



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Henry G. Tomkowiak, et al.--Overtime  
Compensation- Civilian Police Officers  
File: B-223775  
Date: February 12, 1988

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### DIGEST

1. Federal employees are covered by 2 statutes requiring compensation for overtime work, the Fair Labor Standards Act, or FLSA, and the Federal Employees Pay Act, commonly called "title 5" overtime. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit.
2. Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30-minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30-minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation.
3. Civilian police officers required to report for duty at least 15 minutes prior to the start of each shift may be allowed overtime credit for their preshift services under the Federal Employees Pay Act, title 5 of the United States Code, 5 U.S.C. § 5542. They may not be allowed credit for their meal breaks under the standards prescribed for "title 5" overtime, however, where it appeared that they were relieved from their posts during these breaktimes and were required only to remain in contact by radio for recall on an occasional basis in emergency situations.
4. Fair Labor Standards Act claims and overtime claims under 5 U.S.C. § 5542 which are filed with the General Accounting Office (GAO) are both subject to the 6-year statute of limitations under 31 U.S.C. § 3702(b)(1). Since claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of claims

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arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment, as 31 U.S.C. § 3702(b)(1) bars claims presented to GAO more than 6 years after date claims accrued.

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## DECISION

This decision is in response to a request from W. Van Tassle,<sup>1/</sup> Department of the Air Force, Headquarters Air Force Accounting and Finance Center, Denver, Colorado. The request concerns the claims of Henry G. Tomkowiak and 43 other civilian police officers<sup>2/</sup> employed by the Air Force at Selfridge Air National Guard Base, Michigan, for overtime compensation for preshift and meal break duties under the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542. We conclude that the claimants are partially entitled to overtime compensation to the extent shown below.

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<sup>1/</sup> Chief, Terminations Branch, Special Accounts Division, Directorate of Settlement and Adjudication.

<sup>2/</sup> Mr. Tomkowiak's claim was received in our Office on December 7, 1981. The claim of Mr. Arthur S. Wood, Sr., was received on March 16, 1982. Claims were received on March 11, 1982, from the following 42 employees: Charles E. Bryson, Nelson H. Brown, James F. Maahs, Thomas A. Welsh, Mark A. Richardson, James G. Feil, Andrew S. Nagy, Robert J. Bodus, George A. Sopfe, Donald R. Owens, Charles R. Redmond, Mieczyslaw K. Swidwinski, Daniel D. Farver, Terry L. Blount, Roger R. Sonnenfeld, Joseph P. Buynak, Barry K. Bumgarner, Donald E. Franklin, Edward O. Swanboro, Frank Petrucci, Richard E. Danford, Denise M. Nicks, Louis E. King, Daniel J. Ruddy, Jr., James R. Tokarski, Arthur A. Jackson, Jr., Walker F. Norvell, Loren K. Follette, James M. Perry, Christopher H. Tipton, Patrick E. Nett, Allan I. Reveley, Stanley W. Shalagan, Susan Gie, Russel M. Stein, Dennis Bristol, Thomas D. Knopf, James J. Hatcher, Robert H. Scott, Robert D. Hill, Jesse H. Becton, Jo Ann Clifford.

## BACKGROUND

The claimants were employed as police officers at Selfridge Air National Guard Base at various times between 1974 and 1980. While so employed they had regular workweeks consisting of a daily 8-1/2-hour shift, 5 days per week. Each 8-1/2 hour shift included an uncompensated 1/2-hour meal break.

Mr. Tomkowiak states that his claim for overtime compensation is for the period from July 30, 1974, to July 30, 1980. He states that throughout this period he was required to arrive for duty at least 15 minutes prior to the start of his shift. During those 15 minutes he was expected to arm and equip himself, read official notices and records, and receive verbal briefings. He reports that he was also required to be in an "on-call" status at all times, "including breaks for lunch."

Mr. Tomkowiak claims that, in consideration of these circumstances, he should be allowed overtime compensation for each period of 15 minutes of work performed prior to duty time, and an additional 30 minutes for every meal break per duty day over the 6-year period beginning July 30, 1974. The claims of the other 43 police officers are similar to the one presented by Mr. Tomkowiak.

The administrative report initially submitted by the Air Force confirmed the claimants' contention that they were required to report and perform preliminary duty before the regular 8-1/2-hour shift. The initial administrative report, however, suggested that the preshift duty should be disregarded as de minimis because the police officers had to arrive only 5 minutes prior to the start of their normal shift to draw weapons and radios. As to the meal breaks, the report stated that the police officers only had to be on radio call status while off the installation during their normal scheduled meal period of 30 minutes. The report stated that "[w]hile it certainly did not occur on a frequent basis, it was possible for a patrolman to be called off a meal to respond to an incident of an emergency nature."

Counsel for the claimants subsequently furnished our Office with a copy of an "Incident Worksheet" dated August 8, 1974, which was initiated because one of the claimants reported for duty 9 minutes before the start of his shift rather than the required 15 minutes prior to the start of his shift. The "Incident Worksheet" provided the following details: "Ptm. [Name Deleted]--was counseled \* \* \* in regards to his

tardiness in reporting for duty. Ptm. [Name Deleted]--was reminded of his responsibilities to report on time and of the possible consequences if this becomes a recurring problem."

We requested Air Force officials at Selfridge Air National Guard Base to explain this document in view of its implication that a strictly enforced 15-minute early reporting requirement had been in effect, notwithstanding the statements contained in the initial administrative report which indicated there was at most only a minimal, 5-minute pre-shift duty requirement. They acknowledged that the Incident Worksheet indicated that the Officer was required to report for duty 15 minutes prior to the start of his shift. They stated that they could not substantiate when this practice actually stopped, and that "the age of these claims makes finding formal documentation extremely difficult. Formal documentation, of any kind, prior to [June 1978] is almost nonexistent."

#### FLSA and Title 5 Overtime

As federal employees, claimants are covered by two statutes requiring compensation for overtime work. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., generally requires overtime pay for a workweek longer than forty hours. The Federal Employees Pay Act, currently codified at 5 U.S.C. § 5542(a) and commonly called "title 5" overtime, requires overtime pay for work in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Federal employees were covered only by title 5 until May 1, 1974, when the FLSA was extended to them by Public Law 93-259, 88 Stat. 55. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. See 54 Comp. Gen. 371 (1974).

#### FLSA Requirements

FLSA overtime at one and one-half times the rate of regular pay is ordinarily payable to nonexempt Federal employees who work more than 40 hours per week. However, in providing for coverage of employees engaged in law enforcement activities, such as those involved in the present case, the Fair Labor Standards Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, provided for special maximum hours without overtime. See section 6(c)(1)(A) of the 1974 amendments which added section 7(k) to the FLSA, 29 U.S.C. § 207(k). Beginning January 1, 1975, the maximum hours of aggregate "tours of duty" within a work period of 28 consecutive days

was 240. Effective January 1, 1976, the aggregate tour of duty was reduced to 232 and 216 hours effective January 1, 1977. Effective with the first work period commencing on or after January 1, 1978, the aggregate tour of duty was reduced to 171 hours in a 28-day work period or a tour of duty of 42-3/4 hours in a 7-day work period. See FPM Letter 551-5, January 15, 1975, and FPM Letter 551-20, September 22, 1983, rescinding FPM Letter 551-16, January 15, 1980. Meal breaks, duty free or other-wise, are not excluded from hours worked in determining the overtime entitlement under section 7(k) of the FLSA of law enforcement employees unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4.

#### Opinion Of The Office Of Personnel Management on FLSA Entitlements

The Office of Personnel Management (OPM) is charged with administering the overtime provisions applicable to federal employees under the FLSA. See 29 U.S.C. § 204(f). On May 10, 1982, OPM's Great Lakes Region issued an opinion in response to a request made by the Federal Police Officers Association on behalf of 41 police officers at Selfridge, 34 of whom are included in the present group of claimants.

The opinion issued by OPM's Great Lakes Region notes that positions requiring law enforcement activities have been covered under the FLSA since January 1, 1975, and that employees classified in the Police series, GS-083, such as the police officers at Selfridge Air National Guard Base, are considered to be engaged in law enforcement activities. Further, law enforcement activities are specifically identified for coverage under section 7(k) of the FLSA, codified at 29 U.S.C. § 207(k). Therefore, according to OPM, the claimants are covered by this provision of the FLSA for the purpose of determining their entitlement to overtime compensation. The OPM opinion points out that in extending coverage under FLSA to employees engaged in law enforcement activities, Congress departed from the standard "hours of work" concept and adopted an overtime standard keyed to the length of the "tour of duty."

The FLSA contains specific overtime provisions establishing the minimum standard for entitlement to overtime. The OPM opinion, which was predicated on Federal Personnel Manual (FPM) Letters 551-5 and 551-16, states that law enforcement employees "shall be compensated at a rate not less than one and one-half times the regular rate at which they

are employed if currently their tour of duty exceeds 46-1/2 hours in a 7-day work period, 186 hours in a 28 day work period \* \* \*." (Emphasis in original.) The OPM opinion adds that before law enforcement personnel can be entitled to overtime under FLSA, they must exceed these hours of duty. The OPM opinion further notes that the claim of the police officers at Selfridge is based on their statements that they were required to work 15 minutes prior to the beginning of their shift, and sometimes also during their meal periods. The OPM opinion says that these statements were supported by operating instructions dated March 1, 1974, and October 1, 1979, to the extent that the police officers were required to arrive "\* \* \* in sufficient time before guardmount to read at least two (2) preceding shift's blotters, [and] receive a briefing \* \* \*." The OPM opinion concludes as follows:

"Under the FLSA, Section 7(K), sleep and meal times, duty free or not, are included in hours of work in determining entitlement to overtime when the employee is on duty for 24 hours or less. Even if we were to allow full credit for your claim, (i.e., 15 minutes each day prior to beginning of the shift and 30 minutes each day for lunch) the police officers' tour of duty would not exceed the 46-1/2 hours in a 7-day work period as stipulated under Section 7(K) of the FLSA. They do not meet the requirements for entitlement to overtime under the FLSA."

The OPM opinion adds, however, that final administrative decisions on claims for overtime compensation under the FLSA and the Federal Employees Pay Act are reserved by law to the Comptroller General.

The OPM opinion was based on the provision contained in FPM Letter 551-16, dated January 15, 1980, as to the number of hours a tour of duty must exceed to activate the overtime pay requirements of the FLSA. However, with the issuing of FPM Letter 551-20, on September 22, 1983, the instructions contained in FPM Letter 551-16 concerning the overtime standards for employees engaged in law enforcement activities were rescinded. FPM Letter 551-20 announced that effective retroactively to the first work period commencing on or after January 1, 1978, the overtime standard for employees engaged in law enforcement activities was to be as follows: any period of work in excess of a tour of duty of 42-3/4 hours in a 7-day work period, or 171 hours in a 28-day work period would result in overtime pay. Therefore, to the extent inconsistent with the standard enunciated by

FPM Letter 551-20, we consider the OPM opinion dated May 10, 1982, to be superseded.

#### ANALYSIS

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 he has worked the overtime with sufficient evidence to show the amount and extent of his 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 to show the exact amount of overtime worked or to rebut the employee's evidence. Civilian Nurses, 61 Comp. Gen. 174 (1981). Additionally, we have held that while claims against the government must be predicated, if at all possible, upon official records, we will accept other forms of evidence or documentation where agency action has precluded the availability of official records which might reflect overtime. See Christine D. Taliaferro, supra.

In the case of the police officers at Selfridge Air National Guard Base, we find that the claimants' statements and the "Incident Worksheet" dated August 8, 1974, along with the several agency operating instructions discussed in the OPM opinion, create a reasonable inference that the law enforcement officers were expected to report and carry out duties and obligations 15 minutes prior to the start of each shift.

With respect to the police officers' 30-minute meal break during each shift, as indicated above, the Fair Labor Standards Amendments of 1974 added section 7(k) to the FLSA in order to provide special maximum hours without overtime for employees engaged in law enforcement and fire protection activities. Under the regular overtime provisions of the FLSA, found in section 7(a), only those periods during which the employee is completely relieved from duty are excluded from hours worked for the purpose of determining FLSA entitlement. FPM Letter 551-1, May 15, 1974, Attachment 4, paragraph c. In contrast, meal breaks, duty free or otherwise, are not excluded from hours worked in determining the overtime entitlement under section 7(k) of the FLSA for law enforcement and fire protection employees unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4. Therefore, the claimants may be credited with their 30-minute meal break during each shift, subject to the applicable statute of limitations discussed below, in calculating FLSA overtime regardless of whether or not they were relieved from their

posts for a meal break. See Guards at Otis Air Force Base, B-198065, Oct. 6, 1981.

In sum, for purposes of computing overtime compensation under the FLSA the claimants must be credited with the performance of a 43-3/4-hour tour of duty each week throughout the period in question. This includes the basic 40-hour workweek, plus an additional 3/4 hour each workday for pre-shift duties and the meal break. Under FPM Letters 551-5 and 551-20, supra, this gives rise to an entitlement to overtime compensation for 1 hour for each regular workweek commencing with the first pay period after January 1, 1978. Prior to that date no FLSA entitlement would accrue because the employees' creditable tour of duty of 43-3/4 hours per week did not exceed the then existing standard required to activate the overtime pay requirement of the FLSA then in effect.

#### Title 5 Requirements

Overtime under the Federal Employees Pay Act (5 U.S.C. § 5542), commonly referred to as "title 5" overtime, is payable to federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. Guards at Otis Air Force Base, supra; Guards at Rocky Mountain Arsenal, B-199673, June 15, 1981.

Commencing with our decision in 53 Comp. Gen. 489 (1974) and in subsequent decisions, we have followed the principles set forth in Baylor v. United States, 198 Ct. Cl. 331 (1972), regarding the determination of whether overtime was properly ordered or approved. The standards for determining whether a meal break may be counted as work or duty time under title 5 are also discussed extensively in the Baylor case, in which the Court of Claims addressed the question of whether the General Services Administration (GSA) afforded its uniformed guards a duty-free lunch break. The Court held that an agency may classify a lunch break as duty free when it makes such time available and the employee is actually able to take advantage of the break. The break need not be regularly scheduled so long as it is regularly taken, even where the employee is subject to emergency call. One qualification is that the employee must be permitted to leave his post for the lunch break or the lunch break will not be considered duty free. Jose Najar, et al., B-213012, Nov. 3, 1983, and cases cited therein.



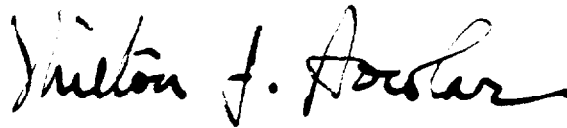
In our view the officers in the present case have not demonstrated under the Baylor standards that they were restricted to the extent that they lacked duty-free meal breaks. Although the police instructions required the officers to remain subject to radio call for emergencies during meal breaks, the record indicates that they were regularly relieved from their posts during breaktime and were free to travel off base for meals. Hence, we conclude that their meal breaks may not be counted as worktime for title 5 overtime compensation purposes. It is also our view, however, that in the circumstances presented the officers are, under the Baylor standards, entitled to count the 15 minutes of their preshift duties each day during the period at issue as worktime for title 5 overtime compensation purposes. In that regard, it appears from the evidence of record that they were regularly required to perform actual work for a full quarter hour each day prior to the start of their regular shifts. Hence, we conclude that under title 5 overtime they are eligible for 1-1/4 hours of overtime compensation per 5-day workweek each week throughout the period in question subject to the 6-year time limitations discussed below.

#### Statute of Limitations

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, 62 Comp. Gen. 80 (1982); Nancy E. Howell, B-203344, Aug. 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, *supra*. Since the subject claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of the claims arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment.

CONCLUSION

Subject to the above stated 6-year time limitations under 31 U.S.C. § 3702(b)(1), we hold that the claimants are partially entitled to overtime compensation under both title 5, U.S.C. § 5542(a), and under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. As stated in Guards at Otis Air Force Base, B-198065, supra, and in John Nyberg, et al., B-212699, Feb. 10, 1986, each claimant is entitled to be compensated under whichever statute provides the greater total compensation. Because the determination of the actual amounts due depends upon detailed computations for each of the applicable weekly periods of entitlement for each claimant, the claims are hereby remanded to the Air Force for final settlement.

*for*   
Comptroller General  
of the United States