



The Comptroller General
of the United States

Washington, D.C. 20548

133431

Katzenberger

Decision

Matter of: International Association of Firefighters,
Local F-48 - Overtime Compensation

File: B-226136

Date: July 13, 1987

DIGEST:

1. International Association of Firefighters, Local F-48, requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act (FLSA) of supervisory grade GS-7 firefighters. Under 29 U.S.C. § 204(f) the Office of Personnel Management (OPM) is authorized to administer the FLSA with respect to federal employees. Consistent with prior decisions recognizing that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions, this Office will not consider the claims.
2. Supervisory federal firefighters who are exempt from the Fair Labor Standards Act but who receive premium pay under 5 U.S.C. § 5545(c)(1) on an annual basis for regularly scheduled standby duty are not entitled to additional overtime pay under 5 U.S.C. § 5542 for work that is part of the firefighters' regularly scheduled administrative workweek.

DECISION

ISSUE

This action is in response to a request from Mr. Mark D. Hutchings, President, International Association of Firefighters (IAFF), Local F-48, for a decision on two issues. The first issue is whether the Office of Personnel Management's (OPM) determination that supervisory grade GS-7 firefighters are exempt from the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., is proper. The second issue is whether FLSA-exempt grade GS-7 firefighters

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who are receiving premium pay as authorized by 5 U.S.C. § 5545(c)(1) for regularly scheduled standby duty are entitled to additional overtime pay under 5 U.S.C. § 5542(a) for work scheduled in advance in excess of 8 hours a day.

We hold that in view of the applicable provisions of law granting OPM the authority to determine the exempt/nonexempt status under the FLSA for federal employees, this Office will not consider the claims of the supervisory GS-7 firefighters concerning that issue. With regard to the second issue, we hold that firefighters who receive premium pay on an annual basis for regularly scheduled standby duty are precluded from receiving additional overtime pay under section 5542(a) for work that is part of an employee's regularly scheduled administrative workweek.

BACKGROUND

This matter has been presented under our procedures set forth at 4 C.F.R. Part 22 (1986) for decisions on appropriated fund expenditures which are of mutual concern to federal agencies and labor organizations. This matter was filed on behalf of Ronald Dunn, Thomas Watson, and Richard Wilson, all supervisory grade GS-7 Captains employed by the U.S. Department of Defense at the Naval Station, Mare Island, California.

Supervisory grade GS-7 firefighters at Mare Island are regularly scheduled to work a tour of duty of 144 hours in a biweekly work period, 64 hours of which are considered standby duty, during which time the firefighters are required to remain at their work station in an on-call status. Effective for the first full pay period in November 1985, OPM determined that supervisory grade GS-7 firefighters are exempt from the provisions of the FLSA. Final regulations authorizing this change were published in FPM Bulletin 551-18 dated March 13, 1986 (5 C.F.R. Part 551). The record notes that IAFF Local F-48 filed FLSA complaint forms with the San Francisco Regional Office of the Office of Personnel Management to review this determination. After an investigation into the matter, OPM found that the supervisory grade GS-7 firefighters are properly exempt.

As a result, these firefighters receive their basic rate of pay for 80 hours of work and premium pay of up to 25 percent

of their basic rate as authorized by 5 U.S.C. § 5545(c)(1) for regularly scheduled overtime, night, holiday and Sunday work. Prior to the change in eligibility, these firefighters also received overtime pay for 38 hours as authorized by the FLSA, 29 U.S.C. § 207(k) and 5 C.F.R. § 551.541.

In its submission, IAFF contends that OPM erred in determining that supervisory grade GS-7 firefighters are exempt from the FLSA, and that, in this regard, OPM is not carrying out the intent of Congress in its implementation of the FLSA. The IAFF argues that it was not the intent of Congress to create two separate and distinct pay systems within the federal fire service which appear to penalize an employee promoted to a higher level of authority. The IAFF further believes that the 25 percent premium pay does not provide proper compensation for the hours worked as scheduled overtime, and the union contends that these firefighters should be compensated for work performed during their regular shifts, including standby time, in excess of 80 hours per pay period, at time and one-half of their regular rate as provided under 5 U.S.C. § 5542(a).

OPINION

Exemption of coverage under FLSA

Prior to 1974, all pay entitlements of federal employees, including firefighters, were set forth in Title 5 of the United States Code. In 1974, however, the federal government in its status as an employer was brought within the coverage of the FLSA by the enactment of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, April 8, 1974. However, certain employees are exempted from coverage under the FLSA including "executive employees" whose positions are determined to be managerial or supervisory. See 29 U.S.C. § 213(a)(1) and 5 C.F.R. § 551.204 (1986).

Under 29 U.S.C. § 204(f), OPM is authorized to administer FLSA with respect to federal employees. We have stated in past decisions that we consider the role granted OPM in administering the FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. We have consistently held that this Office will not review OPM's

determinations as to an employee's exempt or nonexempt status. Lee R. McClure, et al., 63 Comp. Gen. 546 (1984); 59 Comp. Gen. 128 (1979); B-51325, October 7, 1976. Regarding IAFF's claims that OPM is not carrying out the intent of Congress in its application of the FLSA regulations to the firefighters, we note that this issue has been considered in litigation concerning the method of calculating overtime for firefighters under the FLSA. The decision in Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985), which held that the government's method of computing FLSA overtime was reasonable, is replete with references to OPM's consistency in carrying out its obligations under the FLSA. The court held that:

"OPM has been given the power to interpret the statute and set forth the guidelines and policies of the agency. OPM has met its obligation by the promulgation of FPM Letter 551, through which the agency attempts to limit the confusion resulting from applying two different laws to the same concern. We conclude that OPM's interpretative guidelines 'harmonize(s) with the statute's origin and purpose,' * * * as well as with the Secretary of Labor's regulations."

Zumerling, 769 F.2d 745 at 750. See also Wheeler v. United States, 9 Cl. Ct. 579 (1986), cert. denied, 107 S.Ct. 1372 (U.S. March 9, 1987) (No. 86-1000). Since the courts have held that OPM's administration of the FLSA is both reasonable and consistent with the statute, the regulations promulgated by the Secretary of Labor, and the intent of Congress, it is not necessary for this Office to consider it further.

Accordingly, since OPM has authority to make final determinations as to an employee's exemption status and has in fact considered the claims of the supervisory GS-7 firefighters and determined them to be exempt as "executive employees," this Office will not consider the claims.

Additional overtime compensation

The statutes governing the payment of overtime compensation to federal employees are contained in Title 5 of the United States Code. The specific provisions relating to

compensation for overtime are set forth at 5 U.S.C. § 5542(a)(1) as follows:

"(a) For full-time, part-time and intermittent tours of duty, 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, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay." (Emphasis added.)

The specific provisions relating to compensation for standby duty are set forth in the same subchapter at 5 U.S.C. § 5545(c)(1) as follows:

"(c) The head of an agency, with the approval of the Office of Personnel Management, may provide that --

"(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 * * * ." (Emphasis added.)

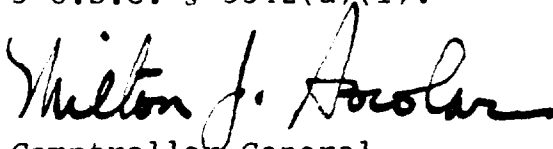
As we discussed in Lewis E. Meyer, B-200639, April 15, 1981, the legislative history of 5 U.S.C. § 5545(c)(1) shows that the annual premium pay provision was enacted for the express

purpose of allowing additional annual pay in lieu of overtime, night, and holiday pay for General Schedule employees who are required to remain at or within the confines of their stations during longer than ordinary periods of duty, but who spend a substantial part of their time on duty in a standby status rather than actually performing work. In Meyer we stated that additional compensation of 25 percent of basic pay is the maximum a General Schedule employee may receive, except for "irregular" or "unscheduled" overtime duty in excess of the regular tour of duty.

As we discussed further in National Federation of Federal Employees, Local 387, B-213931, June 21, 1984, the applicable regulation, 5 C.F.R. § 550.163(a), "Relationship to Other Payments," states that an employee receiving premium pay on an annual basis for regularly scheduled overtime, a substantial part of which consists of standby duty, may not receive premium pay for regular overtime work or night, holiday or Sunday work. By definition "regular overtime work" means overtime work that is part of an employee's "regularly scheduled administrative workweek." 5 C.F.R. § 550.103(g). A "regularly scheduled administrative workweek" for a full-time employee is the period within an administrative workweek, established in accordance with 5 C.F.R. § 610.111 within which the employee is regularly scheduled to work. 5 C.F.R. § 550.103(n). Under 5 C.F.R. § 610.111(c)(1), when an employee is paid additional pay under 5 U.S.C. § 5545(c)(1), his regularly scheduled administrative workweek is the total number of regularly scheduled hours of duty a week. Under 5 C.F.R. § 610.111(c)(2), when an employee has a tour of duty which includes a period during which he remains at or within the confines of his station in a standby status rather than performing actual work, his regularly scheduled administrative workweek is the total number of regularly scheduled hours of duty a week, including time in a standby status except that allowed for sleep and meals by regulation of the agency.

In NFFE, Local 387, cited above, we held that, because the firefighters were receiving premium pay on an annual basis for regularly scheduled overtime, a substantial part of which consisted of standby duty, they are precluded from receiving overtime pay for the same hours under 5 U.S.C. § 5542(a).

Similarly, in this case, there is no contention of "irregular" or "unscheduled" overtime work by the supervisory grade GS-7 firefighters in excess of their 144-hour regularly scheduled administrative biweekly pay period, which includes regular overtime work. Accordingly, since these firefighters are receiving premium pay on an annual basis for their regularly scheduled overtime, a substantial part of which includes standby duty, they are not entitled to receive additional overtime pay for the same hours under 5 U.S.C. § 5542(a)(1).

for 
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