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

FILE: B-208203 **DATE:** February 3, 1983

MATTER OF: Frances W. Arnold - Overtime Claim under the Fair Labor Standards Act

DIGEST:

1. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence.

2. Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive.

3. 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

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worked" in determining whether employee has worked more than 40 hours in a workweek.

4. Employee who was previously awarded backpay for overtime work performed from June 23, 1974, through January 4, 1976, seeks additional compensation for overtime work from January 4, 1976, through June 17, 1978. Since prior claim was filed in GAO on July 15, 1980, portion of claim arising before July 15, 1974, should not have been considered by agency since Act of October 9, 1940, as amended, 31 U.S.C. § 3702 (b)(1), bars claim presented to GAO more than 6 years after date claim accrued. Therefore, agency should offset amount of prior erroneous payment against amount now due to employee.

This decision is in response to a request from Ms. Anita R. Smith, an authorized certifying officer with the Department of Agriculture (USDA) in New Orleans, Louisiana, concerning the claim of Ms. Frances W. Arnold for overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976). For the reasons stated below, we hold that payment of Ms. Arnold's claim for overtime compensation may be authorized.

At the time of her retirement in March 1980, after 42 years of Federal service, Ms. Arnold was employed by the Farmers Home Administration (FmHA), USDA, in Marysville, Kansas, as a GS-5 County Office Assistant, a nonexempt position under the FLSA. In May 1980, shortly after her retirement, Ms. Arnold filed a claim with the FmHA for $12,445.48 in overtime compensation for hours she claims to have worked between January 1976 and November 1978.

The hours for which Ms. Arnold requests compensation cannot be verified by the agency now because the daily work measurement cards have been destroyed in the intervening years. Yet, Ms. Arnold's supervisor does recall seeing her work hours in excess of her normal tour of duty and has stated in a letter to FmHA's State Director, dated May 28, 1980: "I can verify [that] overtime was worked." He

states, however, that he cannot verify the exact number of hours worked by the claimant. In support of her entitlement to overtime pay, Ms. Arnold submitted to the agency both a handwritten report and a typed report listing all overtime hours she claims to have worked. The agency then apparently used the reports submitted by Ms. Arnold to prepare its own reconstructed Time and Attendance reports covering the dates in question. The employee evidently reconstructed her claim from personal records that she kept from 1976 to 1978.

The certifying officer has questioned Ms. Arnold's entitlement to overtime pay in light of the information contained in two internal agency memoranda advising Ms. Arnold and her supervisor that she was not to be permitted to work hours outside of her regular tour of duty. The first of these memoranda, dated March 5, 1975, was from the FmHA District Director to Ms. Arnold. He stated as follows:

> "It has come to my attention that you may be working hours beyond the regular duty hours of 8:00 a.m. to 5:00 p.m.
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> "Under the Fair Labor Standards Act of 1974 we cannot permit you to work any overtime that is not authorized and FmHA cannot authorize employees in the nonexempt status to work any hours except from 8:00 a.m. to 5:00 p.m. You must schedule, organize and give priority to work most essential. It is realized [that] some work cannot always be accomplished in the hours of 8:00 a.m. to 5:00 p.m. so it must be delayed until another time.
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> "This is to confirm the previous discussions we have had on working overtime. Please refer to Kansas Bulletin 1722(200) dated June 13, 1974 and if you have any questions, please contact me."

Despite this admonishment, the employee continued to work hours in excess of her regular tour of duty. Although Ms. Arnold's supervisor (who was the only other person working in the Marysville office) knew that she was continuing to work overtime, he apparently took no action to prevent her from doing so. Furthermore, the agency itself has submitted no evidence to show that anyone else intervened to

ensure Ms. Arnold's compliance with the March 5 directive.

Sometime later, the FmHA State Director was informed that Ms. Arnold was not complying with the terms of the memorandum and was continuing to work overtime. In an effort to remedy the situation, he sent her a second letter on June 8, 1978, over 3 years after the initial memorandum had been sent. In that letter, the Director stated:

> "Reports indicate that * * * you are working more than eight hours per day in order to perform your job. * * *
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> "This letter is notifying you that you cannot continue working more than eight hours per day for the FmHA. This eight hours must be performed between 8:00 a.m. and 5:00 p.m." (Emphasis in original).

A copy of this letter also was sent to Ms. Arnold's supervisor in Marysville, since a footnote at the bottom of the letter was specifically addressed to him. That footnote stated: "CS, Marysville - Note: If employee continues to come to work before 8:00 a.m. and leaves after 5:00 p.m., you are to pick up her office keys."

Shortly after she received the State Director's letter, Ms. Arnold went on extended sick leave pending her retirement. Her retirement became effective on March 22, 1980, and she submitted her claim for overtime compensation to the agency 2 months later.

The certifying officer's submission notes that Ms. Arnold has previously submitted a claim to the agency for overtime compensation for excess hours worked during 1974 and 1975. Although that claim was processed and paid in December 1981, the certifying officer further states, "[w]e now question the validity of [the prior] claim in view of the District Director's memorandum of March 5, 1975."

The certifying officer also has asked us whether the holding in our recent decision Christine D. Taliaferro, B-199783, March 9, 1981, is relevant to the pending claim. In that decision, we ruled that the FLSA requires employers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." The certifying officer has raised the issue of the FLSA's

record-keeping obligation in this case because the FmHA did not maintain all of the records pertinent to Ms. Arnold's claim. Specifically, the certifying officer asks the following questions:

> "1. Would the fact that Ms. Arnold was formally advised in March 1975 that she could not work any overtime, unless it was authorized, nullify her claim since the time worked was in contravention of a direct order?
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> "2. If the claim is allowed, would the documentation submitted by the employee be adequate to process the claim?
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> "3. If the claim is disallowed, should we try to recover the amounts already paid subsequent to [the District Director's] memorandum to Ms. Arnold?"

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). The Act defines "hours worked" as all hours which the employer "suffers or permits" the employee to work. 29 U.S.C. § 203(g). 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. Under FLSA, employers have a continuing responsibility to ensure that work is not performed when they do not want it to be performed. Furthermore, "[m]anagement must assure that supervisors enforce that rule." Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974. (Emphasis in original). In addition, the courts have cited approvingly the Department of Labor's regulation on this matter which states as follows:

> " * * * it is the duty of the management to exercise its control and see that [overtime] work is not performed if it does not want it to be performed. * * * The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." (Emphasis added). 29 C.F.R. § 785.13. See Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975).

As noted above, Ms. Arnold's supervisor was aware that she was working hours in excess of her normal tour of duty. Yet, neither he nor anyone else from the agency took the action necessary to terminate this activity. Since Ms. Arnold was performing actual overtime work both with the knowledge of her supervisor and for the benefit of the agency, and this work was accepted by the agency, we believe that the agency must be said to have "suffered or permitted" her to work overtime. The fact that the District Director sent a memorandum to Ms. Arnold directing her not to work overtime hours is in itself not sufficient to show that the agency did not "suffer or permit" the overtime work. While the proscriptive language in that memorandum would have been sufficient to prevent the claimant from collecting overtime pay under the "officially ordered or approved" language of 5 U.S.C. § 5542, it is not sufficient under the "suffered or permitted" language of the FLSA. In the absence of evidence showing that the agency or the employee's supervisor took further action and was successful in preventing her from working overtime, we conclude that the overtime work performed by Ms. Arnold was "suffered and permitted" by the agency and is therefore compensable under the FLSA. The certifying officer's first question is answered accordingly.

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the employee must prove that she has in fact performed overtime work for which she was not compensated. She must then produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Christine D. Taliaferro, B-199783, March 9, 1981. At that point, the burden of proof shifts to the employing agency either to show the precise amount of work performed or to rebut the employee's evidence. Jon Clifford, et al., B-208268, November 16, 1982.

An agency cannot deny an employee's overtime claim on the basis of incomplete or unavailable records. 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). Where the agency has failed to keep adequate records, it must either rebut the employee's evidence by other means or pay the claim.

In Christine D. Taliaferro, above, the agency failed to record the employee's overtime hours as required by the FLSA. The claimant, however, was able to provide the agency with a list of overtime hours worked, which was compiled from her personal calendar. Additionally, the employee's supervisor stated that he had observed the claimant working overtime and had no reason to doubt the veracity of her records; furthermore, he actually recommended that the claim be paid. In light of the above, we held that the claimant both "proved that she in fact performed overtime work" and "produced sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference." This shifted the burden of proof to the agency, either to show "the precise amount of overtime work performed" or "to negative the reasonableness of the inference to be drawn from the employee's evidence." Since the agency could not produce any evidence on the matter, we held that it was required to pay Ms. Taliaferro's overtime claim.

The record in this case supports Ms. Arnold's claim that she performed work for which she was not properly compensated under the FLSA. Ms. Arnold's supervisor verifies that she worked overtime. Furthermore, like Ms. Taliaferro, Ms. Arnold has submitted a list, which she transcribed from her own personal records, of the dates, times and amounts of overtime hours she claims to have worked. We believe that Ms. Arnold's list, like Ms. Taliaferro's list, constitutes sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference. Since FmHA has not 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, Ms. Arnold is entitled to overtime pay under the FLSA.

Under the FLSA, only those hours in excess of a 40-hour workweek, as opposed to an 8-hour workday, are compensable as overtime. 5 C.F.R. § 551.501(a). In addition, "[p]aid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work" for purposes of computing overtime under the FLSA. 5 C.F.R. § 551.401(b). In examining the reconstructed Time and Attendance reports submitted by the agency in this case, we found a number of instances in which the agency had improperly characterized the employee's annual, holiday and sick leave as "hours of work" in determining her entitlement to overtime pay.

Therefore, before FmHA pays Ms. Arnold's claim, it should conduct a thorough review of its Time and Attendance reports to assure that the employee does not receive overtime pay for hours which are not in fact "hours of work" under the FLSA.

In light of the agency's apparent recent error in characterizing Ms. Arnold's annual, holiday and sick leave as "hours of work" under the FLSA, we now question the correctness of the amount paid to Ms. Arnold in 1981, in satisfaction of her prior overtime claim. Therefore, before FmHA pays the current claim, it should also review any available information concerning Ms. Arnold's prior claim, including its reconstructed Time and Attendance reports and Ms. Arnold's own notes detailing her work from 1974 to 1975. If FmHA determines that it overpaid Ms. Arnold in 1981 because it improperly classified her annual, holiday and sick leave as "hours of work" for purposes of computing FLSA overtime, the agency should offset the amount previously overpaid against the sum now due to Ms. Arnold for overtime work performed from 1976 to 1978.

Finally, the Act of October 9, 1940, as amended, 31 U.S.C. § 3702 (b)(1), provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years of the date it first accrued or be forever barred. Filing a claim with any other Government agency does not satisfy the requirements of the Act. Frederick C. Welch, B-206105, December 8, 1982, 62 Comp. Gen. ___; Nancy E. Howell, B-203344, August 3, 1981. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. Frederick C. Welch and Nancy E. Howell, above. We have previously held that the 6-year statute of limitations is applicable to claims for overtime pay under the FLSA. Transportation Systems Center, 57 Comp. Gen. 441 (1978). In such cases, the claim is said to accrue when the overtime work is actually performed. Paul Spurr, B-199474, April 2, 1981.

Ms. Arnold's current claim for overtime pay from January 4, 1976, through June 17, 1978, is not barred by 31 U.S.C. § 3702 (b)(1), since it was filed with GAO on September 5, 1980, and was thus well within the applicable 6-year limitation period. However, a portion of Ms. Arnold's prior claim should not have been paid by the agency. Since the earlier claim was initially filed in GAO on July 15, 1980, the agency should not have considered any portion of that claim arising before July 15, 1974. Therefore, the agency should now offset the amount erroneously paid to Ms. Arnold in 1981 for overtime work from June 23, 1974, through July 14, 1974, against the amount to be paid in satisfaction of the current claim.

Accordingly, with the qualifications stated above, FmHA may pay the claim.

Milton J. Socolar

for Comptroller General
of the United States