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

B-170264

December 21, 1973

Mr. Alexander P. Butterfield
Administrator
Federal Aviation Administration
Department of Transportation

Dear Mr. Butterfield:

We refer to the October 1, 1973, letter from your Chief, Financial Systems Division, reference AAA 400, and to previous letters from your Accounting Programs Division dated May 16, 1972, June 9, 1972, and February 7, 1973, reference AMS 430, regarding the claims of Messrs. Richard N. Longbrake, Clyde F. Mccerve and Delmar M. Black for overtime compensation for time alleged to have been spent in a standby status at the Federal Aviation Administration's (FAA) Boise Cascade Facility.

By memorandum of this date, for the reasons set forth below, we have directed our Transportation and Claims Division to pay the claims of those three individuals upon the basis of the accounting information provided as attachments to the letters from the Accounting Programs Division.

The correspondence cited above indicates that there is some misconception as to the legal basis for payment of the three claims presently before this Office as well as the previously settled claims of Mr. Olin B. Cross and other employees at the FAA's Pleasants Peak facility. By Settlement Certificate dated November 22, 1971, Mr. Cross was paid the sum of $1,614.72 in satisfaction of his claim for overtime compensation for time spent in a standby status at the Pleasants Peak facility during the period from December 3, 1961, through March 25, 1965. That settlement was legally predicated upon the authority of 5 U.S.C. 5542 governing compensation for overtime work inasmuch as pertinent regulations together with information received from the FAA substantiated the claimant's contention that a minimum of two men were required to remain on site at all times.

Correspondence that we have received in connection with adjudication of the claims of Messrs. Longbrake, Mcserve and Black indicates that FAA continues to regard time spent by those employees at the Boise Cascade Facility, as well as by

[Claim for Overtime Compensation While in Standby Status] ~~-77357~~ 092012

other employees similarly situated, as noncompensable notwithstanding that they too were required by the FAA to remain at their stations during nonduty hours. As a basis for that position, the October 1, 1973, letter from your Chief, Accounting Programs Division states:

> "The FAA Western Region has determined that the employees' activities were not substantially restricted nor their whereabouts narrowly limited in that (1) they were not required to perform work during their off-duty hours, and (2) their off-duty hours were spent predominantly for the employee's benefit rather than the employer's. In addition, the employees were aware of the then existing requirements of their employment when they were selected for these particular positions."

In regard to the argument that the employees were not required to perform actual work during nonduty hours, it is well established that time spent by an employee in a standby status at his station is compensable as overtime hours of work under either section 5542 or section 5545 of title 5 of the United States Code. Section 5545 clearly provides in subsection (c)(1) that time spent by an employee in a "standby status rather than performing work" may be compensated thereunder on an annual basis "instead of premium pay provided by other provisions of this subchapter". The reference therein to "other provisions" is to the regular overtime provision contained at 5 U.S.C. 5542.

In Farley v. United States, 131 Ct. Cl. 776 (1955) the Court of Claims held that a correctional officer required to remain overnight at an assigned cottage, during which time she was subject to call and responsible for the care of inmates, was entitled to overtime compensation under the Federal Employees Pay Act of 1945, as amended, now codified in pertinent part at 5 U.S.C. 5542 and 5545. Therein the Court further held that an agreement to work overtime without compensation cannot be enforced contrary to the provisions of a statute clearly providing overtime compensation for work in excess of 40 hours per week. See also England et al. v. United States, 133 Ct. Cl. 768 (1956), and Dotling v. United States, 193 Ct. Cl. 125 (1970). Under the above-cited authorities an employee who is required to remain for a 24-hour period at his duty station in a standby status is entitled

on the basis of the two-thirds rule to compensation for 16 of those hours. Under the two-thirds rule time spent sleeping or eating, during which no substantial labor is performed, is not compensable. Gaetke v. United States, 136 Ct. Cl. 756 (1956), Armstrong v. United States, 144 Ct. Cl. 659 (1959), and Collins v. United States, 141 Ct. Cl. 573 (1958).

The argument that the employees' time during nonduty hours was spent predominantly for their own rather than FAA's benefit, as well as the cited test of whether the employees' activities were substantially restricted or their whereabouts narrowly limited is not here relevant. That argument, as will be discussed below, relates to standby duty at home rather than at the employee's duty station.

The test of whether an employee's off duty hours are spent predominantly for his own or his employer's benefit is set forth in Armour and Co. v. Wantock, 323 U.S. 126 (1944). There, in interpreting the Fair Labor Standards Act, the Supreme Court stated:

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

By subsequently enacted statute, specifically the Federal Employees Pay Act of 1945, as amended, now codified at 5 U.S.C. 5542 and 5545, Congress in effect defined the situation in which an employee is required to remain at his duty station as one in which an employee's time is spent predominantly for his employer's benefit. Subsection 5545(c) provides in part as follows:

"(c) The head of an agency, with the approval of the Civil Service Commission, may provide that--

"(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors; or * * *."

As indicated by our previous discussion, we regard the above definition of standby duty as equally controlling for interpretation of 5 U.S.C. 5542(a) governing regular overtime.

In defining the words "at or within the confines of his station" used in 5 U.S.C. 5545(c)(1), subsection 550.143(b) of title 5 of the Code of Federal Regulations provides:

"(b) The words 'at, or within the confines of, his station', in § 550.141 mean one of the following:

"(1) At an employee's regular duty station.

"(2) In quarters provided by an agency, which are not the employee's ordinary living quarters, and which are specifically provided for use of personnel

required to stand by in readiness to perform actual work when the need arises or when called.

"(3) In an employee's living quarters, when designated by the agency as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when an employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his tour of duty but may leave his quarters provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required."

The cases at haud fall squarely within the purview of subparagraphs (b)(1) or (b)(2) above and thus the test of whether an employee's whereabouts are narrowly limited and his activities substantially restricted set forth at subparagraph (b)(3) is inapplicable. The latter test as well as the test of whether an employee's off duty hours are spent predominantly for his own or his employer's benefit are for consideration in cases where the employee is required by his employer to remain in his living quarters holding himself in a state of readiness. See Rapp v. United States, 167 Ct. Cl. 852 (1964), Moss v. United States, 173 Ct. Cl. 1169 (1965), and 52 Comp. Gen. 587 (1973). While an employee who is "on call" at home may in fact be found to have spent his time predominantly for his own benefit, Congress has made the determination, reflected by enactment of 5 U.S.C. 5542 and 5545, that where, as in the instant cases, a Federal employee is required to remain at his duty station and away from his home his time is necessarily spent for the benefit of his employer.

The only remaining legal issue presented in these cases is whether, in accordance with the requirement contained at 5 U.S.C. 5542, the standby duty was "officially ordered or approved". The administrative report dated June 9, 1972, states that "Standby duty, as that term is used in 5 U.S.C. 5545(c), has never been authorized by the Western Region". Yet, the

supplemental report furnished by letter of October 1, 1973, states that "It is FAA policy to have electronics technicians at the Cascade ARSR, either by a technician on duty, or on-call during nonduty hours." Moreover, in reference to that policy, it is reported that "the employees were aware of the then existing requirements of their employment when they were selected for these particular positions."

Notwithstanding that overtime compensation may not have been formally authorized, the FAA requirement that duty be performed appears clearly to meet the test iterated by the Court of Claims in Baylor et al. v. United States, 198 Ct. Cls. 331 (1972). There the Court stated:

> "* * * This case is important in that it illustrates the two extremes; that is, if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes 'officially ordered or approved' but, at the other extreme, if there is only a 'tacit expectation' that overtime is to be performed, this does not constitute official order or approval.
>
> "In between 'tacit expectation' and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as 'more than tacit expectation.' Where the facts show that there is more than only a 'tacit expectation' that overtime be performed, such overtime has been found to be compensable as having been 'officially ordered or approved', even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been 'induced' by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been 'officially ordered or approved' and therefore compensable. * * *"

For the foregoing reasons Messrs. Longbrake, Meserve and Black, as well as other employees with similar claims, are entitled to payment of overtime compensation. We hope that the above discussion will help to clarify the issue of their entitlement.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States