



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

## Decision

**Matter of:** Robert A. Buchan et al. - Regularly Scheduled Overtime Pay

**File:** B-242411

**Date:** October 22, 1991

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### DIGEST

FBI Special Agents, who receive administratively uncontrollable overtime pay under 5 U.S.C. § 5545(c) (2) (1988), were called upon to respond to a prison riot. They claim regularly scheduled overtime pay for the period of November 29-December 4, 1987, in which they were rescheduled to 12-hour shifts. We deny their claims for regularly scheduled overtime pay since the 12-hour shifts were a one-time, on-the-spot response to a short-term emergency situation and were not regularly scheduled overtime within the intent of the statute and the implementing regulations in 5 C.F.R. § 550.151 (1991).

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### DECISION

Mr. Robert A. Buchan and 27 other Special Agents of the Federal Bureau of Investigation (FBI), Department of Justice, Chicago, Illinois,<sup>1</sup> request that we reconsider our Claims Group's denial of their claims for regularly scheduled overtime pay.<sup>2</sup> For the following reasons, we affirm our Claims Group's action and deny their claims.

### BACKGROUND

The 20 Special Agents involved in this appeal are employees of the Chicago Field Office of the FBI. As ordered, 26 of them reported to a federal prison in Atlanta, Georgia, at midnight on November 23, 1987, in order to assist in quelling a riot which had erupted. Also, as ordered, 2 other Special Agents arrived a few days later. During their first 2 days, they worked long hours with minimal time

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<sup>1</sup> Mr. Buchan and the 27 other Special Agents were originally represented by their counsel, Mr. R. William Barton, Patterson, Belknap, Webb & Tyler, who filed this appeal.

<sup>2</sup> Settlement Certificate, Z-2861837, July 2, 1990.

rest. On Wednesday, November 25, 1987, the FBI official in charge ordered 12-hour shifts to begin on Thursday, November 26, 1987. The 28 Special Agents were split into 2 groups, with one group scheduled to work from midnight until noon, and the other group to work from noon until midnight. These 12-hour shifts continued every day through midnight on Friday, December 4, 1987; then 8-hour shifts were worked on Saturday, December 5 and Sunday, December 6, 1987, before the temporary duty assignment ended. The Agents' administrative workweek normally begins on Sunday and ends on Saturday.

The 28 Special Agents were paid night, holiday and Sunday differential. They also were paid their normal administratively uncontrollable overtime (AUO) pay under 5 U.S.C. § 5545(c)(2) (1988). However, they contend that they should also have been paid for "regularly scheduled" overtime under 5 U.S.C. § 5542 (1988) and its implementing regulations in 5 C.F.R. Parts 550 and 610 (1991). As stated above, their claims for the period of November 26 through December 4, 1987, were denied by our Claims Group.

On appeal, the counsel for the agents concedes that the overtime worked from November 26-28 was not regularly scheduled, but counsel argues that the overtime worked during the administrative workweek beginning November 29 was regularly scheduled because it was scheduled in advance of an administrative workweek. Counsel for the agents argues that regularly scheduled work is "work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks . . ." 5 C.F.R. § 550.103(p). Regular overtime work is "overtime work that is part of an employee's regularly scheduled administrative workweek." 5 C.F.R. § 550.103(g). Thus, he bases the claims on the wording of the implementing regulations.

The FBI contends that the overtime was not regularly scheduled, and thus was administratively uncontrollable overtime. It notes that the Special Agents who filed these claims were all members of the FBI's Chicago Field Office SWAT team, and that it is not realistic to expect SWAT teams to be deployed in a uniform fashion such that the work of particular shifts of SWAT team members will be dictated solely by supervisory personnel at the scene. Rather, such scheduling will depend upon the behavior of the individuals who precipitated the events which led to the request for participation of SWAT team personnel.

#### OPINION

Title 5, United States Code, § 5542(a) (1988), provides that 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, are overtime work. See 5 C.F.R. § 550.111(a) (1991).

Under 5 U.S.C. § 5545(c)(2) (1988), the Special Agents are paid administratively uncontrollable overtime pay instead of other premium pay, except for "regularly scheduled overtime . . . ." See 5 C.F.R. § 550.151 (1991).

As to what constitutes "regularly scheduled overtime," 5 C.F.R. § 550.103(g) (1991), the current governing regulations, which first went into effect in 1983,<sup>3</sup> provides as follows:

"(g) 'Regular overtime work' means overtime work that is part of an employee's regularly scheduled administrative workweek."

In addition, 5 C.F.R. § 610.102(g) (1991) provides that "'regularly scheduled' work means work that is scheduled in advance of an administrative workweek . . ." under 5 C.F.R. § 610.111.

As applied here, the scheduling of the 12-hour shifts was a one-time, on-the-spot decision in response to a short-term emergency situation. Even though it carried over into another workweek, this clearly was not "regularly scheduled overtime" within the intent of 5 U.S.C. § 5545(c)(2) and the implementing regulations in 5 C.F.R. § 550.151 (1991). We believe that the regulation was not intended to apply to this short-term prison riot situation. If the emergency had continued for a longer time and become subject to assignment of overtime shifts on a regular basis, a different result could ensue.

The work of controlling a prison riot for the short period of time involved here is of an unpredictable nature, not subject to administrative control. Sound operational planning to deal with such a short-term emergency situation, including rotation of available staff, does not turn uncontrollable overtime into regularly scheduled overtime. As the FBI's submission notes, the unpredictability of criminal behavior and the exigency of law enforcement's need to respond to such behavior led to the establishment of administratively uncontrollable overtime for federal criminal investigators. Indeed, 5 C.F.R. § 550.153(a),

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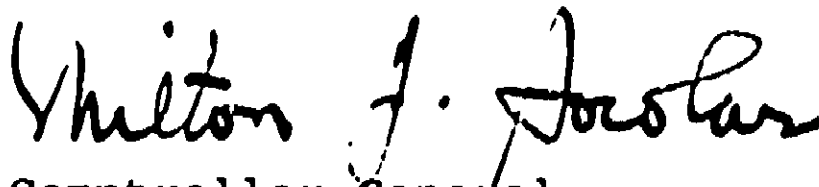
<sup>3</sup> As James Barber, 63 Comp. Gen. 316, 320-321 (1984) recognizes, the 1983 revised OPM regulations supersede our prior decisional definitions of "regularly scheduled" overtime for work performed on and after February 28, 1983.

which describes the basis for determining positions for which administratively uncontrolled overtime pay is authorized, provides:

"A typical example of a position . . . is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it, . . . His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of day). . . ."

The basic characteristic of administratively uncontrollable overtime work is, therefore, its unpredictability, and the persons performing such work must be flexible enough to work the hours which the events dictate. The overriding short-term emergency nature of the work in controlling the prison riot involved here makes these 12-hour shifts administratively uncontrollable overtime work.

Accordingly, we affirm our Claims Group's action, denying the claims of the 28 Special Agents.



**Acting** Comptroller General  
of the United States