29223

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

FILE: B-202626 **DATE:** September 4, 1984

MATTER OF: Kenneth W. Swartley - Reconsideration - Holiday Premium Pay

DIGEST:

We affirm our prior decision that when an employee's regular daily tour of duty covers portions of 2 calendar days, one of which is his designated holiday, all of that tour of duty is considered to occur during the employee's holiday. Even though part of the holiday tour may begin on a day during which the employee has already worked 8 hours, that portion of the holiday tour of duty is not considered overtime under 5 U.S.C. § 5542, which would preclude it from being considered holiday work. See 5 U.S.C. § 5546(b).

We have been asked to reconsider our decision Kenneth W. Swartley, B-202626, June 15, 1982, in which we held that an employee is entitled to 8 hours of holiday premium pay even though his 8-hour work shift covers portions of 2 calendar days, one of which is not a holiday, and he has already worked 8 hours on an earlier shift on the first day. Since our decision gives effect to the letter and spirit of the holiday pay law, we do not think it necessary to modify our prior Swartley decision.

Mr. Donald B. Rock, Director of Personnel and Training, Federal Aviation Administration, U.S. Department of Transportation, has requested that we reconsider part of the holding in Swartley. The Swartley decision involved a grade GS-14 air traffic controller who was regularly engaged in a 5-day workweek beginning Friday and ending on Tuesday with Wednesday and Thursday being his regularly scheduled days off. During the time in question, Tuesday, November 20, 1979, was designated as Mr. Swartley's holiday in lieu of Thanksgiving pursuant to 5 U.S.C. § 6103 and FAA regulations. On November 19, 1979, Mr. Swartley was on duty for an 8-hour shift from 6:54 a.m. to 2:54 p.m. with 2 hours of annual leave taken during the first 2 hours of the shift.

029910

He then returned to duty at 11 p.m., November 19, 1979, and worked an 8-hour shift ending at 7 a.m., November 20, 1979. Mr. Swartley received his standard pay for the first shift on November 19, 1979. The FAA paid him 1 hour of overtime pay for the hour that he worked from 11 p.m. to midnight on November 19, 1979, and 7 hours of holiday pay for the 7 hours worked on November 20, 1979.

Mr. Swartley claimed holiday premium pay for the 1 hour he worked from 11 p.m. to midnight on November 19, 1979. We allowed Mr. Swartley's claim and modified our prior decision B-193384/B-193544/B-194035, June 18, 1979, which prohibited payment of holiday premium pay for portions of an employee's shift which fell outside the calendar holiday.

Mr. Rock states that he agrees with our modification of B-193384/B-193544/B-194035, June 18, 1979, to the extent that an employee may receive holiday premium pay for his full 8-hour tour of duty when the tour covers portions of 2 calendar days, one of which is a holiday. He states, however, that in Mr. Swartley's case, the hour which he claimed at the holiday pay rates should be considered overtime because Mr. Swartley had already been paid for 8 hours of work and leave on that day.

In this connection, Mr. Rock points to 5 U.S.C. § 5542(a) which provides that work in excess of 8 hours in a day is overtime. The holiday pay statute, 5 U.S.C. § 5546(b), provides:

> "An employee who performs work on a holiday designated by Federal statute * * * [or] Executive order * * * is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not -
>
> (1) in excess of 8 hours; or
>
> (2) overtime work as defined by section 5542(a) of this title."

Mr. Rock claims that since the first hour of Mr. Swartley's second shift on November 19, 1979, was the ninth hour of paid work or leave for that calendar day, Mr. Swartley is precluded from receiving holiday premium pay for that hour as it is overtime work under 5 U.S.C. § 5542(a).

In interpreting the above-quoted holiday pay law, we were mindful of the operation of the overtime statute, and we considered its effect in Mr. Swartley's case. We did not ignore the provision of the overtime statute but rather viewed it in conjunction with the holiday pay law and Executive Order No. 11582, February 11, 1971, which provides in part:

> "Sec. 5. Any employee whose workday covers portions of two calendar days and who would, except for this section, ordinarily be excused from work scheduled for the hours of any calendar day on which a holiday falls, shall instead be excused from work on his entire workday which commences on any such calendar day.
>
> "Sec. 6. In administering the provisions of law relating to pay and leave of absence, the workdays referred to in sections 3, 4, and 5 shall be treated as holidays in lieu of the corresponding calendar holidays."

As discussed in our prior decisions, the holiday premium pay law was designed to apply to work on a holiday within an employee's basic 40-hour workweek. See, e.g., 37 Comp. Gen. 1, 3 (1957). In our view, the clear intent of this law, as well as Executive Order No. 11582, is that an employee who puts in a regular 40-hour workweek which includes a holiday is entitled to 8 hours of holiday pay. The exclusion in 5 U.S.C. § 5546(b) for work in excess of 8 hours or for overtime merely precludes an employee from enlarging his or her regular work schedule in order to obtain more than 8 hours of holiday premium pay.

As we stated in Swartley, when an employee's regular daily tour of duty covers portions of 2 calendar days, Executive Order No. 11582 permits the designation of all of the tour of duty as occurring during the employee's holiday. In Mr. Swartley's case, therefore, since the full 8-hour tour of duty from 11 p.m. November 19 through 7 a.m. November 20, apparently was designated by the FAA as being Mr. Swartley's holiday for pay and leave purposes, the initial hour of that shift cannot also be considered overtime work under 5 U.S.C. § 5542.

We emphasize that this holding applies only where the 11 p.m. to 7 a.m. shift is part of the employee's regular tour of duty. Finally, we point out that if the FAA wishes to avoid the result of our interpretation, it can do so by use of its considerable discretion in scheduling tours of duty and in designating days for holiday pay and leave purposes.

Accordingly, we affirm our prior decison in Swartley.

for Milton J. Socolar
Comptroller General
of the United States