

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

FILE: B-208831

DATE: April 15, 1983

MATTER OF: David L. Gipson

DIGEST:

When a firefighter's overtime is reduced as a result of military leave for National Guard training, the firefighter is entitled to receive the same amount of compensation as he normally receives for his regularly scheduled tour of duty in a biweekly work period. The military leave provision, 5 U.S.C. § 6323, expressly provides that an employee is entitled to leave for military duty without reduction or loss of pay.

An authorized official of the Defense Logistics Agency has asked us to issue an advance decision concerning the entitlement of Mr. David L. Gipson, a firefighter for the Defense Logistics Agency, Richmond, Virginia, to additional premium pay when his overtime entitlement under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, is reduced due to military leave for National Guard duty during his regularly scheduled tour of duty. Mr. Gipson, when absent from work during his tour of duty while on military leave, is entitled to receive the same amount of pay which he would otherwise receive for working his regularly scheduled 144-hour tour of duty in a biweekly pay period.

Mr. Gipson is regularly scheduled to work a tour of duty of 144 hours in each biweekly pay period. Apparently, for each week he is scheduled for a 72-hour tour of duty consisting of three 24-hour shifts. During each 24-hour shift he is in a work status for 8 hours and in a standby status, including a designated sleep period, for the remaining 16 hours. For this extended tour of duty, he receives his basic rate of pay and premium pay of 25 percent of his basic rate for the standby duty as authorized under 5 U.S.C. § 5545(c)(1). See 55 Comp. Gen. 908 (1976). Since he receives premium pay for the regularly scheduled standby duty, he is not entitled to receive overtime pay under 5 U.S.C. § 5542(a) for regularly scheduled overtime within this 144-hour biweekly pay period.

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Although Mr. Gipson is not paid overtime under 5 U.S.C. § 5542(a) for any of the 144 hours he works in a biweekly pay period, he does receive compensation under the Fair Labor Standards Act for those hours he works in excess of 108 hours in a biweekly pay period. He is paid under the authority of subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 60, which added subsection 7(k) to the Fair Labor Standards Act, 29 U.S.C. § 207(k). This amendment extended overtime compensation benefits to firefighters requiring that they be paid at a rate of not less than one and one-half times their regular rate for all hours in excess of 108 hours in a biweekly pay period. See Federal Personnel Management (FPM) Letters 551-5, January 15, 1975, and 551-16, January 15, 1980, for a more detailed explanation. Of consequence here is that under the Fair Labor Standards Act only those hours that the employee is actually on duty are included in hours worked and paid time off is not included as hours worked. See paragraph C7, Attachment 2 to FPM Letter 551-5, January 15, 1975; and 5 C.F.R. 551.401(b) (1982).

Thus, under the FLSA paid time off, including time on military leave, is not included as hours worked. Therefore, when on military leave Mr. Gipson's overtime compensation for a biweekly pay period under the FLSA is reduced. An illustration is provided in the submission showing a pay period in which Mr. Gipson was on military leave for the entire 72 hours of work scheduled for one of the two weeks in the pay period. Since he only worked 72 hours in that pay period and did not exceed the 108-hour threshold needed to receive overtime, he received no overtime compensation under the FLSA for this pay period. It is this specific situation that prompts the question of whether when on military leave Mr. Gipson still should receive the same compensation he would have received had he actually been on duty for the entire 144 scheduled hours.

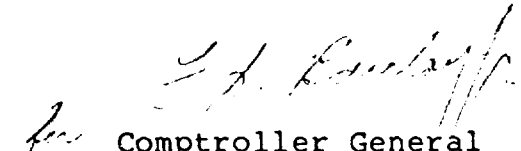
In Matter of Overtime Compensation for Firefighters, B-207710, February 28, 1983, we considered whether firefighters scheduled to work 144 hours in a biweekly pay period and compensated under FLSA for hours in excess of 108 hours were entitled to overtime under FLSA when they were on court leave during part of their 144-hour scheduled tour of duty. We held that the firefighters were not

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entitled to overtime under FLSA for any time lost due to jury duty since overtime under the FLSA is only for hours actually worked, and excludes periods of paid absence. We did rule, however, that the firefighters were entitled to receive the identical compensation including the amount of overtime pay that would have been paid under FLSA since the court leave provision, 5 U.S.C. § 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Therefore, if the employee were denied the amount of overtime he would have earned under FLSA for the hours he was on court leave, the mandate of the statute, that the employee not have his pay reduced or lost, would be violated.

Since the provision for military leave, 5 U.S.C. § 6323, has virtually the same language as that in the court leave provision with regard to reduction or loss of pay, we must reach the same result in this case. Indeed, the decision of February 28, 1983, specifically noted in several places the similarity of the two provisions and in effect concludes that these provisions require that an employee shall receive the same compensation he otherwise would have received but for the fact he was absent on military or court leave. B-207710, February 28, 1983, citing 27 Comp. Gen. 353, 357 (1947).

Accordingly, under the authority of 5 U.S.C. § 6323 Mr. Gipson is entitled to the same amount of pay that he would otherwise receive for his regularly scheduled tour of duty in a biweekly pay period notwithstanding periods of military leave.


Comptroller General
of the United States