Approved For Release 2002/07/03 : CIA-RDP83-01004R000300040013-4

STATINTL

15 May 1963

Night Differential in Conjunction with Overtime

GAO Referral Not Required

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1. The statute of the Federal Employees Pay Act which deals with N/D in conjunction with overtime uses the phrase "regularly scheduled work" but it does not define the phrase. The Comptroller General of the United States has rendered a decision in a case which closely parallels some situations [redacted] are sometimes required to work overtime during unscheduled hours at night because [redacted] extend beyond their normal times due to unforseen developments in the areas covered.

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-145581 July 6, 1961

Honorable Glenn T. Seaborg, Chairman
United States Atomic Energy Commission

Dear Mr. Seaborg:

By letter of April 11, 1961, inadvertently dated March 11, 1961, the Deputy General Manager requested our decision concerning the payment of premium compensation under section 301(a) of the Federal Employees Pay Act of 1945, as amended by the act of September 1, 1954, 68 Stat. 1110, for night work performed by AEC security guards and security shipment couriers. So far as here pertinent, said section 301(a), as amended, provides for the payment of premium compensation of 10 percent (hereinafter referred to as night differential) for any "regularly scheduled work" between the hours of 6:00 p.m. and 6:00 a.m.

It appears from the Deputy General Manager's letter that the "security guards" are those employees engaged upon intra-plant activities, including such duties as area patrol, visitor escort, classified trash burning details, traffic control, and security posts. In view of the regular pattern of work hours for those employees, few problems concerning payment of night differential are encountered. However, the following two factual situations, with the accompanying questions, are presented:

"In one situation, the security guards who work daytime shift are occasionally required (due to the absence of normally assigned personnel) to work night shifts on either, or both, the sixth and seventh days of the workweek (i.e., on days normally not worked).

"(a) In this situation, are the security guards who are so directed to perform night work on both the sixth and seventh days entitled to night pay differential for such sixth and seventh days of work?

"(b) Are they entitled to night pay differential if they are directed to work only the sixth or the seventh day?

"The second situation involves overtime for certain guards who are required to check in and out at a central location and who are then transported between the central location and a security post immediately before and after

GAO Wash., D.C.

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their eight-hour tour of duty. For example, a security guard may be required to be present at 'Security Guard Headquarters' for checking-in at 2:45 p.m., after which he is furnished transportation so as to arrive at the security post by 3:00 p.m. After completion of eight hours of duty at the security post, he is returned to the 'Headquarters' for checking-out which is not completed until 11:15 p.m.

"(c) Under the above circumstances, may the security guard be paid night differential for the overtime period after 11:00 p.m. as well as the period from 6:00 p.m. to 11:00 p.m.?"

Questions (a) and (b) refer to employees assigned temporarily to regularly scheduled tours of duty other than their own regular tours. Under subsections (c) and (d) of section 25.232 of the Federal Employee Pay Regulations, such employees are entitled to night differential for the night hours involved even though the work may constitute overtime for the substituting employee and the work does not recur for him. 36 Comp. Gen. 657, 660. Questions (a) and (b) are answered in the affirmative.

Concerning question (c), we understand that the fifteen-minute intervals required for checking in and out and going to and from the security post are considered as compensable time for overtime compensation purposes. Since such intervals are a regular part of the daily tour of duty, no reason is apparent why night differential should not be paid under the law and regulations cited above for all time served between the hours of 6:00 p.m. and 6:00 a.m. This question is answered in the affirmative.

"Security couriers" are described as those employees whose duties are concerned with escorting inter-plant shipments of classified matter (ranging from documents to large and bulky quantities of materials and structural components). There is a frequent shifting of the employees between intra-plant guard duty and inter-plant courier duty. The number of couriers assigned to a particular shipment varies with the physical size, strategic importance and nature of the shipment, and such other factors as availability of sleeping and eating accommodations, the number of hours an individual can be on duty without such fatigue as would reduce his alertness, layovers, and problems of supervision and administrative arrangements peculiar to the individual shipment.

The forty-hour basic workweek of security couriers consists of five days of eight hours each, which, generally, are the first five days of the calendar week in which "scheduled" or anticipated shipments required their services, and which usually are consecutive.

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However, certain unpredictable factors relating to necessity for shipment of material on an "as ready" basis, transportation routing delays, etc., make it impossible to fit the shipments to a uniform basic workweek. The actual hours of duty are determined by the duties to be performed in connection with the particular shipment. Some shipments can be completed within the basic eight-hour workday while others require more time, running up to several weeks in some instances. Of particular significance in considering this case in connection with the Aviles case, infra, is the requirement that once the shipment has begun the assigned couriers must stay with the shipment until it is delivered or until they are relieved by other couriers, whether such tour of duty be less than one day or several weeks in duration. The "required duty" does not, however, include time spent in resting, sleeping, eating, and the like, when the employee is relieved from actual duty even though he must remain "captive" with the shipment on the train, plane, or motor vehicle.

The questions concerning security couriers are as follows:

"(d) Are security couriers assigned to security shipment duties entitled to night pay differential for all time spent in 'required duty' between 6:00 p.m. and 6:00 a.m.?

"(e) If the answer to (d) is negative, are security couriers assigned to security shipment duties entitled to night pay differential only for time spent in 'required duty' between 6:00 p.m. and 6:00 a.m. which is part (or all) of the first eight hours of work that day?"

As previously noted, the night differential statute uses the phrase "regularly scheduled work" but it does not define the phrase. We have considered the matter in, among others, our decisions in 36 Comp. Gen. 657; 39 id. 73; 40 id. 397. The matter also was recently considered by the United States Court of Claims in the case of Aviles, et al. v. United States, and another, decided October 5, 1960, involving meat inspectors of the Department of Agriculture assigned to slaughtering and meat processing plants. The Department's regulations required that an inspector be present throughout the period of operation. Certain of the processing plants frequently operated for more than eight hours per day although the exact period of operation might vary from day to day. The Court found (Finding No. 20) that the inspectors performed some overtime on the majority of the days they were assigned to processing establishments and that from time to time "the recurring overtime" included hours between 6:00 p.m. and 6:00 a.m. The Court in that case decided that the overtime worked by the plaintiffs was part of regularly scheduled tours of duty and held that night differential should be paid for

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any overtime hours that might be worked between 6:00 p.m. and 6:00 a.m.

From the facts presented concerning security couriers, the conclusion seems warranted that the conditions of employment are such that time on duty, including duty at night, is determined by an inherent requirement of the employment that the employee remain on duty until the completion of a task or until relieved. Therefore, in light of the conclusion reached in the Aviles case and upon the basis of the Deputy General Manager's statement that the night work recurs regularly although not according to a fixed hours-of-work pattern, we hold that payment of night differential may be made to security couriers for night work included either in the basic workweek hours or in overtime hours. Question (d) is answered in the affirmative, making it unnecessary to answer question (e).

Referring to the last paragraph of the Deputy General Manager's letter, you are advised that nondoubtful claims which may result from this decision may be paid by your Commission; however, doubtful claims and those which may be affected by the 10-year limitation of the act of October 9, 1940, 31 U.S.C. 71a, should be forwarded to our Claims Division for appropriate action, as provided in sections 2015 and 2025, respectively, of Title 4, General Accounting Office Manual.

Sincerely yours,

Joseph Campbell

Comptroller General
of the United States

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RSS
OTGOING

OP MEMORANDUM
NO.

OFFICE OF PERSONNEL MEMORANDUM

SUBJECT: Night Differential Pay

STATINTL REFERENCE: [redacted]

1. Headquarters Regulations show that night differential pay is received for work regularly scheduled between 6:00 p.m. and 6:00 a.m. Generally, for night work to constitute regularly scheduled work, it must be authorized in advance and must be scheduled to recur on successive days or after specified intervals. The term "regularly scheduled" may also be applied in the following work situations:

a. An employee is entitled to a night differential for night work performed when he is assigned temporarily to a tour of duty other than his own;

b. An employee is entitled to night differential pay where the nature of the work requires him or her to regularly remain on duty until the completion of the task or until relieved, although not according to a fixed work schedule.

2. An employee may be eligible for both night differential pay and overtime compensation. When the night work is not regularly scheduled and is in excess of the normal basic work week, such overtime work must be authorized by a designated senior official.

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(6) Employees entitled to holiday premium pay will receive such pay when appropriate for hours worked not in excess of twelve which are not overtime work within a regularly scheduled workday.

(7) Employees entitled to Sunday premium pay will receive such pay for each hour of Sunday work which is not overtime work and which is not in excess of twelve hours for each regularly scheduled tour of duty which begins or ends on Sunday.

(8) Employees entitled to night differential pay will receive such pay for all regularly scheduled work between the hours of 6 p.m. and 6 a.m.

(9) Whenever possible two consecutive days off will be provided in each workweek. As a minimum, one regular day off, preferably Sunday, will be provided.

(10) The regularly scheduled hours of work in a nonstandard workweek will be performed within a period of not more than six days of an administrative workweek that consists of seven consecutive calendar days. Agency management has established the administrative workweek as Sunday through Saturday.

(11) Annual and sick leave will be charged according to leave taken against the employee's established work schedule.

(3) **WORK SCHEDULES FOR INDIVIDUALS.** Operating Officials and Heads of Independent Offices may establish work schedules for individuals of not less than 40 hours which differ from the basic workweeks of their components as necessary either (a) to carry out the missions of those components or (b) to enable the individuals concerned to take educational courses which will equip them for more effective work in the Agency. This authority does not extend to work schedules proposed for operations that are staffed on a 24-hour basis that involve regularly scheduled tours of duty exceeding eight hours a day or to schedules for operations staffed on a 24-hour basis that involve seven or more consecutive working days.

c. **PREMIUM PAY.** General Schedule employees eligible for premium pay under the provisions of the Fair Labor Standards Act will receive the highest rate of overtime compensation and additional premium pay to which entitled under either FLSA or other applicable pay laws and policies.

(1) **NIGHT DIFFERENTIAL WORK.** Night differential work is regularly scheduled work between 6:00 p.m. and 6:00 a.m.

(a) Night differential work is compensated at an additional pay rate of 10 percent of basic salary for General Schedule employees.

(b) Night differential pay rate is also payable when an emloyee who is otherwise entitled to night differential pay does not work during those hours because of a holiday or for a period of leave with pay of less than eight hours during any biweekly pay period. It is not payable for any period of leave if the aggregate of paid leave during the same biweekly pay period is eight hours or more, nor is it payable for any period covered by a lump-sum leave payment.

(c) Prevailing rate employees will be paid for night differential work at rates in accordance with their wage schedule.

(2) **OVERTIME WORK AND COMPENSATION**

(a) **Definitions**

(1) Compensable overtime is that work performed by an employee in excess of the normal basic workweek which has been authorized by a designated senior official as compensable in accordance with Agency policy. Such overtime may be authorized in advance to meet scheduled or irregular requirements or authorized after performance by the employee.

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