PAM I
23633

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

FILE: B-205348 **DATE:** November 23, 1982

MATTER OF: John L. Svercek, et al. - Bona Fide Meal Periods Under Fair Labor Standards Act

DIGEST: The Office of Personnel Management has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no bona fide lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute preshift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., for hours worked in excess of 40 in a week as no offset for lunch breaks may be made.

Mr. Don E. Hansen, Chief, Fiscal Standards Branch, Financial Systems Division, Office of Accounting, Federal Aviation Administration (FAA), has requested our decision as to whether six FAA Air Traffic Control Specialists may be paid overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976). For the reasons which follow we hold that the employees may be compensated for overtime work under FLSA insofar as their claims are not barred by 31 U.S.C. § 71a (1976).

BACKGROUND

Mr. Hansen has forwarded the claims of Messrs. John L. Svercek, George C. Spencer, Stanley G. Johnston, Joseph G. Keller, Wallace E. Hamel and Arthur W. DeAlfi for overtime compensation for attending pre-duty briefings prior to the beginning of their scheduled shifts at FAA's Binghamton, New York, facility. These claims had been investigated

by the Office of Personnel Management's (OPM) New York Regional Office. Under 29 U.S.C. § 204(f) (1976), the Civil Service Commission, now OPM, is authorized to administer FLSA with respect to individuals employed by FAA.

After an investigation into the employee's claims, OPM's New York Regional Office issued compliance orders to the FAA finding that the pre-duty briefings were compensable work periods under FLSA and requesting that FAA pay overtime compensation for such work where appropriate. The FAA now forwards a rebuttal of OPM's compliance orders and has asked us to review the matter.

The New York Regional Office of OPM found that during the period May 1, 1974, to July 1, 1976, FAA policy, as expressed in FAA Facility Operations Handbook 7230.1c, required that air traffic controllers report for a pre-duty briefing prior to the beginning of their scheduled shift. The FAA did not prescribe the length of the briefings but the briefings varied in length from 5 to 20 minutes. The employees here did not report to or depart from the facility at the same time, and they were permitted to depart prior to the scheduled end of the shift if they were properly relieved.

The OPM then found that an average of 15 minutes for the pre-shift briefings was a reasonable claim and that the time in these pre-shift briefings meets the FLSA definition of "work" that is suffered or permitted and which should have been compensated under the provisions of 29 U.S.C. § 207(a)(1).

In reaching its decision, OPM's New York Regional Office considered FAA's contention that time spent on lunch breaks should have been used to offset the compensable pre-shift work. The FAA submitted a memorandum from the current Chief of the Binghamton Tower stating that for the period September 1975, through July 1976, "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The FAA further contended that all of

the employees spent their lunch breaks away from the work site in a cafeteria which was physically located in the same building but on a different floor and that, although the employees were on call while at lunch in the cafeteria, they were never actually recalled to their post of duty during a lunch break.

In response to the FAA's contentions, the employees asserted that they did not routinely have a lunch break because of staffing shortages during the day shift, which meant that there were not enough Controllers to relieve those on each position and that the nonsupervisory Controller often acted as Controller-in-Charge, and because the midnight shift was staffed by only one employee.

After reviewing the facts, the New York Regional Office of OPM found that the FAA had not adequately supported its contention that the employees were given and in fact took a bona fide meal period. The compliance order states that:

> "* * *Under the FLSA for a bona fide meal period the employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily thirty minutes or more is long enough for a bona fide meal period, although a shorter period may be long enough under special conditions. An employee is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. However, it is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period. In this case, we note that the official policy of the FAA is that Air Traffic Controllers work a straight eight-hour tour of duty with no time off

> for a duty-free meal period. Although the employees may be relieved from their work positions, they are subject [to] callback. When contacted by this office, the Chief of the Binghamton Tower stated that his policy was to discourage the employees from eating at the work station, that this policy was never formally promulgated in writing, that he took no special measures to enforce it, that the length of the meal period was never definitely established but was approximately thirty minutes on the average but was sometimes more and sometimes less, that the employees remained subject to recall although this happened infrequently, that the Facility was short staffed during the period in question after his arrival in September of 1975, and that he could not speak to the policy in effect for the rest of the period (May, 1974, to September, 1975). Since the meal period did not have a fixed length and since the employees remained subject to recall, the employees were not completely relieved from duty and the time does not constitute a bona fide meal period under the FLSA." (Underscoring added.)

In challenging OPM's analysis, the FAA relies on the statement from the Chief of the Binghamton Tower that "[i]t was standard practice that all employees received approximately 30 minutes for lunch break." The Chief also stated that his policy was to discourage employees from eating at the work station and that although the employees did remain subject to recall during the meal periods, they were actually recalled quite infrequently. FAA also takes issue with the principle enumerated in the above-quoted compliance order which we have underscored. Rather, FAA relies on our decision Raymond A. Allen, et al., B-188687, September 21, 1977, (modified at Raymond A. Allen, et al., B-188687, May 10, 1978),

in which we held that where an agency can establish that an employee was afforded a lunch break away from his post, the mere fact that the employee was on call and not permitted to leave the building or premises will not defeat a setoff for the lunch breaks unless the employee demonstrates that the break was substantially reduced by responding to calls. The FAA states:

> "It was our agency's position that the line of reasoning demonstrated in this CG decision whereby breaktime must be substantially reduced by actually responding to calls, was applicable in these cases. This differs significantly from the line of reasoning demonstrated by OPM in their compliance orders where they state that the employees were not completely relieved from duty since they remained subject to recall."

The FAA notes that Raymond A. Allen, above, involved employees claiming overtime under 5 U.S.C. § 5542 and not FLSA. Since, however, FAA was unaware of any decision under FLSA addressing the concept of offsetting compensable pre-shift overtime work by meal breaktime, FAA concluded that the above title 5 concept was applicable here.

OPM'S COMMENTS

In view of OPM's responsibility to administer FLSA we requested a report on the compliance order and FAA's question on the validity of the order from OPM's General Counsel. We were particularly interested in the General Counsel's views on the validity of the compliance order's statement that since the meal period did not have a fixed length, and since the employees remain subject to recall, the employees were not completely relieved from duty, and that time does not constitute a bona fide meal period under the FLSA.

The General Counsel reported that the above statement incompletely recapitulated the discussion preceding it as it did not reflect the finding that the employees did not routinely have a lunch break because of staffing shortages. He states that when the employees had no lunch break, they of course, were not recalled, thus partially explaining the infrequency of recalls to duty. He explained further that:

> "* * * in addition to the absence of certainty with respect to whether there would be a lunch break, there was no certainty of when it could be taken, or for how long. The perception of the employees that the lunch time was uncertain and not to be regarded as free time was reinforced by the fact that they are scheduled to work a straight eight-hour tour of duty with no time off for a duty-free meal period. This fact, along with the lack of definiteness as to the establishment or promulgation of the meal period policy, suggests that neither the agency nor the employees regarded the lunch break as bona fide; it was not recognized in the scheduling of work, nor in any agency writing.
>
> "* * * [Moreover] there were additional facts which support the findings but which are not reflected in the report. * * * the 'lunch breaks,' -on the sporadic and infrequent occasions that they were taken -were not generally taken at the 'cafeteria [in reality the airport coffee shop] located away from the work-site.' There was rarely opportunity for doing so. Rather, the meals, when not taken at the work-site itself, were taken in the 'ready room' (also called the 'hot plate' or 'radar range' room), right near the work-site, so that the employee could resume his duties at a moment's notice. * * * the 'lunch periods,' so called, were so subject to

> desultory interruption that they did not even amount to 'rest periods', which FAA recognizes to be 'work time'.
>
> "The agency 'policy' of discouraging the eating of meals at the work-site was not enforced by those who made the policy, simply because it was rare that there was anyone to relieve the employee so that he could go any appreciable distance from the work-site.
>
> * * * * *
>
> "There was no suggestion or pretense that the 'lunch break' was 'free time,' and the characterization of it as such, * * * was 'very much an afterthought on the part of FAA.' * * * as a result of a compliance order dated July 11, 1980, the agency paid, under identical circumstances, overtime compensation to another employee, [omitted], and raised no question whatever about free meal periods."

In view of the above recitation of the facts, it seems clear that OPM did not reach its decision that the lunch periods were work solely because the breaks did not have a fixed length and because the employees were subject to recall. Rather the cumulative evidence that no lunch breaks in fact existed and the employees actually worked through their "breaks" stimulated OPM's decision.

FAA'S POSITION

The FAA does not appear to object to the finding that the pre-duty briefings were compensable hours of work under FLSA but rather FAA contends that the employees did regularly take meal periods which should offset the pre-duty work time performed by the employees. The question therefore, is whether the employees did in fact have bona fide lunch breaks

which are not compensable hours of work and which would serve to offset the work done in the pre-duty briefings.

OPINION

We note initially that Federal agencies must compute an employee's overtime benefits under both FLSA and Title 5 of the United States Code and the employee is to be paid according to the computation most beneficial to the employee. 54 Comp. Gen. 371 (1974). Title 5 concepts do not govern the method of computing entitlements under FLSA. Paul G. Abendroth, et al., 60 Comp. Gen. 90 (1980). Therefore, to the extent that our decision Raymond A. Allen, prescribes rules of entitlement to overtime compensation under Title 5, such rules are not to be applied to questions of entitlement to overtime compensation under FLSA.

The courts have held that under FLSA, the essential consideration as to whether a meal period is bona fide is whether the employees are in fact completely relieved from work for the purpose of eating regularly scheduled meals 1 / and whether the mealtime is free and uninterrupted. 2 /

We have held that we will not disturb OPM's findings of fact on FLSA claims unless clearly erroneous and the burden of proof lies with the party challenging the findings. Paul Spurr, 60 Comp. Gen. 354 (1981). Considering OPM's further explanation of the facts in this case, that the employees either could not leave their work sites for lunch or that they were frequently interrupted if they did leave their work sites, we accept OPM's finding that the employees did not have bona fide lunch breaks and were therefore performing compensable work during their supposed lunch breaks.

1 / Blain v. General Electric Co., 371 F. Supp. 857 (W. D. Ky. 1971)

2 / Fox v. Summit King Mines, Ltd., 143 F. 2d 926 (9th Cir. 1944)

Since these employees did not have bona fide meal periods which would allow an offset, we agree with OPM that these employees are entitled to overtime compensation under FLSA for hours worked in excess of 40 in a week when the employees were engaged in pre-shift briefings.

We note, however, that these claims are partially barred by the Barring Act, 31 U.S.C. § 71a, which precludes our Office from considering a claim not received here within 6 years after the date such claim first accrued. 57 Comp. Gen. 441 (1978). Mr. Svercek's claim was first received in this Office on October 1, 1981, the claims of Messrs. Spencer, Keller, Hamel and DeAlfi were received on August 27, 1981, and Mr. Johnston's claim was received on October 21, 1980. Accordingly, payments may be made to the above claimants as to the portions of their claims not barred by 31 U.S.C. § 71a.

for Milton J. Socolar
Comptroller General
of the United States