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DECISION

20437

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

FILE: B-200354 DATE: December 31, 1981

MATTER OF: Civilian Nurses - Overtime and Sunday Premium Pay Entitlement

DIGEST:

1. An employee's entitlement to overtime compensation may be based on either title 5, U.S.C., or the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., or both. Employees to whom both laws apply are entitled to overtime compensation under whichever one of the laws provides the greater benefit.

2. Civilian nurses who received 30-minute duty-free lunch break during 8-hour and 15-minute shift are not entitled to overtime compensation under either title 5 or the Fair Labor Standards Act. The duty-free lunch period should be set off against the shift schedule resulting in an actual working time of 7 hours and 45 minutes.

3. Although the practice was stopped in November 1978, civilian nurses received compensation for 30 minutes of overtime when they worked through their lunch breaks. In actuality, they worked only 8 hours and 15 minutes and therefore would have been entitled to only 15 minutes of overtime. If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interests of the United States. However, if the indebtedness exceeds the amounts now payable, any such overpayments should be considered for waiver under 5 U.S.C. § 5584.

4. Civilian nurses are entitled to overtime compensation under either title 5 or the Fair Labor Standards Act, whichever is applicable, on those occasions when they reported 15 minutes early and worked through lunch without receiving any prior overtime compensation.

5. Civilian nurses who worked a part of Sunday during their regularly scheduled 8-hour period of service on each of 2 scheduled working days are entitled to premium pay for both shifts under 5 U.S.C. § 5546(a) (1976). However, the nurses are entitled to premium pay for only 1 day when the part worked on the second scheduled workday is considered overtime.

6. Fact that official time and attendance records reflect only standard 8-hour day with occasional overtime would not necessarily defeat employee's claim for overtime compensation. Where accurate records have not been maintained, it is sufficient for employee to prove she has in fact performed overtime work for which she was not compensated under the FLSA, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Other forms of evidence or documentation are also acceptable. Here, it is undisputed that the work schedules required the nurses to regularly report 15 minutes early and their schedule either began or ended on a Sunday.

This is in response to a request by 1st Lieutenant Alan K. W. Young, an authorized certifying officer, Department of the Air Force, Beale Air Force Base, California, for an advance decision concerning payment of the claims of Maxine M. Alexander and eight other civilian nurses similarly situated for overtime and

Sunday premium pay. The claims may be paid in certain circumstances as outlined below.

As a matter of long practice, and extending to April 1979, duty schedules for civilian nurses at the Beale Air Force Base Hospital required them to report for duty 15 minutes prior to their scheduled shift resulting in a workday of 8 hours and 15 minutes. The practice developed from the necessity to provide an overlap between shifts to review patient reports. The 15-minute early reporting time was approved by the Hospital's Civilian Personnel Branch, which apparently had approval authority, on three separate occasions in 1972, 1975 and 1979. The time and attendance cards, however, continued to reflect a standard 8-hour shift.

In addition to asking whether overtime pay may be authorized for the 15-minute early reporting time, the submission questions whether Sunday premium pay may be authorized for 2 days instead of 1 when the nurses worked a part of Sunday on each of 2 scheduled working days. In this regard the record shows that prior to May 1976 the civilian nurses at Beale received a single Sunday premium although they worked a weekend schedule beginning at 10:45 p.m. Saturday to 7 a.m. Sunday, and again from 10:45 p.m. Sunday to 7 a.m. Monday. After May 1976, the weekend schedules were shifted to begin at 11:45 p.m. Saturday to 8 a.m. Sunday, and 11:45 p.m. Sunday to 8 a.m. Monday. The nurses claim that by working a part of Sunday on each of 2 scheduled working days they are entitled to Sunday premium pay for 2 days instead of 1.

The submission states that doubt arises on whether the claims should be paid for several reasons. First, while it is not disputed that the civilian nurses' schedules required them to report 15 minutes early, the time and attendance records reflect only a standard 8-hour shift with occasional overtime, and do not reflect if any leave time was taken. Secondly, although the work schedules resulted in 8-hour and 15-minute shifts, a one-half hour meal break was included in that shift resulting in an actual work time of 7 hours and 45 minutes. Thus, it appears as a matter of practice that a full half hour meal break was treated as a compensated duty-free meal.

In addition, during those times the nurses could not take their meal breaks due to the workload, they were authorized and paid 30 minutes of overtime. This practice was stopped in November 1978 when the nurses were informed that they were not entitled to 30 minutes of overtime pay for working through lunch.

The certifying officer submits the following questions:

"a. Are the claimants entitled to payment for the extra quarter hour at the overtime rate under the provisions either of 5 U.S.C. 5542(a) or the FLSA, 29 U.S.C. 207 even though the quarter hour was not reflected on the related certified Time and Attendance Records?

"b. If the answer to question a is affirmative, to what degree, if any, should the overtime be offset against the thirty minute compensated meal period? Would corrected Time and Attendance Cards be required?

"c. If the answer to question b is negative, how is the excess duty-free mealtime to be treated?

"d. Is an additional payment for Sunday Premium Pay resulting from the requirement for early reporting authorized either for the period prior to May 1976 or for the period thereafter?

"e. In view of the fact that documentary evidence is to a large extent not available, to what extent may employee entitlements be inferred from administrative statements, residual records, and employee statements?"

Overtime for Federal employees is authorized by title 5, United States Code, and by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (1976), for employees who are not exempt from the FLSA. An employee's entitlement to overtime compensation may be based on title 5 or the FLSA, or both. Employees to whom both laws apply may be entitled to overtime compensation under whichever one of the laws provides the greater benefit. 54 Comp. Gen. 371 (1974).

Section 5542 of title 5, United States Code (1976), provides that:

> "(a) * * * 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 * * *."

Only that overtime which is ordered or approved in writing or affirmatively induced by an official with authority to order or approve overtime is compensable. See Winton Lee Slade, B-186013, September 13, 1976, and Baylor v. United States, 198 Ct. Cl. 331, at 359, 360 (1972). Additionally, excused absences with pay (leave, holiday) are "hours worked" under this law.

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA to Federal employees. The FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1976).

Under the provisions of 29 U.S.C. § 204(f) (1976), the Office of Personnel Management is authorized to administer the provisions of FLSA. See B-51325, October 7, 1976. Under the FLSA, a nonexempt employee becomes entitled to overtime compensation for hours of work in excess of 40 hours a week for all work which management "suffers or permits" to be performed. For purposes of this law, excused absences with pay are not considered hours worked. See Federal Personnel Manual (FPM) Letter No. 551-1, para. 3c, and Attachment 4, May 15, 1974.

The Air Force informs us that four of the nurses involved are classified as nonexempt and five of the nurses are classified as exempt from the FLSA. If any questions arise concerning the proper FLSA status of these nurses, they should be directed to the Office of Personnel Management which has the authority to make final determinations as to whether Federal employees are covered by the various provisions of the Act. See B-51325, previously cited.

Those nurses who are exempt from FLSA are entitled to compensation for the overtime work, if at all, only under the provisions of title 5. Thoses nurses who are nonexempt from FLSA are entitled to overtime compensation either under title 5 or FLSA, whichever law provides the greater benefit. While it appears the nurses regularly reported 15 minutes early, they are entitled to overtime compensation only in certain instances.

On those occasions when the nurses reported 15 minutes early and received a 30-minute duty-free lunch period, the duty-free lunch period should be set off against the shift schedule of 8 hours and 15 minutes, resulting in an actual working time of 7 hours and 45 minutes. This setoff applies to both exempt and nonexempt status nurses. See 47 Comp. Gen. 311 (1967); Frank E. McGuffin, B-198387, June 10, 1980; and Attachment 4 of FPM Letter No. 551-1, May 15, 1974. Thus, there is no entitlement to overtime compensation during the time setoff is available. It would appear the nurses received duty-free luncheons unless they claimed otherwise on the time and attendance records.

Thus, the only time the nurses would be entitled to overtime compensation under the circumstances presented are those times when they reported 15 minutes early and worked through lunch without receiving any overtime compensation. The overtime compensation should be computed either under title 5 or under FLSA, whichever is applicable in the individual's case.

Prior to 1978, the nurses apparently were overpaid when they were authorized 30 minutes of overtime when they worked through their lunch breaks. They worked only 8 hours and 15 minutes, and therefore would have been entitled to only 15 minutes of overtime a day at most. As noted, the practice stopped in November 1978, when it was determined that overtime compensation was not permitted. Thus, the question arises whether the overpayments should be waived under the authority of 5 U.S.C. § 5584 (1976), or offset against the amounts now claimed.

Waiver is authorized only where the collection would be against equity and good conscience and not in the best interests of the United States. In B-168323,

December 22, 1969, we considered a case where both overpayments and underpayments resulted from the same misconception on the part of the employing activity as to the proper method of payment for the time worked. Since the employee had filed a claim for additional overtime compensation and there was a net benefit to him even after deducting the amounts owed by him from the additional compensation to which he was entitled, we did not consider that collection of the indebtedness by way of offset would be against equity or good conscience and not in the best interests of the United States. We held that where the overtime payable exceeds the overpayment, which would be collected by offset, no waiver should be granted. However, where the overpayment exceeds the overtime payable there appeared to be an adequate basis for waiving the indebtedness of the employee provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. See also 59 Comp. Gen. 246 (1980).

If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay (see discussion that follows) exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interest of the United States. However, if the indebtedness exceeds the amounts now payable to the nurses, any such overpayments should be considered for waiver. Under 4 C.F.R. § 91.4(b) (1981), waiver may be granted by the head of the agency or the Secretary concerned when the amount is not more than $500.

In regard to whether Sunday premium pay may be authorized for 2 days intead of 1, an employee's entitlement to Sunday premium pay is governed by 5 U.S.C. § 5546(a) (1976), which provides:

"An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay."

The nurses worked a part of Sunday on each of 2 regularly scheduled working days. They are therefore entitled to premium pay for both shifts except when the part worked on one of the Sunday shifts is considered overtime. As the language of the statute plainly states, only that time which is not overtime can be compensated as Sunday premium pay. See James E. Sommerhauser, 58 Comp. Gen. 536 (1979). As previously stated, the only time the nurses would be entitled to overtime would be on the days that they worked through lunch. Therefore, they would not be entitled to Sunday premium pay on those days.

Although the official time and attendance records reflect only a standard 8-hour day with occasional overtime, this would not necessarily defeat the nurses' claims for overtime compensation. 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 that she has in fact performed overtime work for which she was not compensated, 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 negate that produced by the employee. Christine D. Taliaferro, B-199783, March 9, 1981.

Additionally, we have held that while claims against the Government must be predicated, if at all possible, upon official records, we will accept other forms of evidence or documentation where agency action has precluded official records from reflecting overtime. Christine D. Taliaferro, B-199783, supra. In this case it is undisputed that the nurses were regularly required to report 15 minutes earlier than their scheduled shift and that their work schedules began or ended on Sunday. Therefore, their time and attendance records, work schedules, and other documents contained in the record present sufficient evidence to support their claims. Thus, no corrective action is required on the time and attendance cards.

Additionally, we note that Maxine M. Alexander's claim was received by this Office on August 25, 1980, while the other nurse's claims were received on July 18, 1980. Section 71a of title 31, United States Code, states that all claims cognizable by the General Accounting Office (GAO) must be received by GAO within 6 years after the date the claim first accrued or be barred from consideration. Thus, any claim by Ms. Alexander prior to August 25, 1974, and any claim by the other eight nurses prior to July 18, 1974, cannot be considered.

Accordingly, the voucher is returned for action consistent with the above.

Harry R. Van Cleve

For Comptroller General
of the United States