



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-226159

August 29, 1988

Mr. C. J. Cloud
Department of the Navy
Naval Weapons Station
Seal Beach, California 90740-5000

Dear Mr. Cloud:

We refer to your letter dated December 5, 1986 (7300 Ser 0211/2450), forwarded to our Office by the Director, Commercial Accounts Department, Navy Regional Finance Center, Washington, D.C., by letter of January 23, 1987 (7200 Ser 43/004), requesting an advance decision from our Office concerning whether or not the civilian guard personnel at Seal Beach California, are entitled to retroactive compensation for alleged overtime worked and if so, how far back the alleged overtime is compensable.

In your letter of December 5, 1986, you report that some guards have stated that there was an unwritten and undocumented policy of the Security Department to require all civilian guard personnel at Seal Beach to be ready for duty prior to the commencement of their shift. The unwritten policy allegedly required civilian guard personnel to be in uniform, have their government issued firearms checked out from the armory, and on occasion, to have their government vehicle checked out prior to the commencement of their shift. You further report that civilian guard personnel were required to check in their government issued firearms and vehicles and encouraged to change their uniforms after the end of their respective shifts. The claimed period that this unwritten policy was in effect is from July 1970 until February 23, 1986.

Your letter states that an examination of records was made in an attempt to document these claims, but the records reflect only regular time worked. Further, you indicate that turnover of all management personnel that may have implemented or would have had knowledge of the alleged policy precludes your ability to verify the claim.

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FLSA and Title 5 Overtime

As federal employees, claimants are covered by two statutes requiring compensation for overtime work. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., generally requires overtime pay for a workweek longer than forty hours. The Federal Employees Pay Act, currently codified at 5 U.S.C. § 5542(a) and commonly called "title 5" overtime, requires overtime pay for work in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Federal employees were covered only by title 5 until May 1, 1974, when the FLSA was extended to them by Public Law 93-259, 88 Stat. 55. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. See 54 Comp. Gen. 371 (1974).

FLSA Requirements

FLSA overtime at one and one-half times the rate of regular pay is ordinarily payable to nonexempt federal employees who work more than 40 hours per week. However, in providing for coverage of employees engaged in law enforcement activities, such as those involved in the present case, the Fair Labor Standards Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, provided for special maximum hours without overtime. See section 6(c)(1)(A) of the 1974 amendments which added section 7(k) to the FLSA, 29 U.S.C. § 207(k). Beginning January 1, 1975, the maximum hours of aggregate "tours of duty" within a work period of 28 consecutive days was 240. Effective January 1, 1976, the aggregate tour of duty was reduced to 232 and 216 hours effective January 1, 1977. Effective with the first work period commencing on or after January 1, 1978, the aggregate tour of duty was reduced to 171 hours in a 28-day work period or a tour of duty of 42-3/4 hours in a 7-day work period. See FPM letter 551-5, January 15, 1975, and FPM Letter 551-20, September 22, 1983, rescinding FPM Letter 551-16, January 15, 1980. Meal breaks, duty free or otherwise, are not excluded from hours worked in determining the overtime entitlement under section 7(k) of the FLSA of law enforcement employees unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4.

Standard of Proof

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the employee must prove that he has worked the overtime with sufficient

evidence to show the amount and extent of his work as a matter of just and reasonable inference. Christine D. Taliaferro, B-199783, March 9, 1981. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. Civilian Nurses, 61 Comp. Gen. 174 (1981). Additionally, we have held that while claims against the government must be predicated, if at all possible, upon official records, we will accept other forms of evidence or documentation where agency action has precluded the availability of official records which might reflect overtime. See Christine D. Taliaferro, supra.

Title 5 Requirements

Overtime under the Federal Employees Pay Act (5 U.S.C. § 5542), commonly referred to as "title 5" overtime, is payable to federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. Guards at Otis Air Force Base, B-198065, Oct. 6, 1981; Guards at Rocky Mountain Arsenal, B-199673, June 15, 1981.

Statute of Limitations

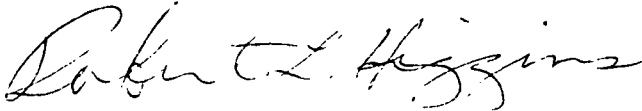
The Act of October 9, 1940, as amended, 31 U.S.C. § 3702(b)(1), provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years of the date it first accrued or be forever barred. Filing a claim with any other government agency does not satisfy the requirements of the Act. Frederick C. Welch, 62 Comp. Gen. 80 (1982); Nancy E. Howell, B-203344, Aug. 3, 1981. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. Frederick C. Welch and Nancy E. Howell, supra.

Although it may be that some of the civilian security guards at Seal Beach could qualify for retroactive overtime payment, your submission contains no evidence, or any basis in fact under the applicable laws explained above which would justify any authorization for payment by our Office at this time. In view of the above this letter should be shared with the civilian security guards at Seal Beach who have expressed an interest in formally pursuing a claim for overtime compensation.

You should also direct the attention of the guards to the above provisions of the statute of limitations.

If, after the guards have completed their reevaluation of the basis for their claims in view of the above information, they still believe that a basis exists to support a claim for retroactive overtime compensation, they may resubmit their request for decision through your office along with the evidence they will have developed in support of their claims.

We regret the delay in responding to your request.
Sincerely yours,

A handwritten signature in cursive script that reads "Robert L. Higgins".

Robert L. Higgins
Assistant General Counsel