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**DECISION**



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

**FILE:** B-194521

**DATE:** February 4, 1980

**MATTER OF:** Evan J. Kemp, Jr. [Compensatory Time Off  
and Personnel Ceilings for Part-Time Employees]

- DIGEST:**
1. Except in limited circumstances where prohibited for nonexempt employees under the FLSA, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of 40 hours in an administrative work-week and 8 hours in a day. 5 U.S.C. §§ 5542 and 5543. A part-time employee may not be granted compensatory time off simply because he works hours in excess of his regular part-time tour of duty.
  2. Part-time employees, irrespective of nature of employment, currently may be counted against full-time permanent and total employment ceilings of agency. Effective October 1, 1980, under 5 U.S.C. § 3404, part-time employees will be counted fractionally based upon number of hours worked.

This action is in response to a request by Mr. James H. Schropp, Assistant General Counsel, Office of the General Counsel, on behalf of the Securities and Exchange Commission - (SEC), for a written opinion by the General Accounting Office in connection with a stipulation of settlement entered into by the SEC with its employee, Mr. Evan J. Kemp, Jr., in Civil Action No. 77-2014 in the United States District Court for the District of Columbia. The settlement provides for the dismissal of Mr. Kemp's suit against the Commission alleging discrimination on account of sex and handicapping condition.

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As part of the settlement agreement, the SEC agreed to request written opinions from appropriate agencies of the Federal Government regarding Government policy towards part-time workers. In particular, the Commission agreed to request this Office:

"to opine that agencies have the authority to provide compensatory time to employees who normally are

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officially assigned to work fewer than 40 hours per week but who are requested, on occasion, to work beyond their normal part-time tour of duty."

In addition, the Commission agreed, "unless prohibited by law," to issue a memorandum to all of its Division and Office Heads, Administrative Officers and Aides, and all supervisory personnel, indicating that:

"\* \* \*part-time employees will be counted fractionally (i. e., the number of hours worked per week divided by 40 hours per week). For example, if a part-time employee works 20 hours per week, he or she would be counted as 1/2 of an employee, if 30 hours are worked, he or she would be considered as 3/4 of an employee."

Mr. Schropp, on behalf of the SEC, also requests that this Office provide a written opinion as to the legality and propriety of counting part-time employees fractionally against an assigned manpower ceiling.

Section 5543, title 5, United States Code (1976), provides for granting an employee compensatory time off from his scheduled tour of duty in lieu of payment of overtime compensation for irregular or occasional overtime work. Under this section the head of an agency may, on request of an employee, grant compensatory time off in lieu of overtime. However, as to employees whose rates of basic pay are in excess of the maximum rate of basic pay for grade GS-10, section 5543(a)(2) gives the head of an agency authority to require that he be granted compensatory time off from his scheduled tour of duty instead of being paid overtime. The regulations implementing this statutory provision are found in 5 C.F.R. § 550.114 (1979).

Although the cited regulatory and statutory provisions do not explicitly state that compensatory time off is another form of premium compensation for irregular or occasional overtime work, it is well established that compensatory time takes the place of monetary premium pay for irregular or occasional overtime. See 37 Comp. Gen. 362 (1957) and Matter of Jacqueline Bailey, B-164689, March 26, 1976. Since compensatory time off may be granted only in lieu of overtime compensation for irregular

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or occasional overtime work, the question of whether this benefit is available to employees for work beyond their normal part-time tours of duty depends upon their entitlement to overtime compensation for those hours of work.

The provisions of title 5 of the United States Code regarding payment of overtime compensation are codified in 5 U.S.C. § 5542 (1976). Section 5542 was amended by Public Law 92-194, December 15, 1971, 85 Stat. 643, to provide for payment of overtime compensation to employees with "full-time, part-time, and intermittent tours of duty" for 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. Prior to this amendment decisions of this Office held that part-time employees, while entitled to overtime compensation for hours worked in excess of 8 per day, were not entitled to payment of overtime compensation for hours worked in excess of 40 per week. 46 Comp. Gen. 337 (1966). However, since the enactment of Public Law 92-194, part-time as well as intermittent employees are entitled to overtime compensation for work they perform in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Therefore, part-time and intermittent employees may be granted compensatory time off in lieu of overtime compensation only for irregular or occasional overtime work performed in excess of 40 hours in an administrative workweek or 8 hours in a day. A part-time employee may not be granted compensatory time off simply because he works hours in excess of his regular part-time tour of duty.

While a "nonexempt" employee may be granted compensatory time off in limited circumstances based on his entitlement to overtime compensation under title 5 of the United States Code, no provision is made under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976), for the allowance of compensatory time off in lieu of FLSA overtime pay. With regard to the granting of compensatory time off to nonexempt employees, see Federal Personnel Manual Letter 551-6, June 12, 1975.

With respect to the legality and propriety of counting part-time employees fractionally against an assigned manpower ceiling, we would point out initially that two kinds of employment ceilings are established for each Federal agency, namely, (1) full-time permanent employment and (2) total employment.

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By subtracting the full-time permanent employment ceiling from the total employment ceiling, the difference, referred to as a "derived ceiling," becomes, in effect, a limitation on the number of part-time, temporary, and intermittent employees. All employment is subject either to the actual full-time employment ceiling or to the derived ceiling. As to employment ceilings, a part-time employee, regardless of the nature of his or her employment, is one who works less than 40 hours a week. The employment may be regular and recurring (permanent); for a temporary period; or intermittent in that the person works only when called in. However, irrespective of the nature of the employment, it is subject to the derived ceiling.

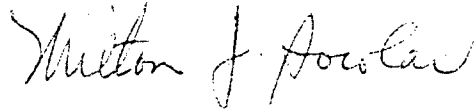
Part-time employees can be hired against vacancies in the derived ceiling as well as against vacancies in the full-time permanent ceiling. In the event the derived ceiling is not high enough to meet an agency's legitimate needs for part-time employment, an attempt should be made to accommodate the part-time employee within the full-time permanent ceiling. If this accommodation is not possible, the agency can make application to the Office of Management and Budget for the conversion of spaces from the full-time permanent ceiling to the derived ceiling to permit the splitting or fractionalizing of full-time jobs. In other words, under present law and regulations, application of the personnel ceiling does not necessarily require an agency to count a part-time employee as the equivalent of a full-time employee or reduce the total man-hours of employment available to the agency. See Federal Personnel Manual, chapter 312, appendix B, 1969 edition, as amended.

The Federal Employees Part-time Career Employment Act of 1978, Public Law 95-437, October 10, 1978, 92 Stat. 1056, codified at 5 U.S.C. §§ 3401-3408, narrows the definition of part-time career employment from a scheduled tour of duty of less than 40 hours per week to a scheduled tour of duty of between 16 and 32 hours per week. Interim regulations implementing this Act were published at 5 C.F.R. §§ 340.101-340.204 (1979). Final regulations effective October 5, 1979, were published in 44 Fed. Reg. 57379. In regard to personnel ceilings, 5 U.S.C. § 3404 provides that, effective October 1, 1980, in administering the personnel ceiling applicable to an agency, a part-time career employee will be counted as a fraction which is determined by dividing 40 hours into the average number of

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hours of the employee's regularly scheduled workweek. Thus, effective October 1, 1980, there would appear to be no legal impediment to issuing the memorandum contemplated by the settlement agreement.

The questions posed by the SEC under the stipulation of settlement are answered accordingly.



For the Comptroller General  
of the United States