

**DECISION**



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

*Botsford*

*26176*

**FILE:** B-202864

**DATE:** September 2, 1983

**MATTER OF:** Reconsideration of Howard L. Young  
B-202864, August 10, 1982 - Overtime  
Compensation

**DIGEST:**

Decision denying claim of employee for overtime compensation for period he was away on military leave is reversed. Claim was denied because although overtime was regularly scheduled, it was not clear that employee would have been required to work the overtime involved. Newly submitted evidence shows that employee would have been required to work and his claim is therefore allowed.

Mr. Howard L. Young has requested reconsideration of our decision, Howard L. Young, B-202864, August 10, 1982, by which we denied his claim for overtime compensation for the period he was on military leave from his civilian position at the Naval Air Rework Facility (NARF) in Jacksonville, Florida.

Mr. Young's claim is based on 5 U.S.C. § 6323, which requires that an employee receive the same compensation he otherwise would have received had he not been away on military leave. As we pointed out in our earlier decision, we have held that in order for overtime work to be compensable with respect to an employee on military leave, the overtime duty must have been "regularly scheduled," and it must have been clear that the employee would have been required to work the overtime. Lewis E. Keith, Jr., B-159835, March 11, 1976, and cases cited therein.

Our decision of August 10, 1982, resulted from Mr. Young's appeal from our Claims Group's denial of his claim on the grounds that neither of the prerequisites for compensation had been met--namely, that the overtime for which he sought compensation was not "regularly scheduled" nor was it clear that he would have been required to work the overtime in question. Although we determined that the overtime was regularly scheduled because it was authorized in advance and was scheduled to recur on successive days, we agreed with our Claims Group that Mr. Young had not shown that he would have been required to work the overtime in question.

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Mr. Young is a member of the Naval Reserve and performed annual active duty training from October 6 to October 19, 1979. He is claiming entitlement to overtime for the following days in the listed amounts:

10/6	Saturday	-	8 hours
10/8	Monday (Holiday)	-	8 hours
10/10	Wednesday	-	2 hours
10/11	Thursday	-	2 hours
10/12	Friday	-	2 hours
10/13	Saturday	-	10 hours
10/14	Sunday	-	10 hours
10/16	Tuesday	-	2 hours
10/17	Wednesday	-	2 hours
10/18	Thursday	-	2 hours
10/19	Friday	-	2 hours

In connection with our earlier decision Mr. Young contended that there were 10 employees on his shop's roster and any number of employees above that number were borrowed from other shops. To support his claim he submitted one memorandum in which his supervisor stated that Mr. Young would have been required to work overtime since the whole shop was on overtime. In another memorandum, his supervisor stated that Mr. Young would have been required to work on October 6 and 8 since overtime was not voluntary. The NARF stated, however, that the assigned strength of that shop varied from 15 to 23 and further stated that not all those assigned worked overtime on the days in question. The NARF submitted the following list showing the number of employees assigned to the shop and the number who worked overtime.

<u>DATE</u>	<u>NUMBER ASSIGNED</u>	<u>NUMBER WORKED</u>
10/10	17	13
10/11	17	11
10/12	17	14
10/13	23	19
10/14	23	9
10/16	15	11
10/17	15	13
10/18	15	11
10/19	16	13

Faced with a factual dispute between the agency and the claimant we were forced to accept the facts as presented by the agency since Mr. Young had not satisfied

his burden of establishing his entitlement to payment by clear and convincing evidence. See 4 C.F.R. 31.7 (1983). Since the evidence as provided by NARF showed that only some of the employees assigned to the shop worked overtime during the relevant dates, and it was therefore not clear that Mr. Young would have been required to work overtime, we denied his claim. We did state, however, that if Mr. Young could provide evidence supporting his contentions concerning the number of employees in his shop and the number who were required to work overtime, we would reconsider our decision.

In seeking reconsideration of our decision Mr. Young submitted a list of 12 employees which his supervisor certified as those permanently assigned to his shop. Mr. Young explains his earlier statement that there were 10 permanently assigned employees in his shop by pointing out that one of the employees is the shop supervisor and another takes care of the Ground Support Equipment, leaving 10 employees to work on the aircraft.

In response to our request NARF submitted their own list of permanently assigned employees which was identical to the list Mr. Young submitted but for the addition of one other employee. The NARF also submitted a chart showing the days each of those employees worked overtime during the period in question. The total number of employees from Mr. Young's shop who worked on each of the days in question is shown on the chart below. We have also added NARF's statement concerning the total number of employees, including those apparently borrowed from other shops, who worked on those days.

<u>DATE</u>	<u>EMPLOYEES FROM MR. YOUNG'S SHOP</u>	<u>TOTAL NUMBER of EMPLOYEES</u>
10/8	8	-
10/10	10	13
10/11	9	11
10/12	10	14
10/13	10	19
10/14	9	9

10/16	9	11
10/17	11	13
10/18	10	11
10/19	9	13

We believe that these figures compel us to reach the conclusion that Mr. Young would have been required to work overtime had he not been on military leave. Despite NARF's contentions to the contrary, we determined in our earlier decision that overtime in Mr. Young's shop is not voluntary. The Labor Management Agreement between NARF and The International Association of Machinists and Aerospace Workers provides that overtime is not voluntary and that employees will be relieved of an overtime assignment only if it would result in an unreasonable inconvenience or pose an undue hardship to the employee, and, there is another employee available. Additionally, we have been informed that employees assigned to a shop which is going on overtime are always selected for the overtime before employees from other shops. Therefore, we assume that those employees absent from Mr. Young's shop were asked to perform overtime but were properly excused from such duty.

In light of this we believe that the facts now show that Mr. Young would have been required to work overtime on all days except Sunday, October 14. On every day except that one the number of employees who worked exceeded the number of employees available from Mr. Young's shop, and employees from other shops were apparently brought in to perform the overtime. We are unable to determine, however, how many, if any, employees from other shops worked on Monday, October 8, nor do we have any such information concerning Saturday, October 6. We therefore hold that Mr. Young is entitled to overtime compensation for every day he has claimed with the exception of October 6, 8, and 14.

*for* *Harry R. Van Cleave*  
Comptroller General  
of the United States