

B-258316

June 2, 1995

Mr. William A. Smoot, Jr.
National Aeronautics
and Space Administration
BFH Payroll Unit
300 E Street SW
Washington, DC 20546

Dear Mr. Smoot:

This responds to your August 23, 1994, letter requesting a decision whether a proposed work schedule complies with applicable laws and regulations. You state that your agency is trying to be innovative and flexible per the President's July 11, 1994, memorandum concerning expanding family-friendly work arrangements in the Executive Branch,¹ but you have concerns regarding the proposed work schedule discussed below.

The request concerns a "first 40-hour" employee, that is one for whom it is impracticable to prescribe a regular schedule of definite hours of duty for each workday and, thus, whose first 40 hours of duty performed within the workweek is considered the employee's administrative workweek. You state that the employee involved would like to work his first 40 hours anytime during the first week of the pay period and then take 40 hours of annual leave the second week of the pay period. Under such an arrangement, the employee could, for example, work from Sunday through Wednesday the first week, be off without charge to leave on Thursday and Friday (and we presume on Saturday), and with the 40 hours of leave, the employee would be off the entire second week of the pay period. For the first week of the next pay period, the employee would not begin to work until either Wednesday or Thursday without charging annual leave for the beginning of the week. Under this proposal, as we understand it, the employee could be off work

¹The President's July 11, 1994, Memorandum for the Heads of Executive Departments and Agencies encourages the broad use of flexible work arrangements. However, by its own terms, this memorandum does not "create any right or benefit, substantive or procedural" against the United States.

064052/154670

beginning Thursday of the first week of the first pay period through Tuesday or Wednesday of the first week of the second pay period, a total of 13 or 14 days, with a charge to annual leave of only 40 hours.

You state that you have no problem with the proposed schedule for the first pay period, but you are concerned that the proposal not to begin work in the second pay period until Wednesday or Thursday, without any charge to leave, violates 5 C.F.R. § 610.111(b) (1993), which provides for "first 40-hours" schedules as follows:

When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek as the basic workweek. A first 40-hour tour of duty is the basic workweek without the requirement for specific days and hours within the administrative workweek. All work performed by an employee within the first 40 hours is considered regularly scheduled work for premium pay and hours of duty purposes. Any additional hours of officially ordered or approved work within the administrative workweek are overtime work."

We understand from a discussion of the matter with a member of your staff that your concerns arise on two grounds. First, by beginning work on Wednesday or Thursday of the first week of the second pay period, the employee would have to work through Saturday to complete his 40 hours, and Saturday in the seventh day of the administrative workweek. Thus he would be working outside the 6-day administrative workweek prescribed pursuant to the regulations. Second, it is your understanding that an employee working a first 40-hour schedule is to begin working on the first day of the 6-day period unless he is on leave. In this case the employee would begin work in the middle of the workweek without charge to leave for the first 3-4 days.

The establishment of work schedules to best accomplish the agency's work is generally a matter within the discretion of the agency concerned, within the parameters established by law, and regulations and guidance provided by the Office of Personnel Management (OPM). See 5 U.S.C. § 6101, and 5 C.F.R. Part 610. See also, 50 Comp. Gen. 708, 711-712 (1971). We understand that you informally contacted OPM concerning this matter, and that you were advised the proposed schedule would not be prohibited, although OPM would not recommend it.

Section 610.111 of 5 C.F.R. implements a statutory requirement that agencies establish a basic administrative workweek for all employees to "be performed within a period of not more than 6 of any 7 days." 5 U.S.C. § 6101(a)(2) (1988). Even for employees for whom it is impractical to prescribe a schedule that specifies the days and hours of work, agencies still must establish the days which make up the employees' administrative workweek and, of course, may establish the agency's working hours. Ordinarily,

employees who for personal reasons do not report for duty when scheduled are charged leave. See eg., Francis A. Brennan, B-210686, Oct. 19, 1983.

As to your concerns regarding the proposed schedule, we agree that without a change in the employee's administrative workweek in the second pay period, the proposal would not comply with the 6-day limitation prescribed in the statute and regulation. Whether to change the employee's administrative workweek to accommodate the employee, however, is a matter within the discretion of the agency, taking into consideration the agency's needs in accomplishing its mission. See William Kohler, B-216756, Feb. 19, 1985. As to the concern regarding allowing the employee to begin work in the middle of the workweek without charge to leave, if the employee's administrative workweek were changed to accommodate the proposed schedule, this problem also may be overcome.

Therefore, as a general matter, section 610.111(b), by its own terms, would not preclude the agency from adopting the schedule proposed here, provided the agency made the necessary change in the employee's workweek. However, whether or not the agency chooses to do so for any particular employee is within the agency's discretion taking into consideration the needs of the agency.

Sincerely yours,

/s/ Seymour Efros
for Robert P. Murphy
General Counsel