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

FILE: B-213179 **DATE:** October 2, 1984

MATTER OF: Plum Island Animal Disease Center - Sleep and Meal Periods Under Fair Labor Standards Act

DIGEST:

1. Since the Office of Personnel Management (OPM) is authorized to administer the Fair Labor Standards Act (FLSA) with respect to most Federal employees, great weight will be accorded to OPM's administrative determinations as to entitlements under the Act. However, since OPM was not given authority to settle or adjudicate claims arising under the FLSA, the General Accounting Office retains jurisdiction to finally decide the propriety of payment on such claims.

2. Between February 2 and February 12, 1977, employees worked 24-hour shifts because of adverse weather conditions. The Office of Personnel Management (OPM) determined that the shifts consisted entirely of "on-duty" time qualifying for overtime compensation under the Fair Labor Standards Act, but that 8 hours of sleep and mealtime must be deducted from each shift. We hold that the employees are entitled to compensation for sleep and mealtime for the 10-day period in question because, at the time the employees' claims accrued, there were no OPM regulations or instructions providing a basis for deduction of sleep and meal time from irregular or occasional overtime hours worked.

The American Federation of Government Employees, Local 1940 (AFGE), on behalf of 56 former and current employees of the Plum Island Animal Disease Center, Science and Education Administration, U.S. Department of Agriculture,[1/] appeals

---

1/ Hereafter, sometimes referred to as "Plum Island" or as the "Center."

our Claims Group settlement denying the employees' claims for overtime compensation for the period February 2 to February 12, 1977, under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. (1982). Specifically, the union challenges our Claims Group's determination that the Department of Agriculture properly deducted 8 hours of sleep and mealtime from each 24-hour shift worked by the employees. For the reasons stated below, we reverse our Claims Group's determination and hold that the employees are entitled to overtime pay for sleep and mealtime.

BACKGROUND

The Plum Island Animal Disease Center is located on an island off the northeastern end of Long Island, New York. Normally, the Department of Agriculture provides a ferry service which transports employees to and from the island before and after their scheduled shifts. Most of the affected employees work rotating 8-hour shifts commencing at 8 a.m., 4 p.m. and 12 midnight; others work only the daytime shift (8 a.m. to 4:30 p.m.).

During the period February 2 to February 12, 1977, the Department of Agriculture was unable to provide regular ferry service because of heavy concentrations of ice surrounding Plum Island. In order to maintain the operations of the Center, the agency placed the employees on 24-hour tours of duty (24 hours on and 24 hours off), transporting two crews to the island and picking up two crews by boat or helicopter each day. During this 24-hour tour of duty on the island, each crew was scheduled to work for 12 hours and to be relieved from duty for 12 hours.

The agency paid the employees for the hours they worked, plus the hours not worked but which were included in their regular tours of duty. However, the agency did not pay the employees for the 12-hour relief periods allowed during each 24-hour shift.

The AFGE filed a complaint with the New York Regional Office of the Civil Service Commission, now the Office of Personnel Management,[2/] contending that the employees were entitled to overtime compensation under the FLSA for the

---

2/ Hereafter, referred to as "OPM" for all periods involved in this decision.

12-hour periods during which they were relieved from duty.[3] After investigating the employees' claims, the New York Regional Office issued a compliance order in October 1978 to the Department of Agriculture, finding that the employees were "engaged to wait" during the 12-hour relief periods, and that such waiting time was compensable as hours of work under the FLSA. However, the New York Regional Office further determined that the agency could deduct up to 8 hours of sleep and mealtime from each 24-hour shift, even though the shifts consisted entirely of "on-duty" time. As the basis for this conclusion, it cited Federal Personnel Manual (FPM) Letter 551-14, May 15, 1978, which contained instructions for applying the FLSA to employees who receive annual premium pay for regularly scheduled standby duty in accordance with the provisions of 5 U.S.C. § 5545(c)(1). Those instructions provided that time spent in a standby status for purposes of 5 U.S.C.§ 5545(c)(1) constitutes hours of work under the FLSA, and that 8 hours of sleep and mealtime may be deducted from tours of duty of 24 hours or more.

The New York Regional Office recognized that FPM Letter 551-14 expressly applied only to those employees who receive annual premium pay for regularly scheduled standby duty under 5 U.S.C. § 5545(c)(1), and that the Plum Island employees did not regularly perform standby duty and were paid overtime on an hourly basis under 5 U.S.C. § 5542.[4] Nevertheless, the Office concluded that the situation involved in this case was "similar" to that addressed by FPM Letter 551-14, warranting the deduction of 8 hours of sleep and mealtime from the 12 hours during which the employees were relieved from duty but "engaged to wait."

The Department of Agriculture, in compliance with the order, paid the employees for 4 of the 12 hours during which they were relieved from duty. The employees, represented by

---

[3] OPM administers the FLSA for most non-postal Federal employees. 29 U.S.C. § 204(f).

[4] Overtime under 5 U.S.C. § 5542 at one and one-half times the basic rate of compensation is payable to Federal employees whose ordered or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day.

AFGE, filed claims with our Claims Group requesting compensation under the FLSA for the remaining 8 hours. The union contended that, at the time the employees' claims accrued, there was no guidance specifically authorizing the deduction of sleep and mealtime from 24-hour shifts worked by employees who are subject to the overtime provisions of 5 U.S.C. § 5542. Further, the union maintained that the order's reliance on FPM Letter 551-14 was erroneous since that guidance, by its own terms, applied only to employees in receipt of annual premium pay.

The AFGE argued that, in the absence of OPM guidance concerning this particular issue, the employees' claims should be resolved in accordance with policy issued by the Department of Labor (DOL), the agency responsible for administering the FLSA with respect to employees in the private sector. See 29 U.S.C. § 204(a)-(e). The relevant DOL policy, set forth in 29 C.F.R. § 785.22, provides that sleeptime may not be deducted from tours of duty of 24 hours or more unless such a deduction is agreed upon by the employer and employee.

Our Claims Group obtained a report from OPM's Office of Pay and Benefits Policy, and, on the basis of that report, denied the employees' claims by settlement dated July 8, 1983.

OPM'S POSITION

The OPM concurs with the determination of its New York Regional Office that 8 hours of sleep and mealtime may be deducted from hours worked by the employees on the basis of FPM Letter 551-14, May 15, 1978. The relevant part of that guidance provides as follows:

> "SUBJECT: Instructions for Applying the Fair Labor Standards Act (FLSA) to Federal Employees in Receipt of Annual Premium Pay (Other Than Those Employees Engaged in Fire Protection or Law Enforcement Activities)
>
> * * * * *
>
> "1. Regularly Scheduled Standby Duty. Under the FLSA an employee is either on duty or off duty. The Act does not recognize a semiduty status such as standby duty. Therefore, it is necessary to determine whether

standby duty time under section 5545(c)(1) of title 5, United States Code, is working time for purposes of the FLSA.

> "a. Standby duty performed at an employee's regular duty station or in quarters provided by an agency which are not the employee's ordinary living quarters. For purposes of the FLSA an employee who is confined to an agency's premises or so close thereto that the employee cannot use the time effectively for his or her own purposes is working while on standby duty. Consequently, time spent by an employee in a standby duty status under 5 C.F.R. 550.143(b)(1) or (2) is compensable as hours of work under the FLSA.
>
> * * * * *
>
> "3. Allowable deductions of meal and sleep periods from 'hours of work.' An agency may exclude bona fide meal periods during the employee's regularly scheduled workday. An employee in receipt of annual premium pay for standby duty who is on duty for 24 hours or more receives basic pay plus annual premium pay for this tour of duty arrangement. Such a tour of duty typically consists of productive work, standby duty, and eating and sleeping periods. Provided an employee has a bona fide sleep period an agency may exclude up to 8 hours of sleep time from such a tour of duty. * * *"

The OPM states that the primary objective of the above-quoted instructions was to establish that time spent in a standby status for purposes of 5 U.S.C. § 5545(c)(1) constitutes hours of work under the FLSA. See FPM Letter 551-14, paragraph 1. After establishing this principle, the instructions provide in paragraph 3 that an agency may exclude up to 8 hours of sleep and mealtime from hours worked. In OPM's view, the provisions in paragraph 1 characterizing standby time as hours of work apply only to employees in receipt of annual premium pay; paragraph 3,

authorizing the deduction of sleep and mealtime from hours of work, applies to all employees, whether they are entitled to premium pay on an annual basis under 5 U.S.C. § 5545(c)(1) or overtime pay on an hourly basis under 5 U.S.C. § 5542(a).

The OPM states that its construction of paragraph 3 of FPM Letter 551-14 is consistent with the "two-thirds" rule for computing overtime pay under 5 U.S.C. § 5542. Under that rule, 8 hours of sleep and mealtime may be deducted from tours of duty of 24 hours or more, unless substantial labor is performed in the time set aside for eating and sleeping. B-173235, November 22, 1971. See also Collins v. United States, 141 Ct. Cl. 573 (1958).

The OPM acknowledges that, at the time its compliance order was issued, there were no regulations or instructions issued under the FLSA which expressly required the deduction of sleep and mealtime from hours worked by employees who were not receiving annual premium pay for standby duty and thus were subject to the overtime provisions of 5 U.S.C. § 5542. Nevertheless, OPM states that it is improper to resolve the employees' claims under regulations and policies issued by DOL, since OPM is responsible for administering the FLSA with respect to Federal employees. Further, OPM states that DOL's regulations in 29 C.F.R. § 785.22, prohibiting the deduction of sleeptime unless there is an agreement to the contrary, do not apply to Federal employees since their pay is fixed by statute and not by negotiation. Additionally, OPM notes that its own regulations in 5 C.F.R. § 551.432, effective January 29, 1981, now require the deduction of sleep and mealtime from tours of duty of 24 hours or more without regard to whether the employee receives premium pay for standby duty or is paid for overtime under 5 U.S.C. § 5542. Neither these current regulations, nor the prior instructions in FPM Letter 551-14, condition the deduction of sleeptime on an agreement between the parties.

AFGE'S POSITION

On appeal, AFGE renews its contention that FPM Letter 551-14 does not apply to the claimants since it expressly covers only those employees who receive annual premium pay under the provisions of 5 U.S.C. § 5545(c)(1). The union additionally argues that, although paragraph 3 of the instructions permits the deduction of sleep and meal-

time from tours of duty of 24 hours or more, tours of duty subject to the deduction are described as "typically" consisting of productive work, standby duty, and eating and sleeping periods. Since the claimants do not regularly perform standby duty, the union argues that there is no basis in FPM Letter 551-14 for excluding sleep and mealtime from hours worked.

The union next argues that the application of DOL policy in the absence of pertinent OPM guidance would comport with Congress' intent in enacting 29 U.S.C. § 204(f), the provisions of which authorize OPM to administer the FLSA with respect to Federal employees. The report of the House Committee on Education and Labor, cited by the union, states that:

> "It is the intent of the Committee that the Commission [now OPM] will administer the provisions of the law in such a manner to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy."/H.R. Rep. No. 93-913, 93d Cong/, 2d Sess. 28 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 2811, 2812.

Finally, the union argues that 29 C.F.R. § 785.22, providing for the exclusion of sleep and mealtime from hours worked unless there is an agreement to the contrary, is appropriate for application in the Federal sector. In response to OPM's statement that 29 C.F.R. 785.22 is inapplicable because the pay of Federal employees is fixed by Congress, and is not subject to negotiation, AFGE cites the Court of Claims decision in Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981). In Beebe, discussed below, the court upheld the validity of OPM guidance authorizing the inclusion of sleep and mealtime in hours worked by Federal firefighters and law enforcement personnel absent an agreement to the contrary, finding that the sleep-and-mealtime issue is a permissible subject for agreement between a Federal agency and its employees.

OPINION

The Fair Labor Standards Act Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, extended FLSA coverage to Federal employees effective May 1, 1974. The

FLSA requires payment of overtime compensation to nonexempt employees for hours worked in excess of 40 hours per week. 29 U.S.C. § 207 (1982).

As discussed previously, the provisions of 29 U.S.C. § 204(f) authorize OPM to administer the FLSA with respect to most Federal employees. However, OPM does not have the authority to adjudicate claims and settle accounts under the FLSA. The authority to finally decide whether the expenditure of public funds under the FLSA is appropriate or not is vested in this Office. 31 U.S.C. § 3526(a) (1982). See Claims Representatives and Examiners, B-51325, October 7, 1976.[5/] Accordingly, although we will accord great weight to OPM's administrative determinations as to entitlements under the FLSA, we will not accept a determination that is contrary to law or without legal basis. See generally Department of Agriculture Meat Graders, B-163450.12, September 20, 1978.

At the outset, we note that the New York Regional Office of OPM determined that the claimants were "engaged to wait" during their 12-hour relief periods, and, therefore, that their 24-hour shifts consisted entirely of "on-duty" time qualifying for overtime compensation under the FLSA. Notwithstanding this determination, OPM decided that 8 hours of sleep and mealtime should be deducted from each 24-hour shift. The FLSA, however, does not address the deduction of sleep and mealtime from hours worked, nor does the OPM opinion suggest that its exclusion of sleep and mealtime was based on an interpretation of the FLSA. Instead, as noted above, it relies entirely on application of FPM Letter 551-14.

Therefore, we conclude that sleep and mealtime may be deducted from the claimant's 24-hour shifts in this case only if this deduction was provided for by OPM's regulations or instructions implementing the FLSA.

[5/] Although we retain final authority to adjudicate claims and settle accounts under the FLSA, we have held that agencies may pay nondoubtful claims pursuant to compliance orders issued by OPM, without resort to a decision from our Office. Lee R. McClure, B-205219, August 27, 1984, 63 Comp. Gen. ___.

The OPM's regulations set forth in 5 C.F.R. § 551.432 now provide that bona fide sleeptime shall not be considered hours of work for FLSA purposes if (1) the tour of duty is 24 hours or more; (2) adequate sleeping facilities are provided; and (3) at least 5 hours are made available for uninterrupted sleeptime. These regulations apply to all nonexempt employees, whether they receive annual premium pay under 5 U.S.C. § 5545(c)(1) or overtime pay under 5 U.S.C. § 5542(a). However, the regulations did not become effective until January 29, 1981, after the employees' claims accrued.

Prior to 1981, there were no OPM regulations or instructions which specifically dealt with the question whether, under the FLSA, sleep and meal time should be deducted from 24-hour shifts worked by employees subject to the overtime provisions of 5 U.S.C. § 5542(a). The only OPM guidance concerning the deduction of sleeptime from tours of duty of 24 hours or more is contained in FPM Letter 551-5, January 15, 1975, pertaining to employees engaged in fire protection and law enforcement activities, and FPM Letter 551-14, which, as discussed previously, concerns employees who are entitled to annual premium pay under 5 U.S.C. § 5545(c)(1).

We are unable to agree with OPM that FPM Letter 551-14 provides a basis for deducting sleep and mealtime from hours worked by the claimants. That guidance was not issued until May 15, 1978, after the employees' overtime claims accrued in February 1977. Furthermore, as the union points out, FPM Letter 551-14 expressly applies only to employees in receipt of annual premium pay under the provisions of 5 U.S.C. § 5545(c)(1). Referring to the annual premium pay regulations contained in 5 C.F.R. § 550.141, we note that employees covered by FPM Letter 551-14 are those who regularly are required to remain at their duty stations for longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work.

The OPM does not contend that overtime work performed by the claimants at Plum Island is comparable to standby duty warranting annual premium pay under 5 U.S.C. § 5545(c)(1), as implemented by 5 C.F.R. § 550.141. What OPM does maintain is that paragraph 3 of FPM Letter 551-14 states a general rule requiring the deduction of sleep and mealtime from hours of work, regardless of whether the

employee is entitled to annual premium pay under 5 U.S.C. § 5545(c)(1) or overtime pay under 5 U.S.C. § 5542(a). This conclusion, however, is not supported by the language of paragraph 3. That paragraph, quoted previously, provides for the deduction of sleep and mealtime only with respect to employees who receive annual premium pay for tours of duty which normally consist of productive work, standby time, and eating and sleeping periods. There is nothing in paragraph 3 to suggest that the deduction for sleep and mealtime also applies to employees who are paid on an hourly basis for irregular or occasional overtime.

Accordingly, we find no regulation or instruction which supports OPM's determination that 8 hours of sleep and mealtime should be deducted from the employees' 24-hour shifts. Since OPM determined that the 24-hour shifts consisted entirely of "on-duty" time, we hold that sleep and mealtime allowed during those shifts is compensable under the FLSA.

The OPM additionally states that the exclusion of sleep and mealtime from hours worked by the claimants would comport with the "two-thirds" rule for computing overtime pay under 5 U.S.C. § 5542(a). As noted previously, that rule requires the deduction of 8 hours of sleep and mealtime from each 24-hour work period.

The fact that an employee is not entitled to overtime compensation under 5 U.S.C. § 5542, however, has no bearing on whether he is entitled to overtime compensation under the FLSA's separate criteria. Mary Joyce Lynch and Darlene I. Drozd, 61 Comp. Gen. 115 (1981). We have held that where the FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. § 5542, the employee is entitled to the FLSA benefit. Dian Estrada, 60 Comp. Gen. 434 (1981). Further, in Beebe v. United States, cited previously, the Court of Claims stated that the "two-thirds" rule, established under the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542, has no effect upon rights acquired under the subsequently-enacted FLSA. 640 F.2d 1283, 1291-1292.

Furthermore, we note that DOL's regulations in 29 C.F.R. § 785.22(a), in effect at the time the employees' claims accrued, provided that:

> "(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no express or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. * * *" (Emphasis added.)

Although OPM is responsible for administering the FLSA with respect to Federal employees, the legislative history of the Act, quoted previously, evidences Congress' intent that OPM administer the Act in such a manner as to assure consistency with regulations, rulings, and interpretations issued by DOL. Furthermore, while OPM maintains that the "agreement" requirement stated in 29 C.F.R. § 785.22(a) does not apply to Federal employees because their pay is fixed by statute and not by negotiation, the Court of Claims in Beebe v. United States, cited above, specifically rejected that argument. In Beebe, Federal firefighters who had performed tours of duty of 24 hours or more claimed overtime pay under the FLSA for sleep and mealtime. The court allowed the employees' claims on the basis of FPM Letter 551-5, which parallels DOL instructions in providing for the inclusion of sleep and mealtime in hours worked by Federal firefighters and law enforcement personnel absent an agreement to the contrary. The Government charged that FPM Letter 551-5 was invalid, since it authorizes the negotiation of rates of pay which are set by statute. Responding to this argument, the court stated that the agreement called for by FPM Letter 551-5 is limited to a determination whether certain time should be regarded as hours of work and does not involve any changes in an employee's rate of pay. Interpreting the provisions of 5 U.S.C. §§ 7102(2) and 7103(a)(14), governing labor-management relations in the Federal sector, the court found that the sleep and mealtime issue represents a "condition of employment" which is a permissible subject of bargaining between a Federal agency and its employees. 640 F.2d 1283, 1292.

There is nothing in the record to indicate that the Department of Agriculture and AFGE expressly or impliedly agreed to exclude sleep and mealtime from hours worked by the employees. Accordingly, our determination that the claimants may be compensated for sleep and mealtime under the FLSA is consistent with DOL's regulations in effect at the time the claims accrued.

For the foregoing reasons, we hold that sleep and mealtime allowed the employees during their 24-hour shifts is compensable under the FLSA. On this basis, we reverse our Claims Group's determination.

for Milton J. Socolar
Comptroller General
of the United States