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Sunny Peterson

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

PHM I



IN REPLY REFER TO: B-192225 (BRP)

OFFICE OF GENERAL COUNSEL

December 28, 1978

Ms. Kay Atchison
P. O. Box 6
Stewart, Nevada 89437

Dear Ms. Atchison:

Reference is made to your letter of April 24, 1978, with enclosures, addressed to the Director, Federal Personnel and Compensation Division (FPCD), of this Office, in which you request clarification of the Federal law concerning the subject of earning, using, and losing compensatory time. The Director, FPCD, has requested that we advise you of your rights under the law and regulations.

You state that you are employed as a Recreation Specialist, GS-9, by the Bureau of Indian Affairs, United States Department of the Interior, at the Stewart Indian School Agency, Stewart, Nevada. You report that you have been employed by the school since October 1971 and along with the Activities Director, you are responsible for all extracurricular activities that take place on the campus.

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Your Leave and Earnings Statement for the pay period ending April 22, 1978, shows that during that period you earned 15 hours of compensatory time, that you had accumulated 504 hours of compensatory time, and that you had 118 hours of annual leave in the use or lose category. You report that the Phoenix area underwent an audit by the Office of Audit and Investigation, Department of the Interior, and it was found that several employees at Stewart had accumulated an extensive amount of compensatory time because employees were being allowed to accumulate compensatory time from year to year. You state that you were not aware of the Federal regulation which purportedly requires that compensatory time be used within a year of the pay period in which it is earned. Also, you do not believe that anyone else at Stewart knew of the regulation.

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In a memorandum dated January 17, 1978, from the Superintendent^e to all school personnel, it was stated that any employee who failed to take his or her compensatory time off by December 31, 1978, would

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lose his or her rights to it and that such compensatory time would be removed from the records. Later, by memorandum dated May 24, 1978, addressed to you from the Superintendent, it was stated, in pertinent part, as follows:

"According to Chapter 630 44 BIAM Sub Chapter I. 4
Compensatory Time.

"Area Directors may grant employees up to six months to use compensatory leave earned when the circumstances warrant. However, compensatory time off should normally be taken within the same pay period following that in which overtime work was performed. If this cannot be done without detriment to the work, compensatory time off may be granted within six months time after overtime work was performed. If an employee fails to take it within the prescribed limit, he shall lose his rights both to compensatory time off and to overtime pay unless the failure is due to an exigency of the service beyond his control. They may be extended to twelve months for employees engaged in educational activities.

"The interpretation made by P. A. O. Personnel is that compensatory time earned is allowable for one year from the pay period in which it was earned. (Example: Compensatory time earned in pay period 1 1977 is good till pay period 1 1978) If the time is not used within this one year period it is subject to removal from the records."

The memorandum further stated that you had a total of 267 hours of usable compensatory time; 104 hours used during 1977-78 was chargeable to school year 1976-77; and that all other hours would be requested to be removed from the records. It was pointed out that the audit stressed that officials and employees at Stewart adhere to the regulations and remove all compensatory time from the records which had been earned more than 1 year earlier.

You explain that you have been allowed to accumulate compensatory time from year to year for the past 4 years. Since you are able to take off for long periods of time only in the summer and you also have annual leave which you must lose or use, you ask the following questions concerning your remaining 253 hours of compensatory time:

- "1. Do I just lose it like we are being told at Stewart?
- "2. Can I get paid for these hours that I have worked in earnest?
- "3. Can I take these hours off this summer without being docked annual leave or having to pay the money or time back to the government?
- "4. Do I have a choice as to whether I get paid for this time or take it off?"

In response to your questions, we point out initially that on the request of an employee whose rate of basic pay is below the maximum rate for GS-10, the head of an agency may grant the employee compensatory time off from his scheduled tour of duty instead of pay for irregular or occasional overtime work. 5 U.S.C. § 5543 (1970). Since your grade level is GS-9, you have the option to request compensatory time or pay for irregular or occasional work which you perform.

Section 5548 of title 5, United States Code, provides that the United States Civil Service Commission may prescribe regulations necessary for the administration of this subject area. The implementing regulation at 5 C.F.R. § 550.114 reads as follows:

"(a) At the request of an employee, the head of a department may grant him compensatory time off from his tour of duty instead of payment under § 550.113 for an equal amount of irregular or occasional overtime work.

"(b) The head of a department may provide that an employee whose rate of basic pay exceeds the maximum rate for GS-10 shall be paid for irregular or occasional overtime work with an equivalent amount of compensatory time off from his tour of duty instead of payment under § 550.113.

"(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time

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off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control."

Thus, the Bureau of Indian Affairs (BIA), Department of the Interior, may properly provide that BIA employees in grade GS-9 or below, who request compensatory time off instead of overtime pay, must take such leave within a prescribed period after the compensatory time has been earned or forfeit entitlement to take time off or to receive pay for the hours of compensatory time. Accordingly, if you requested compensatory time instead of overtime pay, it would appear that you would forfeit the leave if you did not use the leave and the failure to use such leave was not due to an exigency of the service beyond your control.

We also point out that you may have a right to overtime compensation under the Fair Labor Standards Amendments (FLSA) of 1974, Public Law 93-259, 88 Stat. 55, effective May 1, 1974. Such right would be affected by a determination as to whether you are an "exempt" or a "nonexempt" employee under the Act. Determinations in this area are based on instructions issued by the United States Civil Service Commission. The FLSA does not affect any overtime entitlement with respect to "exempt" employees. Therefore, if you, as a Recreation Specialist, GS-9, are exempt from the Act, your sole entitlement, if any, would be under title 5, as previously discussed. However, if you are a "nonexempt" employee under the FLSA, for overtime purposes and commencing on May 1, 1974, you would be covered by two laws. With respect to your case, Public Law 93-259 requires that a nonexempt Government employee who works more than 40 hours in a week shall receive "compensation" at a rate not less than 1-1/2 times the regular rate at which he is employed. No provision is made in the FLSA for the allowance of compensatory time off in lieu of overtime pay, as is provided under title 5, United States Code. Since after May 1, 1974, a nonexempt employee may not be granted compensatory time off for overtime work (unless the granting of such compensatory time off within the same workweek resulted in the total hours worked for that week amounting to less than 40 hours), if you are a nonexempt employee and you performed overtime work in excess of 40 hours a week under the FLSA, it would appear that you should be paid overtime compensation rather than being granted compensatory time off.

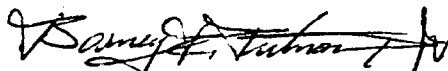
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In the event the 253 hours of compensatory time in question or other such compensatory time has been forfeited by your agency, you may file a claim with the BIA for overtime compensation in lieu of the compensatory time which has been forfeited. In this regard, we point out that 31 U.S.C. §§ 71a and 237 (1976) provide that any claim against the Government which is not received in the General Accounting Office within 6 years of the date such claim first accrued, is barred. The filing of a claim with your agency is not considered as being received in the General Accounting Office. Therefore, if you believe you are entitled to overtime pay or compensatory time for irregular overtime work, you may file a claim with the Claims Division of our Office for recording and transmittal to your agency for processing.

Enclosed you will find copies of several of our recent decisions-- 53 Comp. Gen. 264 (1973); B-183751, October 19, 1976; B-183751, October 3, 1975; and B-178715, May 13, 1975--for your use and information.

We hope that the foregoing information will be of assistance to you in this matter.

Sincerely yours,



Barney R. Putnam, Jr.
Attorney-Adviser

Enclosures