

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548*Coddard
74382***FILE:** B-208396**DATE:** March 1, 1983**MATTER OF:** Frank Newell - Night Differential Pay**DIGEST:**

A Customs Service employee was assigned a long-term project lasting nearly 3 years in which a substantial amount of overtime was performed on an almost nightly basis. The fact that the supervisor did not specifically approve the employee's schedule in advance does not bar him from recovering night differential pay. Considering the regularity of the night work, the long duration of its performance, and the knowledge of the Customs Service that it would be required, we hold that the work was regularly scheduled within the meaning of 5 U.S.C. § 5545(a) and is compensable at night pay rates.

Mr. M. Joseph Donnelly, Director, Financial Management Division, U.S. Customs Service, Boston, Massachusetts, has requested an advance decision as to whether a former employee of the Customs Service is entitled to night differential pay. For the reasons which follow we find that the employee is entitled to night differential pay under 5 U.S.C. § 5545(a).

Mr. Donnelly states that during March 1977 through December 1979, Mr. Frank Newell was an employee of the Customs Service's Financial Management Division. His regular tour of duty was 8:30 a.m. to 5 p.m., Monday through Friday. Mr. Donnelly states that during this time, Mr. Newell was assigned to work overtime in order to implement and then operate a new payroll system.

Mr. Newell has submitted a claim for night differential pay for all of the hours he worked during this period between 6 p.m. and 6 a.m. Mr. Newell bases his claim upon 59 Comp. Gen. 101 (1979).

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Mr. Donnelly states that under 59 Comp. Gen. 101 (1979) it appears that night differential can be paid in three situations, namely when:

1. work is performed during a scheduled night shift;
2. work is habitually and recurrently performed on overtime at night due to the nature of the work requiring the employee to remain on duty until the task is completed or until relieved from duty; or
3. the work involves overtime scheduled in advance to recur on successive days or after specified intervals and falls into a predictable and discernible pattern.

Mr. Donnelly states that Mr. Newell's claim does not fit under the first two conditions described above. He has doubt as to whether the claim qualifies for payment under the third condition. Mr. Donnelly states that doubt exists as to what is needed to qualify under either the successive days or specified intervals criteria in regard to this claim.

Mr. Donnelly notes that in most instances, Mr. Newell prepared his own overtime schedule at least a week in advance. Most of these schedules were not approved by his supervisor. However, the supervisor was in daily contact with Mr. Newell concerning his work assignments. In addition, Mr. Newell prepared daily work sheets describing work performed during the overtime hours. The supervisor reviewed and signed the work sheets as approved at the end of each pay period. The approved work sheets were reviewed by the supervisor prior to his approval of the payment of the overtime on the time and attendance records.

Mr. Donnelly has submitted a sample schedule which shows the work hours which Mr. Newell kept and the overtime which he performed. This sample schedule is representative of the overtime hours worked by Mr. Newell throughout the entire period covering the claim, almost 3 years. The schedule shows that for the most part, Mr. Newell performed substantial amounts of overtime work every day of every pay

period. Moreover, on almost every night during his regular workweek, Mr. Newell performed overtime work, usually 2 hours a night.

Thus, the doubt as to whether this claim may be paid apparently arises because Mr. Newell's specific overtime schedules were not approved in advance by his supervisor.

The authority for the payment of night differential to General Schedule employees is contained in 5 U.S.C. § 5545(a) (1976), which defines nightwork as "regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m."

In Mr. Newell's case there was no scheduled night shift. In the absence of an established tour of duty or shift which falls between 6 p.m. and 6 a.m., our decisions have allowed payment of night differential for work performed during those hours in two situations. See 59 Comp. Gen. 101, 103, cited above. First, we have allowed payment of night differential to employees such as security guards, couriers, or medical personnel who habitually and recurrently perform overtime work at night where, by virtue of the inherent nature of their employment, they are required to remain on duty until the completion of their tasks or until relieved from duty. See 42 Comp. Gen. 326 (1962); 41 *id.* 8 (1961); and Nathaniel R. Ragsdale, B-181237, April 15, 1975. See also Aviles v. United States, 151 Ct. Cl. 1 (1960). These employees often do not perform nightwork according to a fixed pattern but they do so for such a sufficiently long period of time that it becomes usual or customary. See Ragsdale, supra. However, we have held that overtime required merely because of large case-loads and chronic understaffing does not result from the inherent nature of the work performed. What is contemplated in this circumstance is the work of employees who may not perform night work according to fixed hours of work pattern but who do so for such a sufficiently long period of time that it becomes usual or customary. 59 Comp. Gen. 101, 103.

The second situation in which we have allowed payment of night differential in the absence of an established tour of duty or shift is where the nightwork to be performed is considered to be "regularly scheduled work." 59 Comp. Gen. 101, 103, supra. Our decisions have held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals.

42 Comp. Gen. 326, 328, supra; 40 id. 397, 399 (1961); Robert C. Austin, B-188686, May 11, 1978; and B-174388, February 28, 1972. This is to be distinguished from overtime or nightwork which is scheduled on a day-to-day or hour-to-hour basis. See 52 Comp. Gen. 319, 322 (1972); B-151168, May 25, 1976; and B-168048, February 16, 1970. As can be ascertained from a review of our prior decisions, we have utilized the same definitions of "regularly scheduled" for both overtime and night differential purposes. Monroe A. Curtis, B-198260, September 29, 1981.

In Mr. Newell's case, he performed overtime work at night for almost 3 years on almost every workday for generally 2 hours each day. His supervisor was aware of the overtime work and approved it for payment. Although the supervisor did not specifically schedule each day's overtime in advance, the record does show that Mr. Newell was assigned a project in which overtime work was considered necessary as a general proposition.

In view of the facts of this case, the almost 3 years in which Mr. Newell worked overtime at nights, the almost constant repetition of overtime work every night, and the knowledge the supervisor and the Customs Service had that Mr. Newell would be required to work overtime at night, it must be said that Mr. Newell's work was regularly scheduled within the meaning of the night differential pay law, 5 U.S.C. § 5545(a). In 59 Comp. Gen. at 104 we stated:

"Overtime work which we would not consider 'regularly scheduled work' for the purposes of night differential would include situations where a work completion deadline resulted in extensive overtime which was apparently not authorized in advance or scheduled to recur on successive days or after specified intervals."

We find that this case is different from those referred to in the above quote where a work completion deadline may cause a periodic, unplanned use of overtime work. Here, the Customs Service knew Mr. Newell would perform extensive

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overtime at night. The failure of Mr. Newell's supervisor to approve his schedules in advance, is no bar to his recovery of night differential.

Accordingly, Mr. Newell may be paid his claim of night differential pay, if otherwise proper.

for *Milton J. Fowler*
Comptroller General
of the United States