

**DECISION**

1845161 HAZARIAN PLM2  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-199673

DATE: June 15, 1981

MATTER OF: Guards at Rocky Mountain Arsenal - Overtime

- DIGEST:** 1. Guards at Rocky Mountain Arsenal claim overtime compensation for time spent in drawing out weapons and equipment. Where record does not establish that duties required more than 10 minutes to perform, the claim may not be allowed under 5 U.S.C. § 5542. Preshift duties that take 10 minutes or less to perform may be disregarded as de minimis.
2. Guards claim they daily performed 15 minutes of preshift duties incident to drawing out weapons and equipment. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, part of claim may be allowed on basis that the record creates a just and reasonable inference that security guards reported to work an average of 7 1/2 minutes prior to guard mount.

This matter is in response to a request for an advance decision by Mr. S. Brink, Finance and Accounting Officer of the Department of the Army, Rocky Mountain Arsenal (Arsenal), as to whether 74 former and present security guards at the Arsenal, are entitled to overtime compensation for their preshift activities.

The guards in question claim entitlement to overtime compensation incident to their alleged performance of 15 minutes of preshift duties for which they have not been compensated. The claims of 65 guards were first received by our Claims Division on April 16, 1979, the claims of 7 others on June 20, 1979, and the claims of 2 others on November 14, 1979, and February 12, 1980. Section 71a of title 31, United States Code, provides that every claim or demand cognizable by the General Accounting Office shall be forever barred unless received in this Office within 6 years after the date the claim accrued. We have held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as the date the services were rendered

[Claim for Overtime Compensation]

017244

B-199673

and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, those portions of the individual claims which accrued prior to 6 years from the date the claims were first received in this Office are barred from consideration.

The administrative report states that workshifts for guards commenced at 2400, 0800, and 1600 hours each day and that the guards were required to assemble for "guard mount" 15 minutes prior to the beginning of their workshift at which time roll call was taken and daily orders and assignments were published. The guards were paid overtime compensation for the 15-minute period spent at guard mount as well as for the 15-minute period at the end of the workshift during which they were required to turn in their weapons and equipment. The guards claim compensation for an additional 15 minutes overtime based upon their allegations that they were required to report to work 15 minutes prior to guard mount in order to check out weapons, ammunition, and equipment from the arms room. The agency report states that the arms room was open for weapons issuance at least 15 minutes prior to guard mount.

The Army advises that prior to August 7, 1977, there was no regulation, special order, or other written instruction which set forth any required reporting time for guards prior to guard mount. However, section 2-3 of the Security Police Handbook for the Rocky Mountain Arsenal provided in pertinent part that each guard would be in formation and ready for duty at the beginning of guard mount and that at that time each guard would have in his possession his weapon, ammunition and all other prescribed items of equipment. Effective August 7, 1977, the Chief, Security Office, established a new policy where guard personnel would report for duty 15 minutes prior to the beginning of each workshift to draw weapons and equipment and stand guard mount. This new written policy stated that no one would be required to report prior to this 15-minute period for which they continued to receive overtime compensation. Thus, the claims for overtime pay end on August 7, 1977.

Section 4 of the Security Police Handbook at the Arsenal provided in part that side arms were to be drawn from and returned to the arms room and that at no time would the weapon be removed from the arsenal when a guard was not on official duty.

An agency investigating officer found that for the period prior to August 7, 1977, some of the guard personnel arrived at the arms room 15 minutes prior to the beginning of guard mount but that the majority of guards arrived within the 10-minute period immediately prior to guard mount. This officer found that the guards were not issued equipment in any established order and that the Arsenal did not keep any log or record as to when each guard reported to the arms room. Based on its investigation the agency reports that it took up to 2 minutes for each guard to be issued his arms and equipment and that it took 10 to 15 minutes for the entire shift of 15 to 20 guards to be issued weapons and equipment.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. for employees who are not exempt from the FLSA. An employee's entitlement to overtime compensation may be based on title 5, the FLSA, or both.

Section 5542 of title 5, United States Code (1976) provides in pertinent part as follows:

"(a) \* \* \* hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or \* \* \* in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for \* \* \*"

Only that overtime which is ordered or approved in writing or affirmatively induced by an official having authority to order or approve overtime is compensable overtime. See Winton Lee Slade B-186013, September 13, 1976, and Baylor v. United States, 198 Ct. Cl. 331 at 359, 360 (1972).

The controlling definition of what constitutes "officially ordered or approved" overtime is found in Baylor v. United States, supra, where the court states at 359:

"\* \* \* 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 actual possibilities, which is best characterized as 'more than a 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.\* \* \*"

The agency report states that the preliminary duties performed by the guards occurred with the knowledge, if not the inducement, of either or both the Provost Marshall and the Chief of Security, who were the agency officials with the authority to order or approve overtime. In view of the administrative finding regarding the extent of the knowledge of agency officials who were authorized to order or approve overtime and since the Security Police Handbook

B-199673

expressly provided that each guard would be in formation and ready for duty with his weapons and equipment at the beginning of guard mount, we find that the guards' performance of the preshift duties was induced by proper authority and thus "ordered or approved" within the meaning of 5 U.S.C. § 5542. We note that the agency did not find that the guards were induced to report 15 minutes prior to guard mount, or otherwise in accordance with any particular schedule.

Pursuant to the provisions of 4 C.F.R. § 31.7 we decide claims on the basis of the written record and the claimant must bear the burden of establishing the liability of the Government. Although the claimants state that they daily reported for duty 15 minutes prior to guard mount in order to receive their weapons and equipment, the record does not establish that they regularly reported or were required to report 15 minutes early or that the duties they were expected to perform prior to guard mount took more than a few minutes per day. In view of the agency's finding that it took at most 2 minutes for each guard to draw his arms and equipment and in the absence of evidence showing the daily reporting time for each guard, we can only conclude that it has been established that each guard spent 2 minutes per day performing his preshift duties. The fact that it took 10 to 15 minutes to issue weapons and equipment for each shift does not establish the reporting time of each guard. The mere assertion that particular amounts of overtime were worked is not sufficient evidence to support a claim for compensation under title 5, United States Code. See Lawrence J. McCarren, B-181632, February 12, 1975.

The Court in Baylor held that preshift "hours of work" had to exceed 10 minutes per day or such work could be disregarded as de minimis, Baylor at 365. This de minimis rule has been uniformly applied in decisions of this Office. See 53 Comp. Gen. 489 (1974). Accordingly, the claim for overtime compensation may not be allowed pursuant to 5 U.S.C. § 5542 as the claimants have not established that they performed more than 10 minutes of uncompensated preshift duties per day.

B-199673

The Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to certain Federal employees effective May 1, 1974. Under 29 U.S.C. § 204(f) the Office of Personnel Management (OPM) is authorized to administer the provisions of the FLSA. Under the FLSA a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week which management "suffers or permits" to be performed. See para. 3c of Federal Personnel Manual (FPM) Letter No. 551-1, May 15, 1974.

In view of OPM's authority to administer the FLSA with respect to Federal employees we requested and received OPM's views on these claims.

In its report dated February 10, 1981, the Rocky Mountain Region of the OPM advised that from the record it appears that the Arsenal guards were required to at least be on the Arsenal's premises prior to guard mount in order to check out weapons and equipment and that such time is considered "hours worked" under the FLSA. In support of this determination the OPM cites para. B of Attachment 4 to FPM letter 551-1, supra, which provides in pertinent part that in general "hours worked" includes all time that an employee is required to be on duty or on the agency's premises or at a prescribed workplace.

The OPM has also advised that under the FLSA it is the employer's responsibility to keep accurate records as to the hours worked by an employee. The OPM states that since the Arsenal did not keep records of the time spent by the guards in performing preshift duties, the burden of proof is on the agency to show why the claims are not warranted. With the following qualification, we concur with this determination.

The FLSA requires employers to "make, keep and preserve such records of persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." See 29 U.S.C. § 211(c). The courts have consistently applied a special standard of proof for FLSA cases in which the employer has failed to meet his statutory duty to keep accurate records. Under such circumstances, it is sufficient for the employee to prove that he has in fact performed

overtime work for which he was not compensated and to produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-688 (1946), and Hodgson v. Humphries, 454 F. 2d 1279, 1283 (1972).

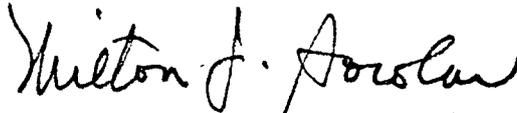
We are unable to find that the plaintiffs have supported their claims for overtime for preshift work in the amount of 15 minutes. There has been no showing made that any or all of the claimants reported 15 minutes early or otherwise in accordance with any consistent schedule. The record does not otherwise establish a just and reasonable inference that any or all guards reported for duty 15 minutes prior to guard mount on a daily basis. However, the agency found that it took up to 15 minutes for each entire shift of guards to be issued their weapons and equipment. Based on this and the agency's additional finding that most guards reported within the 10-minute period immediately prior to guard mount we believe that the record creates a just and reasonable inference that the average reporting time of each guard was 7-1/2 minutes prior to the beginning of guard mount. This inference has not been negated by the agency.

Unlike overtime entitlement under title 5, United States Code, the de minimis doctrine is not applicable to compensation under the FLSA for regularly scheduled overtime work. See paragraph A.2, Attachment 2, to FPM Letter 551-6, June 12, 1975. Accordingly, those guards who occupied positions designated as nonexempt under the FLSA are entitled to additional compensation based on preshift work of an additional 7-1/2 minutes from May 1, 1974, to August 6, 1977. As stated above, under FLSA, only those hours in excess of a 40-hour workweek, rather than an 8-hour workday, are compensable as overtime. 45 Fed. Reg. 85,665 (1980) (to be codified

B-199673

in 5 C.F.R. § 551.501(a)). Additionally, for FLSA purposes, paid absences, such as leave or holiday, are not considered hours worked in determining whether the employee has worked more than 40 hours in a workweek. 45 Fed. Reg. 85,664 (1980) (to be codified in 5 C.F.R. § 551.401(b)).

The employees may be allowed payment for overtime compensation for 37-1/2 minutes for each workweek they actually worked a full 5 days to the extent set forth above.

A handwritten signature in cursive script, reading "Milton J. Aroslan".

Acting Comptroller General  
of the United States