Stafford SLM-T

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Lillie C. Alexander - Claim for Overtime Pay

File: B-224094

Date: February 27, 1987

## DIGEST

A FLSA exempt civilian nurse claims entitlement to overtime for periods of time during which she allegedly performed pre-shift duties, attended mandatory meetings and worked through lunch. Her claim may not be allowed since there was no showing the overtime was actually performed or that if it was, it was ordered, approved, or induced by an official with authority to do so. The employee's claim for working through lunch may not be allowed since she worked an 8-hour shift which had no provision for a duty-free lunch.

## DECISION

This decision is in response to the appeal of Ms. Lillie C. Alexander, from our Claims Group's determination of June 24, 1986 (Z-2854036), disallowing her claim for overtime. From July 1, 1973 to October 18, 1980,[1]/ Ms. Alexander was a nurse at the United States Air Force Hospital, Mather Air Force Base, California. She contends that during this time she was required to report to duty 15 minutes prior to the start of her shift, that she was required to work without a lunch break, and that she was required to attend mandatory meetings outside of her regular working hours. Ms. Alexander claims entitlement to overtime for all of these periods of time. For the reasons outlined below, we uphold our Claims Group's denial of her claim.

FACTS

Ms. Alexander states that she, along with the rest of the nurses on staff at Mather AFB Hospital, was required to report to duty 15 minutes prior to the start of her duty in order to receive a report of patients from the outgoing

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1/ Ms. Alexander's claim was received in this Office on December 29, 1983. Thus, we are precluded by the 6-year Barring Act, 31 U.S.C. § 3702 (1982), from considering any portion of her claim prior to December 29, 1977.

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nurses and to perform a narcotics count. Ms. Alexander also states that she worked without lunch breaks and attended mandatory meetings but gives no indication of the frequency of these incidents, or the amount of time involved. She did submit leave and earnings statements as well as time and attendance records, but these records contain no indication of hours worked in excess of her 8-hour shift.

In its administrative report on this claim, Mather AFB informed us that Ms. Alexander was an exempt employee under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201-219). Mather AFB reported that management was not aware Ms. Alexander was required to report to duty early, that there was no record of any complaint from her, and that the hospital had no records to substantiate her claim. Mather AFB pointed out that with regard to lunch periods, Ms. Alexander's type of tour was governed by Air Force Regulation 40-610 para. 7 (AFR), which provides in pertinent part that:

> "Where more than one 8-hour shift is in operation during a 24-hour period and an overlapping of shifts to permit time off for lunch is not feasible, an on-the-job lunch period of 20 minutes or less may be authorized and included in the regular scheduled tour of duty. Workers must spend their on-the-job lunch period at or near their work stations. Under these conditions, the time covered by the 20 minute on-the-job lunch period is compensable."

The Mather AFB concluded that no overtime would be payable for lunch periods because Ms. Alexander worked an 8-hour per day shift.

Our Claims Group denied Ms. Alexander's claim on the grounds that she had failed to show, as required by the overtime provisions of 5 U.S.C. § 5542(a) (1982), that she had performed overtime which had been ordered or approved by an official who had specific authority to do so. Our Claims Group reasoned that since officials at Mather AFB had no knowledge of the problem, there could have been no order, approval or inducement of overtime work. Ms. Alexander responded to our Claims Group's settlement by contending that officials had to know the nurses were performing overtime because there were three non-overlapping shifts at the hospital and nurses would have to work beyond those shifts in

order to complete their reports. She also claims that complaints concerning this situation were made in 1975 or 1976 by the civilian nursing staff, through the union representative.

DECISION

Federal employees are paid overtime under the provisions of 5 U.S.C. § 5542 (1982) or the FLSA, and those employees covered by both statutes are entitled to compensation under whichever provision provides them with the greatest benefit. Section 5542 of Title 5 provides that:

> "(a) * * * hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * *."

Only overtime which is ordered or approved in writing or affirmatively induced by an official with authority to order or approve overtime is compensable under this section. See Matter of Civilian Nurses, 61 Comp. Gen. 174 (1981), and cases cited therein. On the other hand, employees covered by the FLSA are entitled to overtime compensation for hours of work in excess of 40 hours a week for all work which management "suffers or permits" to be performed. See 5 C.F.R. § 551.103(a)(3) (1986).

Ms. Alexander apparently believes that she is entitled to overtime which is suffered or permitted. As we have pointed out, however, the Mather AFB informed us that Ms. Alexander is not covered by the FLSA. We have no reason to question this determination. Section 213(a)(1) of Title 29, United States Code, provides that persons employed in a professional capacity are exempted from the overtime provisions of the FLSA. Any question concerning the proper FLSA status of Ms. Alexander's position should be directed to the Office of Personnel Management, which has the authority to make final determinations as to whether Federal employees are covered by the Act. 5 C.F.R. § 551.201 (1986).

The information submitted by Ms. Alexander is not sufficient to show either that she actually performed overtime or that there was overtime which was officially ordered or approved under the requirements of Air Force regulations.

As to the requirement that overtime must be properly ordered or approved, paragraph 3a of AFR 40-552, issued September 15, 1971, provides:

> "a. Authorization Requirement. Overtime work must be ordered by the appropriate supervisor and approved in writing by the official designated to authorize overtime payment. Since overtime approval constitutes authority for the expenditure of funds and certification that overtime funds are available, approval must be obtained before the work is performed except in an emergency when it must be made a matter of record no later than the following workday. Work performed by an employee outside his regularly scheduled tour of duty without official authorization or approval cannot be made the basis for overtime pay."

Commencing with our decision in 53 Comp. Gen. 489 (1974), and in subsequent decisions, we have followed the principles of law set forth in Baylor v. United States, 198 Ct. Cl. 331 (1972), regarding the determination of whether overtime was properly ordered or approved. In Baylor the court explained that under the applicable case law, whether work had been officially authorized or approved was a matter of "legal - line drawing." Although work that is required by an official regulation is clearly authorized or approved, a tacit expectation that work be performed is insufficient. Where there is more than a tacit expectation, and where employees have been induced by appropriate supervisors to perform additional duties, overtime has been held to have been authorized and approved. In this regard, our Office has long held that mere knowledge that overtime work is being performed by an employee is not sufficient to support payment of overtime compensation. See Jim L. Hudson, B-182180, January 6, 1982, and cases cited therein. As a result, even if Ms. Alexander's supervisors knew she was reporting early to work, that, in and of itself, would not entitle her to overtime compensation.

Furthermore, even if Ms. Alexander was able to show that she was ordered or induced to perform overtime her claim would not be allowable unless she could show, with some specificity, the actual number of hours worked. An individual who asserts a claim with our Office has the burden of furnishing substantial evidence to clearly

establish liability on the part of the Government and the claimant's right to receive payment. See 4 C.F.R. § 31.7 (1986). With regard to claims for overtime, we require sufficient evidence upon which a reasonable estimate of the actual number of hours worked could be based. Time and attendance reports, personal daily diaries, and certificates of former supervisors showing the amount of overtime worked by the claimant or a statement as to the standard workweek, including overtime performed by the claimant or other similarly situated employees, are examples of supporting evidence which might be sufficient. The records which Ms. Alexander submitted show no evidence of her early reporting or attendance at meetings. Her statement that she performed overtime, standing alone, would not be sufficient to support payment.

With regard to Ms. Alexander's claim for overtime for the periods when she worked through lunch, we note again that she apparently worked an 8-hour shift. As we have pointed out earlier, 5 U.S.C. § 5542(a) authorizes overtime compensation only for work actually performed in excess of 8 hours on any one workday. There was no provision for a duty-free lunch period outside of Ms. Alexander's regular tour of duty.

For the reasons outlined above, we hereby affirm our Claims Group's denial of Ms. Alexander's claim for overtime pay.

Milton J. Socolar

for Comptroller General
of the United States