



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Mr. John F. Higgins
c/o Michael E. Goldman, Assistant Counsel
National Association of Internal
Revenue Employees
Suite 1101 - 1730 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Higgins:

We refer further to letter of June 18, 1973, wherein Mr. Michael E. Goldman, your designated representative in matters before our Office, set forth your claim for overtime pay while in a travel status and per diem during temporary duty incident to the floods caused by Hurricane Agnes. Mr. Goldman states that his letter constitutes an appeal of the decision by Mr. Alfred L. Winston, District Director, Philadelphia District, Internal Revenue Service (IRS), denying your request for overtime pay while in a travel status and per diem while assigned to temporary duty.

The questions presented arose after you were assigned temporarily on July 5, 1972, to the Office of Emergency Preparedness (OEP) due to the floods caused by Hurricane Agnes and told by your supervisor at IRS to report to the person in charge of the OEP office at the Macken School and perform such duties as directed during the hours designated by OEP.

With reference to the period July 5, 1972, to April 14, 1973, the letter states:

"* * * Mr. Higgins remained at the Macken School from July 5 through July 7, 1972. On July 5, 1972, Mr. Higgins left his home at 8:00 a.m. and returned at 9:00 p.m. On July 6, 1972, he departed from his home at 7:30 a.m. and returned at 9:00 p.m. and on July 7, 1972, he left at 7:30 a.m. and returned at 10:00 p.m. Mr. Higgins was required to travel 12 miles from his home to this temporary post of duty.

"On July 7, 1972, Mr. Higgins was directed to report to the OEP office located at the Bloomsburg State College campus. Mr. Higgins worked there until July 10, 1972. On July 8, 1972, Mr. Higgins departed his home at 6:30 a.m. and returned at 10:00 p.m.; on July 9, he departed at

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6:30 a.m. and returned at 10:00 p.m.; and on July 10, he departed from his home at 6:30 a.m. and returned at 8:30 p.m. During the course of his assignment at Bloomsberg, Mr. Higgins traveled 55 miles to his temporary POD which took 90 minutes.

"From July 11 through July 14, 1972, Mr. Higgins was assigned to Pittston, Pa. During this period Mr. Higgins departed his home at 8:00 a.m. and returned at 6:30 p.m.

"From July 15, through August 3, 1972, Mr. Higgins was directed to report to the Macken School. On July 15 through July 22, and July 24 through July 28, Mr. Higgins departed his home at 7:30 a.m. and returned at 6:30 p.m. On Sunday, July 23, he left his home at 7:30 a.m. and returned at 12:30 p.m. From July 29 through August 3, Mr. Higgins left his home at 7:30 a.m. and returned at 6:00 p.m.

"Mr. Higgins continued from August 4, 1972, through April 14, 1973, to work on Saturdays from 8:00 a.m. to 6:00 p.m. (Exhibit 3)."

Exhibit 3 to your claim shows the distance from your residence to your permanent duty station to be 11 miles with normal traveling time 20 to 30 minutes. Approximately the same distance and time relationship is shown for the temporary duty in question with the exception of the 4 days from July 7 through 10, 1972, when the distance from your home to your worksite is shown as 55 miles and the traveling time as 90 minutes.

Apparently you were directed by OEP to arrive at your temporary duty post at 8 a.m. and remain there until closing with the exception of the period July 11-14, 1972, when you were required to report at 8:30 a.m.

The issues raised in your claim are stated to be:

- "(1) Whether an employee who is assigned to a temporary duty station, is entitled to overtime compensation for the time spent in travel status to the temporary duty station [returning to residence each day].

"(2) Whether an employee who is assigned to a temporary duty station and must commute daily is entitled to partial per diem."

The authority for the payment of overtime compensation for time in a travel status away from the official duty station of an employee is contained in 5 U.S.C. 5542(b)(2)(B) which provides as follows:

"(b) For the purpose of this subchapter—

* * * * *

"(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless—

* * * * *

"(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

Subsection 6101(b)(2) of title 5, United States Code, provides that:

"(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee."

Mr. Goldman urges that your travel status resulted from an event which could not be scheduled or controlled administratively. In this connection the President, on June 23, 1972, declared that a major disaster existed in the State of Pennsylvania as a result of Hurricane Agnes.

We have construed the term "event" to include anything which necessitates an employee's travel. However, there must exist an immediate official necessity in connection with that event requiring the travel to be performed outside the employee's regular duty hours. Notwithstanding,

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an official necessity for an employee's travel, we have held that where the necessity is not so immediate as to preclude proper scheduling of travel, the time spent traveling does not qualify as hours of employment. 51 Comp. Gen. 727 (1972) and cases cited therein at page 732. Your duties in rendering assistance to persons in connection with the calculation and reporting of their losses to the Federal Government do not appear to be of such a nature as to have created an immediate official necessity for travel in connection with the uncontrollable event.

The term "could not be scheduled" contemplates more than the fact that administrative pressures make scheduling in accordance with 5 U.S.C. 6101(b)(2) difficult or impractical. 51 Comp. Gen. 727, supra. The administrative control over time in travel status away from official duty station is assumed to be the agency's whether the agency has sole control, or the control is achieved through a group of agencies. Federal Personnel Manual Supplement 920-2, Book 550, subchapter S1-3, paragraph b(2)(c)(iv).

With respect to travel from residence or headquarters to places at which regularly scheduled duties are performed we stated in 52 Comp. Gen. 446 (1973) at page 449:

"Public Law 90-206, approved December 16, 1967, in part, expanded the authority for payment of overtime by adding subsection (b)(2)(D)(iv). The Senate report on the legislation indicates that by that addition Congress intended, in part, to induce agency compliance with the provision of 5 U.S.C. 6101(b)(2) requiring the proper scheduling of travel and, in part, to provide overtime compensation for travel occasioned by emergencies or events beyond agency control in consideration for the imposition such travel makes upon employees' private lives. See page 31 of Senate Report No. 801 on H.R. 7797 wherein it is stated as follows:

'The committee has revised the provisions of the House bill in regard to travel time and overtime pay. The Senate amendment revises present law so that an employee in the classified service, under wage board pay systems, or in the postal field, service shall be paid for travel time outside of his regular work schedule if the travel involves

the performance of work while traveling (such as an ambulance attendant taking a patient to a hospital); is incident to travel that involves the performance of work while traveling (such as a postal employee riding in a truck to a destination to pick up another truck and drive it back to his original duty station); is carried out under arduous conditions; or results from an event which could not be scheduled or controlled administratively.'

'The committee believes that regulations to implement these provisions should take into account the provisions of section 16 of Public Law 89-301, which requires agencies to the maximum extent practicable to schedule travel within the regular work schedule. The committee is convinced that the heads of executive departments and agencies can do much more to prevent the abuse of an employee's own time.'

* * * * *

"Where an employee's regularly scheduled duties involve assignments to which he commutes daily from his headquarters or residence, we do not regard his travel from home and back to perform those regularly scheduled duties as an imposition upon his private life significantly different than the travel required of an employee in reporting to his permanent duty station. For this reason we do not regard Mr. Gamble's travel as overtime hours of work within the meaning of 5 U.S.C. 5542(b)(2). Moreover, as indicated in our decision of June 19, 1972, [B-175608, copy enclosed] such travel was subject to control (scheduling) even though the event giving rise thereto resulted from an event which was not controllable. 50 Comp. Gen. 674 (1971)."

On the facts of your case there appears to be no basis for payment of overtime compensation under 5 U.S.C. 5542(b)(2)(B), the controlling provision of law.

With reference to your entitlement to partial per diem while assigned to OEP, Mr. Goldman refers to B-177419, March 8, 1973. Mr. Goldman's letter and B-177419 set forth the applicable regulations which include

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subsection 6.6d(1) of the Standardized Government Travel Regulations which provides as follows:

"d. Computation of basic entitlement. (1) Travel of 24 hours or less. For continuous travel of 24 hours or less, the travel period will be regarded as commencing with the beginning of the travel and ending with its completion, and for each 6-hour portion of the period, or fraction of such portion, one-fourth of the per diem rate for a calendar day will be allowed; Provided, That no per diem will be allowed when the travel period is 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6:00 a.m. or terminates after 8:00 p.m. (The proviso does not apply in the case of travel incident to a change of official station)."

It appears that IRS has implemented this section in section 13 of its Manual Supplement 17G-239 which is quoted by Mr. Goldman as follows:

"Section 13. Rates of Per Diem

".01 Rates of per diem in lieu of subsistence expenses for travel within the limits of the continental United States are prescribed as follows:

"1. When absence from post of duty is 24 hours or less and a night's lodging is not required, the per diem rate shall be \$10. However, for travel on temporary duty * * * per diem is not allowable for a travel period wholly within the same calendar day unless it is more than 10 hours, or is 6 hours or more and begins before 6 a.m. or ends after 8 p.m."

Mr. Goldman states that the above-quoted regulations presume that an employee who is absent from his official post of duty for more than 10 hours, in travel status, will incur additional expenses. He urges that since IRS has not issued specific regulations limiting reimbursement to additional expenses in fact incurred, it has exercised its discretion in favor of payment.

We do not agree. Again referring to B-177419, supra, we stated:

"It is Mr. Monte's contention that the agency regulation requires payment of a per diem allowance where the period of travel exceeds 10 hours, notwithstanding that an employee incurs no additional expenses by reason of his temporary duty assignment. On the other hand, it is your understanding that payment of per diem is not intended where no additional expenses are incurred as the result of an employee's temporary duty assignment, notwithstanding the length of the travel period involved.

"The effect of subsection 6.6d(1), supra, is to preclude payment of per diem for travel periods of 10 hours or less during the same calendar day, except when the travel period is 6 hours or more and begins before 6 a.m. or terminates after 8 p.m., and to permit payment of per diem where not so precluded. See 38 Comp. Gen. 511 (1959); 41 id. 209 (1961). Cf. B-170291, October 21, 1970, copy enclosed. Where per diem is authorized or approved, that subsection has the further effect of creating a presumption that at least some of those expenses for which per diem is authorized are incurred where an employee's travel exceeds 10 hours or where the period of travel exceeds 6 hours and commences before 6 a.m. or terminates after 8 p.m. and that one quarter of the daily per diem rate for each 6 hours involved is a fair rate of reimbursement.

"We point out, however, that neither section 6.6d(1) nor subsection 13.01, above, diminishes an agency's discretion in regard to the determination of whether a per diem allowance is to be authorized or approved in a particular case. That discretion is to be exercised in accordance with the guidelines set forth in section 6.3, Standardized Government Travel Regulations, which provides in pertinent part as follows:

'6.3 Agency responsibility for prescribing individual rates. a. General. It is the responsibility of each department and agency to authorize only such per diem allowances as are justified by the circumstances affecting

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the travel. Care should be exercised to prevent fixing per diem rates in excess of those required to meet the necessary authorized subsistence expenses.'

"Thus we have held that an agency may properly refuse to authorize or approve per diem for assignments, notwithstanding that the assignments may be of greater than 10-hour duration. See B-176477, February 1, 1973, * * * which involved an agency regulation which provided that per diem is to be authorized only to the extent that additional expenses are incurred in circumstances involving temporary duty assignments at nearby places outside the permanent duty station--even though such duty may be of greater than 10-hour duration."

In the absence of an agency determination to authorize or approve per diem under the circumstances in your case we see no basis for reimbursement therefor.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States