

CP

B-245772

May 7, 1992

DIGEST

Federal Aviation Administration employees who are authorized under a flexible work schedule established pursuant to a collective bargaining agreement, to report to work between 11:45 p.m. and midnight Sunday for an 8-hour shift claim premium pay for the entire shift. While under _____, B-229263.3, April 23, 1992, GAO no longer renders decisions on matters subject to grievance procedures under a collective bargaining agreement, the following views are provided. An employee who performs any part of a regularly scheduled 8-hour period of service on Sunday is entitled to premium pay for the whole shift. In this case, the Office of Personnel Management concluded that under the employees' flexible work schedule any work performed between 11:45 p.m. Sunday and 8:00 a.m. Monday is regularly scheduled work for the purpose of Sunday premium pay. Therefore, the employees are eligible for Sunday premium pay if they report to work between 11:45 p.m. and midnight Sunday.

Office of the General Counsel

B-245772

May 7, 1992

Mr. Alvin E. Ray, Manager
Human Resource Management
Federal Aviation Administration
Great Lakes Region
2300 East Devon Avenue
Des Plaines, Illinois 60018

Dear Mr. Ray:

This is in response to your letter of September 13, 1991, requesting a decision whether the air traffic controllers at the Oberlin, Ohio Air Route Traffic Control Center are entitled to Sunday premium pay under the described circumstances. You submitted the matter to us on behalf of the Federal Aviation Administration (FAA) jointly with the National Association of Air Traffic Specialists under our procedures for decisions on expenditures which are of mutual concern to agencies and labor organizations set out at 4 C.F.R. Part 22 (1992). We note, however, that this case concerns members of a collective bargaining unit covered by grievance procedures under a negotiated agreement which does not specifically exclude the issue presented here from its coverage. Under our decision B-222926.3, April 23, 1992 (copy enclosed), we no longer accept such cases for decision. However, since this case was submitted to us prior to issuance of the _____ decision, we are providing the following views for the information of the parties.

BACKGROUND

Your submission indicates that the air traffic controllers at the FAA's Oberlin, Ohio Air Route Traffic Control Center are assigned to fixed, regular 8-hour watch schedules (shifts). Under the terms of a collective bargaining agreement, the hours of the watch schedules themselves are to be set at least one year in advance and individual assignments to a particular watch schedule are to be made at least 28 days in advance where local conditions permit. (See Article 32 of the Agreement between NATCA and the FAA, p. 67, May 1989). The agreement also permits flexible

112
starting times to be negotiated at the local level.
(Article 34, section 3, p. 70).

The local agreement in effect at the Oberlin facility permits employees to report to work as early as 15 minutes before their assigned shift, and to then leave when they have completed 8 hours of duty. Because their scheduled shift does not change on a regular basis, the employees do not submit schedules in advance. However, they record their actual arrival and departure times on time and attendance forms.

At issue here is a Monday watch schedule that begins at 12:00 a.m. (midnight Sunday) and ends at 8:00 a.m. NATCA contends that employees who choose to report to work between 11:45 p.m. Sunday and midnight are entitled to premium pay for the entire shift, as required by 5 U.S.C. § 5546. That section entitles employees to premium pay for the entire shift if any part of the shift is worked on Sunday and the work is regularly scheduled and not overtime work. The agency contends that the employees are not eligible for premium pay because they are not being ordered to work on Sunday, but simply are choosing to start their shifts early for their own convenience.

ANALYSIS

Entitlement to Sunday premium pay is based on 5 U.S.C. § 5546(a) (1988), which provides that an employee who performs work during a regularly scheduled 8-hour period of service, a part of which is performed on Sunday, is entitled to additional premium pay at a rate equal to 25 percent of his rate of basic pay. In interpreting this provision, we have stated that there is no requirement for a minimum period of Sunday work as a condition of entitlement to the premium pay benefits. Accordingly, we held that employees on the midnight shift at the U.S. Army Communications Command in Detroit, Michigan, were entitled to Sunday premium pay for their entire regularly scheduled 8-hour tour of duty from 11:45 p.m. Sunday to 7:45 a.m. Monday. 60 Comp. Gen. 559 (1981). See also 46 Comp. Gen. 158 (1966). Thus, the issue here is whether the work performed by the FAA employees between 11:45 p.m. and midnight Sunday under the terms of the bargaining agreement is regularly scheduled.

The Office of Personnel Management (OPM) is responsible for prescribing regulations implementing the statutes prescribing work schedules and authorizing premium pay and flexible schedules¹. Therefore, we obtained their views on

¹5 U.S.C. §§ 5548, 6101(c) and 6133 (1988).

this matter. OPM concluded that the employees in this case who report to work between 11:45 p.m. Sunday and midnight are entitled to premium pay for the entire shift.

OPM confirmed with FAA that the schedule at issue here was established according to the terms of a collective bargaining agreement between FAA and the exclusive representative of the employees as a flexible work schedule under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. § 6101 et seq.² Therefore, OPM based its conclusion on 5 C.F.R. § 610.111(d) (1991), which provides that a flexible schedule "is a scheduled tour of duty and all work performed by an employee within the basic work requirement is considered regularly scheduled work for premium pay and hours of duty purposes." OPM further notes that the flexible work statute specifically prohibits employees from using flexible work schedules to obtain premium pay for nightwork, but does not similarly restrict the payment of premium pay for Sunday work. 5 U.S.C. § 6123(c).

OPM's determinations on matters subject to its regulatory authority are entitled to great weight. See Reclamation Drill Rig Operators, 70 Comp. Gen. 380 (1991) and cases cited therein. In this case, as explained below, we believe OPM's position is supported by the applicable provisions of statutes and regulations.

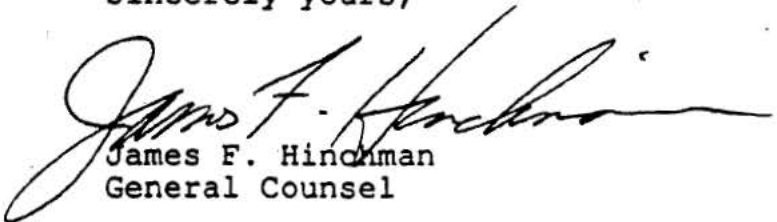
As OPM noted, § 6123(c) which deals only with flexible work schedules, specifically prohibits using flextime to obtain premium pay for nightwork but does not include a similar restriction for Sunday pay, indicating that no such restriction was intended. This is consistent with the provisions of § 6128(c) which concern premium pay under compressed work schedules, and which expressly authorize Sunday premium pay for any part of a shift worked on Sunday. As explained in a committee report on the bill, this was necessary because, although compressed schedules allow employees to work regularly-scheduled 9- or 10-hour days,

²The Act provides that in the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule shall be subject to the Act "and the terms of a collective bargaining agreement" between the agency and the representative; such employees shall not be included in any program under the Act except to the extent expressly provided under a collective bargaining agreement; and an agency may not participate in a flexible or compressed schedule program under a collective bargaining agreement which contains premium pay provisions which are inconsistent with the premium pay provisions in the Act (5 U.S.C. §§ 6123, 6128. 5 U.S.C. § 6130.)

the Sunday pay statute refers to "a regularly scheduled 8-hour period of service" (5 U.S.C. § 5546(a)).³ Thus, to provide Sunday premium pay for a compressed schedule of more than 8 hours, it was necessary to specifically so-state. Therefore, in view of the lack of a restriction on Sunday pay under a flexible schedule and the provision including Sunday pay for a compressed schedule, it appears that Congress did not intend the Act to diminish an employee's right to premium pay for working on Sunday whether under a flexible schedule or a compressed schedule.

In the present case, while pursuant to the collective bargaining agreement the employees have the flexibility to decide whether to report to work up to 15 minutes before the beginning of the scheduled watch, OPM views this flexibility as being encompassed by the Flexible and Compressed Work Schedules Act, which OPM has the authority to implement. As noted above, under the OPM regulations, the work performed between 11:45 p.m. Sunday and 8:00 a.m. Monday is considered regularly scheduled for the purposes of premium pay, and the Sunday pay statute requires premium pay for the entire shift if any part of the shift is worked on Sunday. Accordingly, we concur with OPM that the FAA employees at the Oberlin facility who are under a flexible work schedule and report to work between 11:45 p.m. Sunday and midnight are entitled to premium pay for the shift.⁴

Sincerely yours,


James F. Hinchman
General Counsel

Enclosure

³S. Rep. No. 365, 97th Cong., 2nd Sess. 13, reprinted in 1982 U.S. Code Cong. & Ad. News 565, 575.

⁴We note that under 5 U.S.C. § 6122(b), but subject to the terms of a collective bargaining agreement referred to in 5 U.S.C. § 6130(a) if the agency head determines the organization is incurring additional costs because of participation in a flexible schedule program, the agency head may restrict the employees' choice of arrival and departure times.