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DECISION



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

[Entitlement to

FILE: B-198036

DATE: November 7, 1980

MATTER OF: ATF Special Agents - Regularly Scheduled
or Administratively Uncontrollable Overtime
for Dignitary Protection]

- DIGEST: 1. Alcohol, Tobacco and Firearm special agents were detailed to State Department for dignitary protection. Agents who received annual premium pay for administratively uncontrollable overtime may be compensated for "regularly scheduled" overtime if work was authorized in advance and scheduled to recur on successive days or after specified intervals. Overtime need not be worked the same time each day or in same amounts, but variations in schedule may indicate overtime was irregular or uncontrollable.
2. Alcohol, Tobacco and Firearm special agents were scheduled to work 8 to 12-hour shifts for dignitary protection. Lunch periods authorized within shift may be offset against other overtime claimed unless substantial duties are performed during that period.

The issue in this decision is whether certain Federal law enforcement agents are entitled to compensation for regularly scheduled overtime in addition to annual premium pay for administratively uncontrollable overtime while detailed to protective duties.

This decision is in response to a request from James S. Dunn, Chief, Financial Management Division, Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury. The request from the agency states that certain ATF special agents who receive premium pay on an annual basis for administratively uncontrollable overtime (AUO) have been detailed to the State Department for dignitary protection. Pre-established schedules were issued for these agents, but in some instances the agents worked either fewer or more hours

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than scheduled and the scheduled hours were not necessarily at the same time each day or for the same number of hours. The agency questions whether these agents may be compensated for regularly scheduled overtime under five situations discussed later in this decision.

The authority for the payment of annual premium pay for administratively uncontrollable overtime is contained in 5 U.S.C. § 5545(c)(2) (1976), which provides that:

"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.* * *" (Emphasis added.)

For such employees, "regularly scheduled" overtime is compensable at one and one-half times the hourly rate, but not in excess of one and one-half times the minimum rate for grade GS-10. See 5 U.S.C. § 5542(a) (1976). Premium pay under section 5545 and regularly scheduled overtime under section 5542 are two distinct forms of compensation, and while an employee may receive regular overtime pay in addition to annual premium pay, he cannot claim both for the same work. See Werner F. Michel, B-196276, April 15, 1980, and decisions cited therein.

Our Office has long held that "regularly scheduled" work must be duly authorized in advance and scheduled to recur on successive days or after specified intervals. 52 Comp. Gen. 319 (1972); and 48 id. 334 (1968). See also 53 Comp. Gen. 264 (1973); and 40 id. 397 (1961).

This is to be distinguished from overtime work which is scheduled on a day-to-day or hour-to-hour basis where the overtime varies with no discernible pattern. See Michel, supra. However, the determination whether overtime is "uncontrollable" or "regularly scheduled" is often difficult and is dependent on the particular facts in each case. See Customs Patrol Officers, B-192727, December 19, 1978.

In accordance with the above principles, the agency's five questions are quoted and answered as follows:

1. "Employees were scheduled to work and actually worked more than 8 hours each day during the normal work week. If the amount of overtime scheduled and worked on these normal workdays was the same, i.e., 4 hours each day, is there entitlement to payment for regularly scheduled overtime? Does it matter if the overtime hours scheduled vary in terms of the times it was worked, e.g., 4 a.m. - 8 a.m. on one day versus 5 p.m. - 9 p.m. on the following day?"

{ Since the agents were assigned in advance to 12-hour shifts and the overtime was scheduled to recur on successive days, they are entitled to be paid for the regularly scheduled overtime worked in excess of 8 hours each day. The fact that the overtime hours varied from day-to-day would not affect their entitlement if the amount of overtime was predictable and followed a discernible pattern. } Compare Michel, supra, and B-196563, September 3, 1980.

2. "Employees were also scheduled to work varying amounts of overtime on successive days, e.g., 12 a.m. to 12 p.m. (8 hours regular tour of duty; 4 hours overtime) on Tuesday and 3 p.m. to 12 p.m. (8 hours regular tour of duty;

1 hour overtime) on Wednesday. Would the employees be entitled to the entire amount of overtime worked on these successive days even though the time involved varied or for only that portion of overtime that corresponded on each day?"

As noted above, the overtime need not be worked the same time each day. Since the overtime was authorized in advance and scheduled to recur each day, any work in excess of 8 hours in a day would be compensable at overtime rates, provided that the overtime followed a discernible pattern.

3. "Employees were scheduled to work on Saturdays and Sundays during the recent 3-week detail. Are they entitled to overtime pay for the entire shift or only that portion of overtime which corresponds to the preceding or following regular workday, or must the work shift correspond with one, or more, Saturday and Sunday scheduled shift occurring during the same detail?"

Under section 5542 hours of work in excess of 8 hours in a day or 40 hours in a week are overtime work. Assuming the employees had already worked 40 hours in the administrative workweek, they would be entitled to overtime compensation for the entire shift. However, in the absence of a particular fact situation, we cannot determine whether overtime work performed on Saturday or Sunday during the assignment would be considered "regularly scheduled" since such a determination depends upon the facts of each case. See, for example, 48 Comp. Gen. 334, supra, where employees were assigned to 12-hour shifts until further notice, they worked only 3 consecutive days, and they received compensation for "regularly scheduled" overtime.

4. "Employees were sometimes scheduled identical 12-hour shifts for several

successive days. In a few instances, the entire scheduled shift was not worked, e.g., 9 a.m. to 9 p.m. scheduled shift, actual hours worked, 9 a.m. to 6 p.m. Would such a break in actual overtime work performed preclude the Bureau from authorizing overtime pay on those days when the entire shift was worked?"

[If the variance from the schedule was only occasional or infrequent, the overtime would continue to be considered "regularly scheduled". Compare Michel, supra, where the overtime schedule was very irregular, the amount of overtime varied from day-to-day with no discernible pattern, and the overtime did not recur on successive days or after specified intervals.

5. "Employees are generally requested to work 8 to 12-hour shifts. Specified meal times are not allotted due to the nature of the assignment; however, it is reasonable to believe that at some time during the shift meals are eaten. Most of the time sheets being used do not indicate such time for meals taken. Would it be proper for the Bureau to reduce the hours worked in an 8-hour period by at least one-half hour for such meals even though it is not indicated?"

[Where the agency assigns the agents to a straight 8-hour or 12-hour tour of duty within which a lunch period is authorized, the agency may offset the lunch period against any overtime claimed by the agents. See Lorenzo G. Baca, et al., B-167602, August 4, 1976, and court cases cited therein. On the other hand, where the agents actually performed substantial duties during their lunch periods, offset against other overtime would not be warranted. See Baca, supra. However,

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without additional facts, we cannot resolve this question.

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For the Comptroller General
of the United States