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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Maynard W. Thompson - Intermittent Employee - Claim for Leave Benefits

File: B-236228.2

Date: April 16, 1991

DIGEST

An employee seeks reconsideration of a prior decision on his claim that held that the employee, hired as an intermittent United States deputy marshal, was not entitled to leave benefits because the findings contained in his agency's report supported the determination that he was not assigned regularly scheduled tours of duty. Evidence that he frequently reported to work at 8:30 a.m. sometimes at the request of his supervisor, that he performed a variety of duties, and that he often worked 78 hours in a pay period is not sufficient to refute those findings. The prior decision, B-236228, Dec. 22, 1989, is affirmed.

DECISION

Mr. Maynard W. Thompson requests reconsideration of our decision, B-236228, December 22, 1989, which sustained the denial of his claim for leave benefits.1/ For the following reasons, the prior decision is affirmed.

BACKGROUND

Mr. Thompson initiated a claim on January 28, 1984, with his employer, the United States Marshals Service, Department of Justice, for retroactive leave benefits relating back to the beginning of his employment on August 4, 1970. His claim was based on his assertion that he worked a regularly scheduled tour of duty and, therefore, was a regular part-time employee rather than an intermittent employee as designated by the agency. The agency denied his claim.

In 1986 he requested that the Office of Personnel Management (OPM) amend his personnel records to show that he was a part-time rather than intermittent employee. OPM denied that request.

1/ The request was made through his attorney, Stephen T. Onuska, Miami, Florida.

In 1988 Mr. Thompson filed his claim with our Claims Group. The Claims Group also denied his claim.2/ On appeal we sustained the Claims Group Settlement by decision B-236228, supra, holding that Mr. Thompson was not entitled to retroactive leave benefits as a part-time employee since it had not been clearly established that he served regularly scheduled tours of duty.

In his request for reconsideration, Mr. Thompson contends that major parts of the agency's report to us on his claim were erroneous. He indicates that the 14-year period of his employment was a very busy time for the Marshals Service in Miami, where he was employed, and this resulted in his working many hours and on a variety of duties. Specifically, he challenges the agency's findings that he worked almost exclusively on the service of process which allowed him to work on his own initiative, and that he was not required to report regularly at specific hours or dates. Voluminous papers were presented to establish that Mr. Thompson did work regularly scheduled tours of duty under circumstances similar to those in Kenneth L. Nash, 57 Comp. Gen. 82 (1977). Among the papers are daily logs, pay vouchers, and statements provided by several of his supervisors.

DISCUSSION

The logs and statements show that Mr. Thompson performed a variety of duties, in addition to service of process, over the nearly 14 years he was employed. The evidence shows that he on some occasions guarded prisoners, attended court proceedings, investigated matters, and attended weapons training.3/ The daily logs show that Mr. Thompson frequently reported to the office at 8:30 a.m. and time and attendance reports show he often worked 78 hours in a pay period. Statements by three of his supervisors indicate that during a hijacking, Mr. Thompson was assigned shift duty and required to report at 8:30 a.m. for various work, that Mr. Thompson was required to report by 8:30 a.m. during an unspecified period in 1982, and that he did have duties beyond service of

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2/ GAO Claims Group settlement certificate, Z-2865680, August 25, 1988.

3/ For example, pay vouchers show guard duty irregularly, between March 19 and May 7, 1980; daily logs show weapons training on February 12, 1983; guard duty August 4, 1970, February 14, 1983, March 9, 1983; court attendance on December 21, 1983, January 10, 1984; office work on March 20, 1971, and other dates.

process.4/ However, the service of process appears to have been the duty he most frequently performed and which occupied the majority of his time.

Generally, we cannot conclude that the claimant's evidence sufficiently counters the principal facts in the agency's report.

Clearly, Mr. Thompson's Standard Form 50 shows he was hired under an "excepted appointment-intermittent" as a deputy U.S. marshal, an appointment in which he served until June 15, 1984. Mr. Thompson's statements show that he was aware of the nature of his appointment from the time he was appointed, that he was being paid only for hours actually worked, and that he was not receiving annual or sick leave.

An employee working on an intermittent basis is not entitled to leave benefits because the law requires that an employee work "an established regular tour of duty during the administrative workweek" to be entitled to leave. 5 U.S.C. § 6301(2)(B)(ii) (1988). "Intermittent employment" contemplates service "without a regularly scheduled tour of duty." However, intermittent must be changed to part-time when an agency schedules an intermittent employee in advance of pay periods to work at some time during each administrative week for more than two consecutive pay periods. See Federal Personnel Manual, ch. 340, § 4-1c (Inst. 321, April 3, 1985); 5 C.F.R. §§ 610.102(g) and (h) (1986). As a result of such a conversion, the employee would then be eligible for leave benefits.

To prevail on claims for retroactive lump-sum leave payments based on an alleged change of status from intermittent to part-time employee, claimants must produce evidence sufficient to counter the administrative determination that he or she was not provided specific duty schedules in advance. Frank J. Robichau, Jr., B-230740, Nov. 29, 1988; James P. Wendel, B-206035, Apr. 26, 1982; John W. Matrau, et al., B-191915, Sept. 29, 1978. The fact that an employee establishes a regular pattern of work and actually works 40 hours a week is not a sufficient basis for conversion. See Russel C. Washington, Sr., et al., B-229170, Sept. 9, 1988; Department of Energy Consultants, B-216708, Mar. 29, 1985.

Mr. Thompson has provided evidence of performing duties other than service of process, and of often working 78 hours in a pay period. However, despite statements indicating that he was required to report at a specified time for certain 8-hour

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4/ Others stated that Mr. Thompson was involved in seizures, investigations, trial testimony, and writs of execution.

shifts, the evidence does not refute the agency's statement that he primarily performed service of process for which he was free to set his hours of work, or that, except for unspecified times over the course of nearly 14 years, he generally reported to the office at 8:30 a.m. on his own initiative. That is, there is no specific evidence that he was scheduled in advance for a particular tour of duty for more than 2 consecutive pay periods, as required to be converted to regular part-time status. See the Federal Personnel Manual, c. 340, § 4-1c (Inst. 321, Apr. 3, 1985), supra. See also James F. Daniels, et al., B-241337, Feb. 2, 1991.

Also, based on the evidence, we cannot agree that the decision in Kenneth L. Nash, supra, is applicable. Mr. Nash was given a schedule biweekly by his supervisors, which instructed him exactly the time he was required to work. Mr. Thompson generally set his own schedule, and even on the occasions when he was asked to report at 8:30 a.m., it appears that the schedule for the rest of the day was flexible and depended on the type of work which needed to be done, and Mr. Thompson was in some control over how that work would be scheduled. As explained in Russel C. Washington, Sr., et al., supra, the fact that an employee establishes a regular pattern of work and actually works 40 hours a week does not provide a basis for conversion.

Although Mr. Thompson, at irregular and sporadic periods, may have been instructed to report at a specific time for shift work, that evidence, viewed against the record as a whole involving nearly 14 years of employment, does not establish that the agency's findings and the bases for our previous decision were clearly erroneous. Since the claimant has the burden to counter the agency's determinations, and here Mr. Thompson has not done so, we affirm our previous decision. See James P. Wendel, B-206035, Apr. 26, 1982.

Milton J. Socolar

for Comptroller General
of the United States