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DECISION

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

[Claim for Overtime Compensation]

FILE: B-199783 DATE: March 9, 1981

MATTER OF: Christine D. Taliaferro - FLSA Overtime - Evidence

DIGEST: 1. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, employee may prevail in claim for overtime compensation hours in excess of 40 hour workweek on the basis of evidence other than official agency records. List of hours worked accompanied by recommendation by supervisor that claim be paid is sufficient to establish the amount of hours worked in absence of contradictory evidence.

2. Under Fair Labor Standards Act, overtime is computed on basis of hours in excess of 40 hour workweek, as opposed to 8 hour workday. Additionally, paid absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek.

This decision is in response to the request of Mr. R. G. Bordley, Chief, Accounting and Finance Division, Office of Comptroller, Defense Logistics Agency (DLA), for an advance decision concerning the claim of Ms. Christine D. Taliaferro.

Ms. Taliaferro, a contract administrator who is nonexempt from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), filed a claim with DLA for 53-3/4 hours of overtime compensation for hours worked during the period of March 19, 1979, through

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August 1, 1979. The hours for which Ms. Taliaferro requests compensation were not recorded on the official Time and Attendance Report. Although Ms. Taliaferro's supervisor observed her working hours in excess of her normal tour of duty, he could not certify the exact number of hours worked. In support of her claim, Ms. Taliaferro has submitted a list, which she transcribed from her personal calendar, of the dates, times and amounts of overtime hours.

In view of the authority of the Office of Personnel Management (OPM) to administer FLSA with respect to Federal employees, 29 U.S.C. § 204(f) (1976), we requested and received OPM's views on Ms. Taliaferro's claim. The OPM has determined that barring additional evidence by DLA to refute Ms. Taliaferro's contentions, DLA should pay the claim. With some qualification, we concur with this determination.

The FLSA provides that a nonexempt employee shall not be employed for a workweek in excess of 40 hours unless the employee receives compensation for the excess hours at a rate not less than 1-1/2 times the regular rate. 29 U.S.C. § 207(a)(1) (1976). The Act defines "hours worked" as all hours which the employer "suffers or permits" the employee to work. 29 U.S.C. 203(g) (1976). Work is "suffered or permitted" if it is performed for the benefit of an agency, whether requested or not, provided that the employee's supervisor knows or has reason to believe that the work is being performed. Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974. Ms. Taliaferro's supervisor, as noted above, was aware that she was working after her normal tour of duty and made no effort to terminate the activity. Therefore, the hours worked are compensable overtime under FLSA.

The DLA contends that notwithstanding the fact that Ms. Taliaferro's extra hours constitute compensable overtime, it cannot pay her claim because the exact number of hours worked cannot be substantiated by a Time and Attendance Report or by the certification of her supervisor. We do not agree.

The FLSA requires employers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." 29 U.S.C. § 211(c) (1976). We have been informally advised that under current DLA procedures, only that overtime which is officially requested or approved in advance can be reflected in the official Time and Attendance Report. There is no procedure by which an employee can officially record in the Time and Attendance Report, or any other Government document, unrequested or unapproved overtime which is suffered or permitted. Clearly, then, the DLA has failed to discharge its statutory duty to keep complete and accurate records of all hours worked.

The courts have constructed and consistently applied a special standard of proof for FLSA cases in which the employer has failed to discharge his statutory duty to maintain accurate records. Under such circumstances, it is sufficient for the employee to prove she has in fact performed overtime work for which she was not compensated (as DLA admits Ms. Taliaferro has done) and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. It is then incumbent upon the employer to produce evidence to negative that produced by the employee. See Anderson v. Mt Clemens Pottery Co., 328 U.S. 680 (1946); Joseph G. Moretti, Inc. v. Boogers, 376 F.2d 27 (5th Cir. 1967).

Additionally, we have held that while claims against the Government must be predicated, if at all possible, upon official records, where agency action has precluded official records from reflecting overtime, we will accept other forms of evidence or documentation.

As noted above, Ms. Taliaferro has submitted a list, which she transcribed from her personal calendar, of the dates, times and amounts of overtime hours. Her supervisor witnessed her working outside her tour of duty on several occasions. Although he could not certify the exact number of overtime hours which Ms. Taliaferro worked, he did state that he had no reason to doubt her veracity and recommended that her claim be paid. Under these circumstances, we believe that Ms. Taliaferro has proved that she in fact performed overtime work and has produced sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference. She has, therefore, shifted the burden to the employer to come forward with evidence of the precise amount of overtime work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Accordingly, unless it can produce such evidence, DLA must pay the claim.

Although we have no reason to doubt the legitimacy of Ms. Taliaferro's claim, paying claims based solely upon employee-generated documentation obviously creates a potential for abuse. Therefore, we recommend that DLA expeditiously alter its recordation procedures to comply with the requirements of FLSA and the recently promulgated OPM regulations (effective January 29, 1981) contained in 45 Fed. Reg. 85,664 (1980) (to be codified in 5 C.F.R. § 551.402).

We note that Ms. Taliaferro's computation of overtime hours is ostensibly based upon daily hours worked in excess of 8. Under FLSA, only those hours in excess of a 40 hour workweek, as opposed to an 8 hour workday, are compensable as overtime. 45 Fed. Reg. 85665 (1980) (to be codified in 5 C.F.R. § 551.501(a)). Additionally, for FLSA purposes, paid absences, such as leave or holidays, are not considered hours worked in determining whether the employee has worked more than 40 hours in a workweek. 45 Fed. Reg. 85,664 (1980) (to be codified in 5 C.F.R. § 551.401(b)).

Accordingly, with the aforementioned qualifications, DLA may pay the claim.

Milton J. Socolar

Acting Comptroller General
of the United States