

DECISION

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

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Acct

FILE: B-151168

DATE: MAY 25 1976 U 98919

MATTER OF: **Claims for overtime performed during
Sky Marshal Program**

DIGEST:

1. Secret Service agents temporarily assigned to Sky Marshal Program claim time and one-half overtime for "inflight" duty beyond normal duty hours. Airlines, rather than employing agency, prepared flight schedules for agents 1 to 4 weeks in advance. Since overtime was scheduled in advance and recurred at frequent intervals it may be considered "regularly scheduled" and thus compensable at time and one-half rates under 5 U. S. C. §5542 (Supp. IV, 1974).
2. Secret Service agent supervisors temporarily assigned to Sky Marshal Program were scheduled to 12-hour duty shift Monday through Friday and 8 1/2-hour duty shift on weekends. Overtime was clearly scheduled in advance and recurred at frequent intervals. Thus, it may be considered "regularly scheduled" and compensable at time and one-half rates under 5 U. S. C. §5542 (Supp. IV, 1974).

This action is in response to a request dated September 3, 1975, for an advance decision from Mr. Duncan Calcote, an authorized certifying officer of the United States Secret Service, Department of the Treasury, reference 250.3, x 600.0, whether he may pay the claims of various Secret Service agents for overtime performed during the Sky Marshal Project on the basis of the decision in Rothgeb et al. v. Staats et al., Civil No. 4082 (S.D. Ohio 1974).

The record indicates that beginning September 1970 Secret Service agents as well as agents from the Internal Revenue Service (IRS) and the Bureau of Customs were assigned to serve as security guards or "sky marshals" in the Federal program to deter airline hijackings. Secret Service supervisors were scheduled to work from 8:30 a.m. to 8:30 p.m., Monday through Friday, and from 8:30 a.m. to 5:30 p.m. Saturday and Sunday, and were required to be on stand-by status the remainder of the time. All non-supervisory Secret Service agents were scheduled to be on stand-by status from 8:30 a.m. to 4 p.m., and were required to be available for assignment the remainder of the day.

B-151168

With regard to the assignment of non-supervisory agents to individual flights, the authorized certifying officer states further in his submission:

"Initially, airlines were giving advance schedules consisting of one or two flight patterns, requiring up to two weeks to complete. However, starting November 1, 1970, they were assigning several flight patterns in advance, usually at the beginning of the month, requiring 30 days to complete.

"The flight patterns were keyed to airline flight schedules. The agents could determine in advance the scheduled departure and arrival times and dates for the flights to which he had been assigned, as well as the length of any layover period in the foreign country destination."

It appears that at the outset of this Sky Marshal Program the three Department of the Treasury components (IRS, Secret Service, and Bureau of Customs) determined that any overtime work would be considered "administratively uncontrollable overtime" for which premium pay would be authorized under the provisions of 5 U. S. C. §5545(c)(2) (1970). However, on the basis of an IRS memorandum dated October 9, 1970, IRS agents assigned to Sky Marshal duty were authorized and paid (retroactively to September 1970) time and one-half overtime compensation as "regularly scheduled overtime" under the provisions of 5 U. S. C. §5542 (Supp. IV, 1974). This time and one-half overtime was to be paid for "inflight" time beyond the agent's normal duty hours as well as for "inflight" time when the agent was directed to fly while in "stand-by" status. These payments were made to IRS agents until discontinued on November 1, 1970, but Secret Service agents never received such compensation while assigned to the Sky Marshal Project.

Several IRS agents filed a class action lawsuit for payment of time and one-half overtime for duty performed from November 1970 to February 1971. In our report to the Department of Justice on this lawsuit, B-151168, August 28, 1972, we referred to our decision in 48 Comp. Gen. 334 (1968) in which we defined regularly scheduled work as that authorized in advance and scheduled to recur on successive days or after specified intervals. We stated further that no definite schedule of overtime was prepared at the time the employees were assigned to sky marshal duties, that

B-151168

overtime was not worked on successive days except where a flight began one day and extended into the next, and that the amount of overtime varied from day to day without a discernible pattern. Therefore, we stated that since no definite schedule of overtime work was prepared by Department of the Treasury officials for sky marshals, we did not consider the overtime work to be "regularly scheduled" as defined in 48 id. 334, supra.

The class action lawsuit, Rothgeb et al. v. Staats et al., Civil No. 4082, was filed in the United States District Court for the Southern District of Ohio. The court, in its Findings of Fact and Conclusions of Law issued February 23, 1973, found that the IRS agents had been told in preliminary briefings that they would be paid time and one-half overtime compensation for inflight time outside their normal tour of duty. The court stated further that due to the emergency nature of the project and the suddenness with which it was begun the Department of the Treasury "relied upon and utilized the services of the crew schedulers for the airlines to prepare advance flight schedules for the sky marshals", and that, therefore, the agency had "in fact and in law" ratified or adopted the schedules prepared by the airlines. The court found that while agents were initially given schedules with 1 to 2 flight patterns covering up to 2 weeks, after November 1, 1970, agents were assigned to several flight patterns in advance covering up to 1 month at a time.

The court stated as a conclusion of law that the IRS agents were entitled to three types of compensation: regular pay for work performed during their normal tour of duty; premium pay under 5 U. S. C. § 5545 (c)(2) for administratively uncontrollable overtime for "stand-by" duty outside their normal duty hours and for such duty as reporting to the airport 2 hours before scheduled departure for briefings and surveillance; and time and one-half compensation under 5 U. S. C. § 5542 for inflight time beyond the agent's regular tour of duty. It appears that the major issue in dispute in this lawsuit was the agent's entitlement to time and one-half compensation for regularly scheduled overtime.

The court defined regularly scheduled overtime as duty which an employee is ordered to perform extending beyond his normal tour of duty and which is characterized by the fact that the duration of performance is determinable and ordered in advance by the agent's superior. The court then looked to the fact that the schedules for the agents were prepared in advance by the airlines and concluded that inflight overtime was clearly "scheduled" since these were regularly scheduled flights operated by regularly scheduled airlines. The court took note of the definition of "regularly scheduled" work

B-151168

by this Office and commented that it was not clear or precise nor binding on the court. However, the court stated that the overtime performed by the IRS agents met the definition of this Office in that it was ordered in advance, regularly scheduled, and recurring at specified intervals. As an alternative approach the court looked to the provisions of 5 U. S. C. §5545(c)(1) as authority for granting premium pay for standby duty and overtime compensation for irregular, unscheduled overtime duty in excess of the agent's regularly scheduled workweek.

The United States filed a notice of appeal but later withdrew the notice and did not appeal the decisions on its merits. This Office directed payment to the members of the class who had not withdrawn in accordance with the decision of the court. In addition, when presented with the claims of the remaining IRS agents who were not members of the class in the Rothgeb case, our Office directed that they be paid in accordance with the court's determination.

The question presented in this case involves a request for an advance decision regarding the claims of various Secret Service agents for overtime compensation for work performed during the Sky Marshal project. The authority for the payment of overtime compensation and premium pay is contained in Subchapter V of Chapter 55, title 5, United States Code. Section 5542 provides, in pertinent part as follows:

"Overtime rates; computation

" (a) For full-time, part-time and intermittent tours of duty, 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, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

B-151168

"(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay."

Section 5545 of title 5, United States Code, provides, in pertinent part that:

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

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" (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, 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 frequency and duration of irregular unscheduled overtime duty required in the position."

When a determination is made, as was made in this case, that an employee shall receive premium pay under 5 U. S. C. §5545 (c)(2) (1970), that entitlement is made in lieu of all other premium compensation, except that payable for regularly scheduled overtime. B-160472, January 5, 1967; B-155140, April 21, 1955. Our Office has held that premium pay under 5 U. S. C. §5545 and regularly scheduled overtime under 5 U. S. C. §5542 (Supp. IV, 1974) are

B-151168

two distinct forms of compensation, and that while an employee may receive both forms, he cannot claim both for the same work. B-172622, March 23, 1973. See also Burich v. United States, 177 Ct. Cl. 139 (1966).

As noted above, our Office has held that "regularly scheduled" work must be duly authorized in advance and scheduled to recur on successive days or after specified intervals. 52 Comp. Gen. 319 (1972); 48 id. 334 (1968); 42 id. 326 (1962); and 40 id. 397 (1961). This is to be distinguished from overtime which is scheduled on a day-to-day or hour-to-hour basis. 52 id. 319 (1972) B-176756, February 21, 1973; B-168048, August 19, 1970; B-160472, supra. The final authority to determine whether work performed is "regularly scheduled" or "irregular or occasional" rests with the General Accounting Office and the courts, and not with the employing agency. B-169113, January 11, 1974.

Based on the record before us and the findings of fact made in the Rothgeb decision, and notwithstanding our position in B-151168, August 23, 1972, we are not convinced that the court's conclusion can be shown to be improper. While the Department of the Treasury did not prepare definite schedules for overtime, that fact does not appear to be conclusive since "inflight" time for the Secret Service agents was clearly scheduled as the agents received a written schedule in advance covering between 2 to 4 weeks. Based on the record before us it also appears that "inflight" overtime recurred at frequent intervals, although not normally on successive days.

Therefore, although this matter is not free from doubt, the "inflight" overtime claimed by the Secret Service agents appears to be regularly scheduled and compensable at time and one-half rates under 5 U. S. C. §5542. Compensation previously received by the agents in the form of premium pay for such inflight overtime should be offset against payments made in accordance with this decision.

Accordingly, the voucher in favor of Mr. Kevin M. Tucker may be certified for payment, if otherwise correct.

In addition, the administrative report indicates that Secret Service agent supervisors were ordered to work 12-hour days Monday through Friday and 8 1/2-hour days on weekends. Overtime performed pursuant to such a schedule appears to fall within the provisions of 5 U. S. C. §5542 (1970) and our decisions regarding

B-151168

regularly scheduled work. See 52 Comp. Gen. 319 (1972); 48 id. 334 (1968). It would also appear that the claims may be certified for payment based on the documentation provided by the agents.

Accordingly, the claims of other Secret Service agents may be handled by the Department of the Treasury in accordance with the discussion above.

R.F.KELLER

Deputy Comptroller General
of the United States