



The Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

Matter of: Edward A. Quijano

File: B-217935

Date: October 7, 1986

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### DIGEST

Upon reconsideration of decision B-217935, April 30, 1986, the Comptroller General concludes that the claimant, a former employee of the Veterans Administration, is not entitled to night pay differential for overtime work performed during his employment with that agency between 1976 and 1980. The claimant has the burden of proving that night work conducted between 6 p.m. and 6 a.m. is "regularly scheduled" within the meaning of this term as it appears in the applicable statute, 5 U.S.C. § 5545(a). Despite the presentation of new evidence, the claimant has again failed to provide the evidentiary support necessary to establish that the overtime worked at night was regularly scheduled and qualified for night differential under 5 U.S.C. § 5545(a).

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### DECISION

Mr. Edward A. Quijano has requested that we reconsider our denial of his claim for night differential for overtime hours he worked between 6 p.m. and 6 a.m. incident to his employment by the Veterans Administration between 1976 and 1980.<sup>1/</sup> Essentially, the claimant has identified the overtime hours worked at night for calendar years 1977 and thereafter but has not provided adequate documentation to demonstrate whether these hours were "regularly scheduled" as is required by 5 U.S.C. § 5545(a) in order to receive night differential in addition to overtime pay. Therefore, since this new evidence does not advance the claimant's case, we affirm our previous denial of Mr. Quijano's claim for night differential.

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<sup>1/</sup> Mr. Quijano's claim was denied in Edward A. Quijano, B-217935, April 30, 1986.

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In our decision of April 30, 1986, we noted that our Claims Group had initially denied this claim because Mr. Quijano had not presented any explicit theory of recovery. He simply furnished a list of total hours of overtime he had worked for each pay period during the period of his claim and referred to our decision B-193398, November 27, 1979, which is published at 59 Comp. Gen. 101, and which discusses several situations where night differential is payable in addition to overtime pay, for "regularly scheduled" overtime worked at night. Since the record initially before us contained no evidence of the circumstances under which the overtime was worked, it was not possible to determine if the work was "regularly scheduled." We reviewed the claim in light of additional evidence submitted in January 1986, and found that there was insufficient evidence to show that claimant had advance authorization to perform the overtime hours worked; therefore, his claim was denied once again for failure to demonstrate that the work was "regularly scheduled."

In his letter, dated May 8, 1986, in response to our April 30, 1986 decision, Mr. Quijano recognizes that there are several tests which may be applied in determining whether or not overtime worked at night is "regularly scheduled." He then attempts to demonstrate that he meets one or more of these tests but fails to do so because of a lack of competent evidence.

The general rules to be applied to duty performed prior to February 28, 1983,<sup>2/</sup> in determining when night differential is payable, are set forth in 59 Comp. Gen. 101 (1979), as amplified in Frank Newell, B-208396, March 1, 1983. In summary, overtime is "regularly scheduled" and thus an employee may be entitled to night differential when:

- (1) work is performed during a scheduled night shift between the hours of 6 p.m. and 6 a.m.; or
- (2) an employee habitually and recurrently performs work 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

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<sup>2/</sup> February 28, 1983, is the effective date of new regulations redefining "regularly scheduled work." We have held that the revised standard applies only to work performed after the effective date. See, James Barber, et al., 63 Comp. Gen. 316 (1984).

(3) the work involves overtime, at night, scheduled and authorized in advance to recur on successive days or after specified intervals and falls into a predictable and discernable pattern; or

(4) work is not duly authorized in advance but is characterized by almost constant repetition of overtime work every night and is performed with knowledge of superiors that employee will be required to work overtime at night and with the supervisor's subsequent approval for payment.

In his letter of May 8, 1986, Mr. Quijano attempts to bring his claim within rule (1) above. However, no documentation of the various shifts or tours of duty has been provided. Mr. Quijano would have to prove that there was an established tour of duty or shift between 6 p.m. and 6 a.m. not merely that he did in fact work overtime hours at night. He encloses copies of VA forms 4-5631 but these indicate only the hours worked and not the shift arrangements of the Veterans Administration Medical Center.

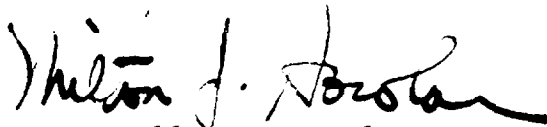
He has not proven the applicability of rule (2) above. He has submitted a VA memorandum with VA standard forms 71 which indicates that he had to work because of "insufficient staff coverage and backlog of projects." However, in this regard, we have held that "overtime required by large caseloads and chronic understaffing" must result from the "inherent nature of the work" to entitle the employee to night differential. 59 Comp. Gen. 101, 103. That is, the employee must remain on duty until the work is completed and the work must be of such a nature that it could not be done later. In order to come within rule (2) Mr. Quijano would have to provide some documentation relating to the nature of the work performed and the circumstances under which the overtime occurred such as a medical emergency requiring day shift personnel to remain on the scene as long as necessary.

Rule (3) above was discussed in our decision of April 30, 1986, where the claim was denied because the claimant failed to show that the overtime worked was authorized in advance. No additional evidence has been presented which might tend to prove that the overtime was approved in advance.

Finally, Mr. Quijano has not proved all essential elements of rule (4) above. He supplies us with VA forms 4-5631 which indicate overtime hours worked. They also indicate subsequent approval for payment by a supervisor. Nevertheless, while showing a considerable amount of overtime worked, the

forms also show significant gaps (often entire weeks) where no overtime was worked at all. Rule (4) arose in Frank Newell where there was a long term pattern of night work overtime characterized by work almost every night for a period of almost 3 years. The supervisors in the Newell case did not specifically schedule each day's overtime in advance but the record shows that they assigned the employee to projects in which overtime was considered necessary as a general proposition. Thus, the Newell case requires some form of informal action by the supervisors tantamount to specific prior scheduling. The claimant has not provided evidence of prior assignment to a long term project where it is understood that overtime must be worked on a nightly basis and therefore does not bring himself within the Newell type situation.

Where the claimant has the burden of proof he must do more than simply refer to a case and supply information which tends to support his claim only in a vague or generalized way. It is incumbent upon claimants to present evidence which specifically demonstrates why they are entitled to payment on the basis of the applicable statutes, regulations, and rules. Mr. Quijano has failed to meet this burden of proof and therefore, we deny his claim for night differential in addition to overtime paid.

  
for Comptroller General  
of the United States