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

FILE: B-198474 **DATE:** February 20, 1981

MATTER OF: Henry F. Alcantar - Standby duty at home

DIGEST: Claimant who was employed as a radiology technician for the Veterans Administration, was required to be available by telephone to perform after hours radiological services. He is not entitled to premium pay under 5 U.S.C. 5545(c)(1) as his residence had not been designated as his duty station and his activities were not substantially restricted. Neither would employee's "on-call" status be considered hours of work for payment of overtime under 5 U.S.C. 5542.

This action concerns the appeal by Mr. Henry Alcantar of the Claims Division's action of December 10, 1979, which disallowed his claim for overtime compensation for the period May 1, 1974, to June 14, 1976. This claim is incident to Mr. Alcantar's contention that he was required to remain in a standby duty status while at his home in connection with his duties as a radiology technician at the Veterans Administration (VA) Medical Center, Sepulveda, California.

The information provided by the agency shows that during the period in question Mr. Alcantar, together with other radiology technician employees, was required to sign up for "on-call" duty once every 4 nights. The employee "on-call" was required to contact the center and leave a telephone number where he could be reached during those times that he was not at home. There is nothing in the record that shows that the agency had designated Mr. Alcatar's home as his duty station.

The two provisions in title 5, United States Code, which provide authority to reimburse an employee for standby duty are sections 5545(c)(1) and 5542.

Section 5545(c)(1) authorizes the head of an agency to pay premium pay on an annual basis 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

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consists of remaining in a standby status rather than performing work." Regulations implementing this provision at 5 C.F.R. 550.143(b) provide the following guidance as to when "on-call" time spent by the employee at his residence qualifies as time spent "at or within the confines of his station:"

> "(b) The words 'at, or within the confines, of his station', in § 550.141 mean one of the following:
>
> "(1) At an employee's regular duty station.
>
> "(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel required to stand by in readiness to perform actual work when the need arises or when called.
>
> "(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

As stated above, the record indicates that the agency informed the claimant that he was not restricted to his residence but that he could leave provided he called in a number where he would be reached in the event he was needed at work.

It is essentially for this reason and based on the above-quoted regulation that our Claims Division denied Mr. Alcantar's claim. The circumstances of his claim are substantially identical to the facts discussed more fully in Primo Mandac, B-197431, August 19, 1980, the decision rendered in response to a claim submitted by one of Mr. Alcantar's coworkers. Mr. Mandac's claim was similarly denied.

Mr. Alcantar, in his letter of appeal, takes exception to the Claims Division's determination that he was merely "on-call" within the meaning of 5 C.F.R. 550.143(b)(3). He states that except in three instances, he remained in his home while "on-call." For this reason he claims that his activities were substantially restricted while he was at home.

We do not question Mr. Alcantar's statement that he in fact remained in his residence while "on-call." His letter of appeal indicates that he may have done so, in part, to be able to respond quickly when called and, in part, out of a sense of professionalism. However, he does not dispute that he was informed by the VA that he was not required to stay at home while "on-call." It is the limitations imposed on the employee's activities by his agency that are relevant to the determination of premium pay entitlement. See Matter of John T. Teske, B-190369, February 23, 1978. This is so notwithstanding Mr. Alcantar's claim that he was required to be "on-call" more frequently than indicated by the VA during a period when he and Mr. Mandac were the only technicians performing "on-call" duty.

Neither do we think that the restriction placed on the claimant while he was "on call" during the period in question qualifies him for overtime compensation under 5 U.S.C. § 5542 which provides in pertinent part as follows:

> "(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime

> work and shall be paid for, except as otherwise provided by this subchapter, at the following rates * * *."

In order to qualify for overtime compensation under this provision the claimant must establish that the "on-call" time at home constituted "hours of work" within the meaning of those words as used in the law.

In the case of Rapp and Hawkins v. United States, 167 Ct. Cl. 852 (1964), involving claims for overtime compensation under circumstances no less restrictive than in the instant case it was held that although the claimants were required to be within hearing distance at all times to answer the telephone, they were not to be regarded as performing work within the meaning of the overtime statute and thus were not entitled to compensation for such services. The court in that case noted that "theoretically the duty officer could be disturbed at any hour during the night." Supra. at 859. To the same effect is Moss v. United States, 173 Ct. Cl. 1169 (1965).

As the record shows that Mr. Alcanter was required to do no more than to be available to answer the phone in the event he was needed at work he would not qualify for overtime compensation under the rule set forth in the Rapp and Hawkins and Moss cases which we have consistently followed. See Glen W. Sellers, B-182207, January 16, 1975, and Teske, supra.

Although the record indicates that Mr. Alcantar is a nonexempt employee under the Fair Labor Standards Act (FLSA) of 1938, as amended, 29 U.S.C. §§ 201 et seq., it does not appear that the "on-call" time at home for which he claims premium pay and overtime would qualify as overtime under the FLSA.

FPM Letter 551-14, May 15, 1978, provides in pertinent part at paragraphs 1.c as follows:

> "c. Oncall or telephone contact standby. An employee who is merely required to leave word where he or she can be reached * * * is 'waiting to be engaged,'

> and is not working for purposes of the FLSA. This is true even if the employee is restricted to a reasonable mileage or time callback radius."

In his appeal Mr. Alcantar claims that he is entitled to the payment of overtime on the basis that one of his supervisors promised that he would receive such payment. It is well settled that in the absence of specific statutory authority, the United States is not responsible for erroneous advice or acts of its officers, agents, or employees, even though committed in the performance of their official duties. See John S. Treadwell, B-192659, February 14, 1979, and Clayton Jennings, B-194270, May 9, 1979.

Accordingly, the disallowance of the Claims Division is sustained.

Milton J. Socolar

For the Comptroller General
of the United States