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DECISION



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

FILE: B-202859

DATE: April 6, 1982

MATTER OF: Bruce Mandell -- Overtime Compensation under
the Fair Labor Standards Act

- DIGEST:**
1. The Office of Personnel Management (OPM) issued compliance order requiring Army to pay overtime compensation under Fair Labor Standards Act 29 U.S.C. § 201 et seq., to employee who worked for Army in both civilian and military reserve capacity. GAO will not disturb OPM's findings that employee did perform work in his civilian capacity as such finding is not clearly erroneous and burden of proof lies with party challenging findings.
 2. Claim for overtime compensation under either title 5, U.S. Code, or Fair Labor Standards Act, 29 U.S.C. § 201 et seq., accrues at the time overtime is performed and will be barred by the limitation provisions of 31 U.S.C. § 71a unless filed in this Office within the 6-year statutory period.

This is in response to a request for an advance decision submitted by the Executive, Assistant Comptroller for Finance and Accounting, Department of the Army. The request seeks our decision regarding the validity of a compliance order issued by the Office of Personnel Management (OPM) pertaining to a Fair Labor Standards Act (FLSA) overtime claim of Mr. Bruce Mandell.

The record shows that from 1974 to 1978, Mr. Mandell worked for the Army in the dual status of a civilian employee and a reservist with the 340th Military Police Company. In his complaint seeking compensation for overtime, Mr. Mandell alleged that for one day each week, from May 7, 1974, to August 29, 1978, he worked 5 hours in excess of his normal 8 hour workday. He also stated that

the work which he performed during these overtime hours was done in his civilian capacity as an Administrative Supply Technician.

After receiving Mr. Mandell's claim, OPM conducted an extensive investigation into his allegations. Since the Army had not kept all of the necessary records from which Mr. Mandell's claim could be verified, OPM obtained sworn statements from his company commanders and co-workers attesting to the veracity of the allegations. As a result of this investigation, OPM issued a compliance order to the Army which requires the Army to pay compensation to Mr. Mandell for the overtime that he claimed.

The Army concedes that its supervisory personnel did "suffer and permit" Mr. Mandell to work some overtime hours, but argues that they did so without knowledge of his dual status. The Army also reports that its records only go back as far as January 1977 and therefore, it is unable to verify Mr. Mandell's claim for periods prior to that date. In addition, the Army argues that Federal Personnel Manual (FPM) Letter No. 551-9 (1/76) precludes consideration by OPM of a complaint filed more than 2 years after the alleged FLSA violation, or 3 years if the violation is alleged to have been willful.

Section 204(F) of FLSA, 29 U.S.C. §§ 201, 204(F) (1976), authorizes the OPM to administer the Act with respect to most Federal employees. Under the authority of that statute, OPM has promulgated regulations which provide for gathering facts and issuing decisions in response to FLSA violations. As we said in Paul Spurr 60 Comp. Gen. ____, April 2, 1981, B-199474, "this system provides OPM with the means of obtaining all possible information upon which to base their decision." Accordingly we held that we will not disturb OPM's factual findings unless they are clearly erroneous.

In Paul Spurr we also said that: "Once a covered ('non-exempt') employee has established the fact that he performed work for which he was improperly compensated under the FLSA, he must produce sufficient evidence to

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show the amount and extent of that work as a matter of reasonable inference. The burden then shifts to the employer to come forward either 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. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Munsower v. Callicott, 526 F.2d 1187 (8th. Cir. 1975)."

The only evidence submitted by the Army is its statement that it cannot locate all of the records needed to substantiate Mr. Mandell's claim. This does not satisfy its burden of proving that OPM's factual findings were clearly erroneous. On the contrary, from the statements provided by Mr. Mandell's co-workers, we believe it is reasonable to conclude, as OPM did, that Mr. Mandell did work the hours for which he has submitted his claim.

With regard to the issue of Mr. Mandell's dual status, OPM found that for the first twenty-three dates Mr. Mandell claims to have worked overtime, his civilian job was Tool and Parts Attendant, WG-6904-6. For the remaining dates, he was employed as an Administrative Supply Technician, GS-301-5.

OPM reduced Mr. Mandell's claim by twenty-three days, from May 7 through November 5, 1974, because he was not serving in a dual status technician capacity while he was employed as a Tool and Parts Attendant, and it was therefore reasonable to conclude that any work he performed at the Reserve Center on those dates was in a military capacity.

As to the compensation claims on the other dates, with the exception of June 17, 1975, OPM held that the Army had not provided proof sufficient to disprove Mr. Mandell's claim that he performed overtime compensation in his civilian capacity. We uphold OPM's determination as the Army has presented no basis to overrule OPM's determination as to Mr. Mandell's civilian status.

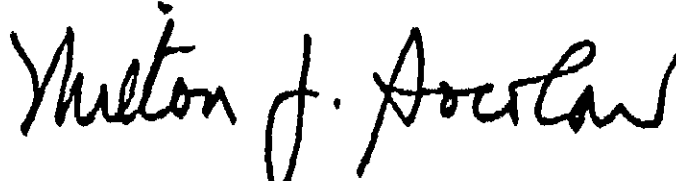
The Army's contention that the limitation provision of FPM Letter No. 551-9 precludes consideration of this

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claim is without merit. In Transportation Systems Center, 57 Comp. Gen. 441 (1978), we held that the only limitation provision which would operate to bar payment to a Federal employee of a meritorious claim under the FLSA, is the 6-year limitation period contained in 31 U.S.C. § 71a (1976).

However, 31 U.S.C. § 71a is applicable to bar a portion of Mr. Mandell's claim. In this case, Mr. Mandell's claim was filed in this Office on August 14, 1981. Since his claim accrued at the time the overtime was performed, any portion that can be shown to have accrued prior to August 14, 1975, may not be paid. Paul Spurr, supra.

Accordingly, with the above modification, Mr. Mandell is entitled to overtime compensation under the FLSA pursuant to the compliance order issued by the Office of Personnel Management.

for 
Comptroller General
of the United States