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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-197598 (RCP)

April 3, 1980

Mr. C. D. Loeffler
Fire Chief
NAS Chase Field
Beeville, Texas 78103

Do not make available to public reading

Dear Mr. Loeffler:

We refer to your submission dated January 18, 1980, in which you present a series of observations and contentions in regard to the payment of overtime compensation under the Fair Labor Standards Act (FLSA) at your installation. Generally, your concern appears to be with the manner in which fire-fighters' FLSA entitlement is computed for pay periods in which they receive premium pay under 5 U.S.C. § 5545(c)(1) for their standby duty.

The authority of the General Accounting Office to consider FLSA claims of Federal employees is derived from its authority to adjudicate monetary claims (31 U.S.C. § 71) and to render advance decisions to certifying or disbursing officers or heads of agencies on payments (31 U.S.C. §§ 74 and 82d). Under these authorities, your request for information concerning implementation of the FLSA does not entitle you to a formal decision. However, the following information is provided for your assistance.

Fundamental to your inquiry is the fact that the Office of Personnel Management (formerly Civil Service Commission) is designated by law to administer the FLSA with respect to most Federal employees. 29 U.S.C. § 204(f) (1976). Pursuant to this statutory authority the Civil Service Commission issued Federal Personnel Manual Letter No. 551-5 on January 15, 1975, which is entitled "Instructions for Applying the Fair Labor Standards Act (FLSA) to Federal Employees Engaged in Fire Protection Activities or Law Enforcement Activities." As a result, it would appear that the provisions of subsection D of Attachment 2 to FPM Ltr. 551-5, which define and set forth the method of computing an employee's regular rate of pay for purposes of computing his overtime pay entitlement under the FLSA, are applicable to the firefighters in question.



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You have not specifically alleged how local authorities may be misinterpreting governing regulations or in what respect you contend that such laws and regulations are outdated. Generally, the authority to fix the hours of work of employees, including the authority to fix basic workweeks and work schedules, is vested in the heads of agencies. This authority may be delegated to subordinate officials and must be exercised in accordance with applicable laws. See 5 U.S.C. §§ 302, 6101(a); 5 C.F.R. § 610.111; and FPM chapter 610, subchapter 1. In addition, 5 C.F.R. § 550.161 (1979), which pertains to payments of premium pay on an annual basis, provides in part as follows:

"The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for:

"(a) Fixing tours of duty; ordering employees to remain at their stations in a standby status; and placing responsibility on employees for remaining on duty when required by circumstances.
* * *"

As noted in subsection C.1 of Attachment 2 to FPM Ltr. 551-5, when Congress extended the coverage of the FLSA to employees engaged in fire protection activities, it was aware that the work schedules of these employees vary from the work schedules of other employees, and that some adjustment would have to be made in the usual rules for determining hours of work in their case. Thus, Congress departed from the standard "hours of work" concept and adopted an overtime standard keyed to the length of the "tour of duty." In addition, Congress also adopted a new work period concept which may be used instead of the usual workweek basis for determining overtime hours. Accordingly, each agency is responsible for establishing the work period to be used for scheduling employees included under section 7(k) of the FLSA (i.e. employees engaged in fire protection activities) pursuant to subsection C.3(a) of Attachment 2 to FPM Ltr. 551-5. For this extended tour of duty arrangement a firefighter receives his basic rate of pay and premium pay on an annual basis for the standby duty under 5 U.S.C. § 5545(c)(1).

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In our decision in B-178613, July 6, 1973, copy enclosed, a firefighter claimed overtime compensation for watchwork performed during periods he said were set aside for sleeping during his normal standby hours. This watch duty was rotated with other firefighters. We noted that section 5545(c)(1) of title 5, United States Code, authorizes premium percentage compensation not in excess of 25 percent of basic pay to an employee in a position requiring him regularly to remain at, or within the confines of his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work. Such additional percentage compensation is in lieu of other compensation for overtime, night, holiday and Sunday work except for situations--not indicated in your submission--where an employee has irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Therefore, where the employee did not perform work in excess of his 72-hour weekly tour of duty but performed watchwork during his normal standby hours, we held that there was no authority for allowance of additional compensation where the employee during his regularly scheduled tour of standby duty is required to perform certain duty which is regarded more in the nature of work than the normal standby duty. We have also held, in regard to the "two-thirds rule", that time available for, or spent, sleeping and eating is noncompensable even where the employee is required to be on the employer's premises. The exception to this rule, not clearly evident in your submission, is where substantial labor is performed in the time set aside for sleeping and eating. B-173235, November 22, 1971.

For your further information we are enclosing a copy of our decision in 55 Comp. Gen. 908 (1976) in which we upheld the Civil Service Commission's computation of Federal firefighters' overtime pay under the Fair Labor Standards Act, and agreed with the Commission's definition of a "regular rate" as it was used to compute their overtime entitlement. Those firefighters received annual premium pay for standby duty under 5 U.S.C. § 5545(c)(1).

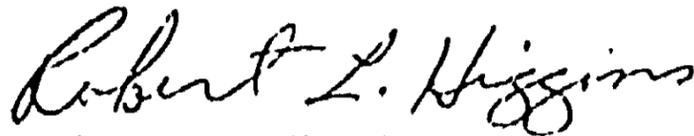
As to the complaints raised in the attachment to your letter we would point out that it is a general rule for all

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Federal employees covered by FLSA's overtime provisions, and not just for firefighters, that hours of leave are not counted as hours of work. See Attachment 4 to FPM Letter 551-1, April 15, 1974. Moreover, it is clear from 5 U.S.C. § 5545(c)(1), the law which provides premium pay for standby duty, that the standby premium pay is paid in lieu of holiday pay for holiday work. See B-192815, December 7, 1978.

If, after considering the foregoing, any one of the firefighters in question wishes to file a specific monetary claim concerning this matter, it should be addressed to the Associate Director, FGMSD, Claims Group, U.S. General Accounting Office, Washington, D.C., 20548. See 4 C.F.R. §§ 31.2, et seq.

Sincerely yours,



Robert L. Higgins
Assistant General Counsel

Enclosures