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PLM II

DECISION



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

FILE: B-195155

DATE: February 7, 1980

MATTER OF: Marion D. Murray

DIGEST: Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584.

*OLG 80
209* — Mr. Arthur H. Nies, Acting Deputy Director, Administrative Management, Science and Education Administration, United States Department of Agriculture, requests a determination as to whether Mr. Marion D. Murray, an Agricultural Research Technician with the Department's Agricultural Research Service in Columbia, Missouri, is entitled to the payment of overtime compensation for hours of work performed during the period from 1966 to 1976. The submission involves a review of the determination by the United States Civil Service Commission (Commission) (now the Office of Personnel Management), that Mr. Murray is entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. (1976). The agency questions the propriety of the Commission's findings. *AGC 00666*

DLG 00925

The record shows that from 1966 to 1976, Mr. Murray was called upon by his immediate supervisor to perform overtime work, as necessary, for approximately 8 weeks each year during the summer growing season. Mr. Murray and his immediate supervisors Drs. Coe and Doyle, agreed that Mr. Murray would be allowed an hour off as compensatory time for each hour of overtime.

The agency states that neither Dr. Coe nor Dr. Doyle had the authority to order or approve overtime work during the periods in question. We have been informally advised that the administrative officers vested with the authority to order or

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approve hours of overtime work, were not aware of the overtime work by Mr. Murray. Neither the hours of overtime worked by Mr. Murray nor the hours of compensatory time used were recorded in his official Time and Attendance Reports until after 1976.

Mr. Murray claims overtime compensation on the basis that he was not advised that he could have received overtime compensation, rather than compensatory time, for each hour of overtime.

Sections 71a and 237 of title 31 of the United States Code (1976) requires that all claims cognizable by the General Accounting Office be received in this Office within 6 years after the date such claim first accrued or be forever barred. Mr. Murray's claim was received by our Office on January 3, 1978, when the Claims Division received correspondence from Mr. Murray concerning his claim. Thus, that portion of Mr. Murray's claim for overtime compensation prior to January 3, 1972, may not be considered.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the FLSA for nonexempt employees. 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 has been officially ordered or approved in writing or induced by an official having authority to order or approve overtime work is compensable overtime. Joan J. Shapira, B-188023, July 1, 1977. Since Mr. Murray's overtime was not ordered, approved, or induced by proper authority there is no entitlement to overtime compensation under 5542. Mr. Murray would not be entitled to compensatory time under 5 U.S.C. 5543 (1976) since compensatory time may be granted only where the employee would be entitled to overtime compensation. Federal Personnel Manual, Chapter 550, Subchapter 1-3d, 5 C.F.R. 550.114 (1978) and 56 Comp. Gen. 219 at 222, 223 (1977).

The Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to certain Federal employees. Under 29 U.S.C. 504(f) the Civil Service Commission (Commission) (now the Office of Personnel Management) 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 the Federal Personnel Manual (FPM) Letter No. 551-1, May 15, 1974. There is no entitlement to compensatory time off in lieu of overtime pay under the FLSA. See para. A1 of Attachment 1 to Federal Personnel Manual Letter 551-6, June 12, 1975.

The United States Civil Service Commission, St. Louis Region, on February 23, 1978, determined that Mr. Murray, a nonexempt employee under the FLSA, was entitled to overtime compensation in the amount of \$284.43 for overtime hours of work performed during the period July 1, 1976, to August 31, 1976.

The Commission considered that portion of Mr. Murray's claim dating from December 29, 1975, two years prior to the date it accepted his complaint, since court action to enforce FLSA payments must be brought within 2 years of the date the cause of action accrues. Subsequent to the Commission's determination regarding Mr. Murray's claim our Office held, in concurrence with the views of the Commission, that the applicable statute of limitations for the administrative consideration of FLSA claims filed by Federal employees is the 6-year statute of limitations under 31 U.S.C. 71a and 237 (1976). 57 Comp. Gen. 441 (1978). Accordingly, Mr. Murray may submit his claim to the Office of Personnel Management for its determination as to whether he is entitled to the payment of any additional overtime under the FLSA for the period retroactive to the effective date of the act's applicability to Federal employees, May 1, 1974.

The Commission's determination was based on the finding that the overtime was "suffered or permitted" as "management officials knew or had reason to believe that the work was performed."

The Commission determined that it was agreed that the 91-3/4 overtime hours which Mr. Murray worked during 1977 was representative of the number of overtime hours performed in the prior years. Thus, he was entitled to overtime compensation for 91-3/4 hours of work during the period July 1, 1976, to August 31, 1976.

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Since he took compensatory time off on a one for one basis, the Commission offset the amount of overtime compensation he should have received for 91-3/4 hours of work by the value of the compensatory time. The Commission held that Mr. Murray was entitled to \$284.43.

The agency questions the propriety of the award since Mr. Murray received compensatory time.

Since Mr. Murray is not entitled to compensatory time under title 5 or under the FLSA in lieu of overtime pay, the Commission properly found that the payment of compensatory time did not nullify his entitlement to overtime compensation. See para. Alc of Attachment 1 to FPM Letter 551-6. Mr. Murray may receive payment under the FLSA for those hours of overtime which the Commission determined he was suffered or permitted to work.

The payment of compensatory time, however, was an erroneous payment. The waiver act, 5 U.S.C. 5584 (1976) provides that an erroneous payment may be waived where collection of the overpayment would be against equity and good conscience and not in the best interest of the United States. For those hours of work for which compensatory time was erroneously granted and for which overtime compensation is found due under the FLSA, the overtime payable under the FLSA would be greater than the value of the compensatory time. In such a situation, collection of the value of the compensatory time by way of offset would neither be against equity or good conscience nor in the best interest of the United States. See B-168323, December 22, 1969, see also 53 Comp. Gen. 264, 269 (1973). The Commission in determining Mr. Murray's overtime entitlement from July 1, 1976, to August 31, 1976, applied such an offset.

Those erroneous payments of compensatory time for hours of work which are not compensable under the FLSA, may be considered for waiver as there is no indication of fraud, misrepresentation, or lack of good faith on the part of Mr. Murray.

Mr. Murray's claim may be settled administratively in accordance with the above.



For the Comptroller General
of the United States