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DECISION



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

FILE: B-197977

DATE: February 9, 1981

MATTER OF: Richard A. Olson - ^{Claim for} Standby ^{Duty} Premium Pay

- DIGEST: (1) Fire Chief who transferred from Navy to Air Force and who was paid standby premium pay was not paid premium pay for hours of absence by Air Force. Even though Navy had paid employee premium pay during hours of absence, Air Force method of reimbursing Fire Chief is one of two proper methods sanctioned by regulations.
- (2) Employee on standby duty is entitled to have his standby premium pay considered as basic pay for purposes of computation of retirement annuity.

Mr. Richard A. Olson has appealed our Claims Division's denial of his claim for premium pay for standby duty during periods of absence from duty as Fire Chief at Vandenberg Air Force Base, California. He has also requested a ruling as to whether his premium pay is base pay for the purpose of computing his retirement annuity.

FACTS

The record shows that as a Fire Chief Mr. Olson worked a tour of duty consisting of a 40-hour basic workweek, Monday through Friday and a weekly 16 hour standby tour of duty. Mr. Olson received premium pay at the rate of 15 percent for the performance of the standby duty except for periods of absence, in which case a pro rata share of the premium pay was withheld. It is this nonpayment of premium pay for periods of absence to which Mr. Olson objects. The periods of absence involved both official business while on temporary duty and sick leave.

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The Claims Division denied Mr. Olson's claim on the basis that his standby premium pay, derived from 5 U.S.C. 5545(c)(1) (1976), is based on an hourly monetary value for service and therefore for periods of absence from scheduled standby duty, he is not entitled to receive premium pay. The Claims Division also found, citing 46 Comp. Gen. 200 (1966), that standby premium pay is not regarded as basic compensation for retirement purposes.

Mr. Olson states that prior to his employment with the Air Force, he held Fire Chief positions with the Navy and in each of these positions his tour of duty was considered to be a 56 hour workweek. He was paid 15 percent premium pay and was able to take leave of absence from his standby tour without a pro rata reduction in premium pay.

He also states that had he known the Air Force was not going to compensate him in the same manner the Navy was he would never have transferred to the Air Force. In an attempt to verify his pay prior to his transfer to the Air Force he had the following message transmitted to the Air Force:

"Mr. Olson accepts with EOD of 7 May 78; however, request confirmation of informal info received by selectee that workweek is 56 hours with firefighter premium pay as provided by FPM."

The reply from the Air Force stated "* * * 56 hour work week with premium pay is confirmed." Mr. Olson says he read this reply as meaning he would be paid premium pay the same as when he was employed by the Navy.

OPINION

It is clear from the record that Mr. Olson is being paid standby premium pay under 5 U.S.C. 5545(c)(1) (1976) and the implementing regulation, 5 C.F.R.

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550.141 (1980). The question then is whether the Air Force has the authority under the regulations to deny premium payments for periods of absence.

Section 550.161 of title 5, Code of Federal Regulations places responsibility on the head of an agency or his designee to fix tours of duty ordering employees to remain at their stations in a standby status and to determine which employees shall receive premium pay on an annual basis. The Air Force has made that determination in Mr. Olson's case.

In addition, section 550.162(a) of the regulations provides that except as otherwise provided in this section, an employee's premium pay on an annual basis under 5 U.S.C. 5545(c)(1) begins on the date that he enters on duty in the position concerned for the purposes of basic pay, and ceases on the date that he ceases to be paid basic pay in the position. Paragraphs (b) and (c) are exceptions to paragraph (a). Paragraph (b) provides for the payment of annual premium pay on a seasonal basis. Paragraph (c) limits annual premium pay during temporary assignments to other duties and training. Paragraph (e) provides that an agency shall continue to pay an employee premium pay on an annual basis while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraphs (a), (b), and (c) of this section.

Mr. Olson points out that paragraph (e) of the above regulation is mandatory because it provides that an agency shall continue to pay an employee premium pay on an annual basis while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraphs (a), (b) and (c) of 5 C.F.R. 550.162. However, paragraph (e) only applies to an employee who is on leave with pay. Therefore, paragraph (e) of the regulation would not be applicable in Mr. Olson's situation when he is performing official business on temporary duty away from his standby duty station and is

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not on leave. Moreover, paragraph (c) of section 550.162 is discretionary in nature since it provides that an agency may continue to pay an employee premium pay on an annual basis while the employee is on a temporary duty assignment. Thus, the Air Force has exercised its discretion and chosen not to pay its employees standby pay while on a temporary duty assignment.

Likewise, with regard to Mr. Olson's absence from standby duty because of sick leave, we have recently discussed the effect of paragraph (e) on the entitlement of an employee on extended sick leave pending disability retirement to premium pay on an annual basis for standby pay in B-197476, August 26, 1980, and for administratively uncontrollable overtime in 43 Comp. Gen. 376 (1963), and B-175788, June 1, 1972. These decisions hold in substance that in this situation section 550.162(e) of the regulations pertaining to leave with pay status is not conclusive as to entitlement, that this regulation does not contemplate a situation where there is no reasonable expectation that the employee will return to work, and that an employee on leave with pay is no longer entitled to receive premium compensation when it is administratively determined that there is no basis for anticipating that his irregular, unscheduled overtime work or standby duty requirement will continue.

These decisions recognize the long term situation where the employee is not expected to return to work. Thus, one could draw the analogy that employees such as Mr. Olson who are on a short authorized period of sick leave would be entitled to standby duty pay under the authority of paragraph (e). However, the following discussion will clarify this matter since the agency is vested with the authority to use different methods of computing premium pay.

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Under the authority granted agencies
in 5 C.F.R. § 630.210:

"An agency having employees who work 24-hour shifts or other uncommon tours of duty may prescribe supplemental regulations consistent with subchapter I of Chapter 63 of title 5, United States Code, and this part for administering leave for these employees."

This authority has been further explained at Federal Personnel Manual (FPM) Supplement 990-2, Book 630-10, S2-6b as follows:

"Agency authority. An agency may establish a basic tour of actual duty separate and distinct from additional tours of standby duty. In a situation of this kind, the employees may have an 'uncommon' tour of duty, including additional standby duty, within the meaning of section 630.210 above, but the employees may be credited and charged leave on the 40-hour workweek instead of for the total workweek. On this basis, premium pay would not be authorized for periods of absence from scheduled standby duty except when an employee is excused from regularly scheduled standby duty for personal reasons (sickness, etc.) and there was no specific need for his standby services during the period of absence (42 Comp. Gen. 426). When, however, an agency needs to establish uncommon tours of duty, section 630.210 authorizes the agency to adjust leave earnings and charges in relation to the established uncommon tours of duty. For example, if an agency has to establish

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the following tours to meet its needs, the crediting and charging of leave would be administratively handled as follows:

"(1) Additional annual pay. The firefighter's tour of 72 hours on and 72 hours off results in biweekly tours of 145-1/2 hours to 193-1/2 hours. Over a three pay-period cycle, the employees work an average tour of 169.83 (crew A) or 169.72 (crew B) hours. Thus, the firefighters work an average of 85 hours per week. Leave is to accrue on the ratio of a 40-hour workweek to the average workweek of 85 hours. The accrual of leave on this basis contemplates that the employee concerned will be charged for all hours of absence from his scheduled tour * * *"
(Underscoring supplied.)

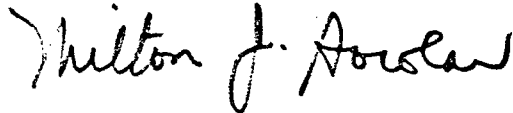
Under paragraph 2-6b above, the agency has the option to compensate employees for standby duty using two distinct methods. Mr. Olson is compensated under the first method, i.e., he is not paid premium pay for absences but he is only charged leave for absences from his 40 hour basic tour of duty. Under the second method, that which Mr. Olson was paid under while he was employed by the Navy, Mr. Olson would continue to receive premium pay for periods of absence, but he would be charged leave for time off during his standby tour. The decisions previously referred to, B-197476, August 26, 1980, B-175788, June 1, 1972, and 43 Comp. Gen. 376 (1963) which state that premium pay may not be continued for employees on extended sick leave and therefore which imply the reverse, that employees on a short period of sick leave may receive premium pay, are inapplicable. Those cases did not contemplate the method of computing premium pay under FPM Supp. 990-2, Book 630-10, S2-6b.

It is unfortunate that Mr. Olson was not aware of the Air Force's method of applying the premium pay provisions cited above. Nevertheless the Air Force

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acted within the scope of its discretion as allowed by the regulations and its withholding of premium pay for absences is proper. Mr. Olson's claim for premium pay during his absences from duty is denied.

We agree with Mr. Olson's contention, however, that his standby premium pay should be considered as part of basic pay for computing his retirement annuity. 5 U.S.C. 8331(3)(c), (1976); 47 Comp. Gen. 694 (1968). Corrective action, including the necessary retroactive deductions from Mr. Olson's premium pay, should be made so that his premium pay is properly considered for retirement annuity purposes.

A handwritten signature in cursive script, reading "Milton J. Fowler".

for the Comptroller General
of the United States