was cancelled after the employee had performed one shift of overtime work. While the cancellation of a portion of the assignment would not necessarily defeat the employee's entitlement to additional pay, we cannot resolve this supplemental issue based upon the limited facts provided.

Harry D. Van Cleave

For the Comptroller General
of the United States