

DECISION



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

60660

FILE: B-51325

DATE: MAR 19 1978

MATTER OF: Overtime Compensation of Firefighters
Under FLSA

98465

DIGEST:

Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under the Fair Labor Standards Act in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by the number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to the number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at the rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay.

This action is in response to a request from Mr. Nathan Wolkowin, President, National Federation of Federal Employees, for a decision concerning the legality of the Civil Service Commission's (CSC) computation of overtime compensation due firefighters under the provisions of the Fair Labor Standards Act.

Subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law No. 93-259, approved April 3, 1974, 88 Stat. 60, amended section 7 of the Fair Labor Standards Act, 29 U. S. C. § 207, by extending overtime compensation benefits to firefighters as follows:

"(k) No public agency shall be deemed to have violated subsection (c) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a

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number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed."

The above provision was effective January 1, 1975, and other subsections of section 6 of the 1974 Act provide that in each succeeding year until 1977 there shall be a reduction in the aggregate hours in tours of duty beyond which overtime is compensable.

Mr. Wolkomir takes issue with the Commission's interpretation of the above provision in two instances. Primarily, Mr. Wolkomir is concerned over CSC's definition of "regular rate." The regular rate is used to base the computation of the firefighters' overtime and is described on page 5 of Attachment 2 to Federal Personnel Manual (FPM) Letter 551-5, January 15, 1975, as follows:

"The employee's hourly 'regular rate' is * * * determined by dividing the employee's total remuneration for employment in any work period by the total number of hours in the employee's tour of duty under the FLSA (all hours actually on duty including scheduled and unscheduled periods)."

Mr. Wolkomir states, concerning the above computation:

"The Air Force has computed the regular rate of pay for its firefighters by dividing 72 hours (tour of duty) into the weekly salary a firefighter received prior to the passage of FLSA. It is our contention that the divisor should properly be 60 hours per week since this is the tour of duty prescribed by the Act before overtime payments begin. The CSC regulations cited above and the Air Force interpretation of them has resulted in overtime rates as low as \$1.70 per hour. Several firefighters work 24 hours overtime per pay period (two weeks) and receive \$35 for this duty. This is less than the minimum wage prescribed by the Fair Labor Standards Act."

Mr. Wolkomir also challenges CSC's computation of overtime once the regular rate has been determined. Mr. Wolkomir objects to the

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Commission's computation of overtime under the FLSA as being one-half times the regular rate. He believes that overtime should be computed at one and one-half times the regular rate.

The Department of Labor has been vested with the authority for administering the FLSA with respect to non-Federal employees covered by the FLSA since the inception of the Act. However, since the Commission is responsible for administering the FLSA with respect to Federal employees, we requested a report from the Commission on Mr. Wolkomir's contentions. The Commission responded as follows:

"The term 'regular rate' is defined by section 7(c) of the FLSA to include 'all remuneration for employment paid to, or on behalf of, the employee' except for certain payments specifically excluded by paragraphs (1) through (7) of that subsection. Furthermore, regulations promulgated by the Department of Labor on overtime compensation under the FLSA in 29 C. F. R. § 778.109 state that the 'regular rate' is an hourly rate of pay determined by dividing the employee's total remuneration for employment (excluding the statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. * * *

"As a general practice, a Federal firefighter is scheduled for a tour of duty of 72 hours per week, consisting of three, 24-hour shifts. During each 24-hour shift, the firefighter is normally in a work status for eight hours and in a standby status, which includes a designated sleep period, for the remaining 16 hours. For this extended tour-of-duty arrangement, a firefighter receives his basic rate of pay and premium pay on an annual basis for the standby duty--normally, 25% of his basic rate of pay--under 5 U. S. C. § 5545(c)(1). This combined basic rate of pay plus premium pay is his total remuneration for employment for his 72-hour weekly scheduled tour of duty. Accordingly, the formula for computing a Federal firefighter's hourly 'regular rate' of pay, as contained in FEPI Letter 551-5, is proper, with 72 hours as the divisor.

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"Once the firefighter's hourly 'regular rate' of pay has been so computed, he is then entitled to overtime pay for all work in excess of 240 hours in a work period of 28 consecutive days (60 hours in a seven-day work period) as provided by section 7(k) of the FLSA. Under the guidelines contained in 29 C.F.R. Part 778.325, this overtime pay is computed at one-half times the employee's 'regular rate' of pay, since, as illustrated above, a Federal firefighter has already been compensated for the entire 72-hour tour of duty for each workweek through the combination of basic rate of pay and premium pay for the standby duty.

"In Mr. Wolkonir's example, he cites \$1.70 per hour as the overtime rate of pay for Air Force firefighters. However, since these firefighters have been compensated for all 72 hours in their weekly tour of duty at an hourly 'regular rate' of \$3.40, the additional compensation of \$1.70 per hour, for each hour of overtime (12 in a week) provides an hourly overtime rate of \$5.10 or one and one-half times their 'regular rate' of pay for the extra 12 hours of work beyond 60 hours in accordance with the requirements of section 7(k) of the FLSA."

We agree with the Commission that the firefighters' regular rate of pay is to be computed by using as divisor of their total compensation the number of hours in their tour of duty, 72, as opposed to the number of hours in the tour of duty beyond which overtime must be paid, 60. The above-cited Department of Labor regulation, 29 C.F.R. § 778.109, interpreting the "regular rate" under the FLSA makes clear that the divisor to be used in determining the "regular rate" is the total number of hours worked by the employee in a given week. Thus, there is no basis to find that the divisor is limited to the number of hours beyond which overtime must be paid. Section 778.109, in pertinent part, states:

"The 'regular rate' under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece rate, salary, commission

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or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek * * *."

Therefore, even though firefighters may be compensated under the provisions of title 5 of the United States Code for 40 hours a week at a basic rate plus 25 percent premium pay, for the purposes of the FLSA they have a regular rate of pay which is their total compensation divided by their 72-hour tour of duty.

Moreover, we find that the Commission method of computing the 12 hours of overtime pay as one-half times the firefighters' regular rate is also correct. The firefighters' regular rate of pay for FLSA purposes is their total compensation divided by 72 hours. In other words, they have been compensated for each of their 72 hours at an hourly regular rate, in this case \$3.43 an hour. Since the FLSA requires that overtime hours be compensated for at one and one-half times the regular rate and since the firefighters have already received their regular rate for all hours worked including the 12 overtime hours, they are entitled to only one-half times their regular rate of pay for the 12 overtime hours.

The Department of Labor's regulation concerning the computation of overtime for private sector employees covered by the FLSA who are entitled to overtime for work over 40 hours of work a week and whose workweeks are longer than 40 hours may be so interpreted. See 29 C.F.R. § 778.325, which provides, in pertinent part:

"* * * If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of \$110 for 60 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of \$1 per hour (half time) in addition to his salary, and to statutory overtime pay of \$3 per hour (time and one-half) for any hours worked in excess of 55."

As the Commission points out, the effective overtime rate for the firefighters in question is \$5.10 per hour which rate is one and one-half times the regular rate of \$3.40. It is evident the firefighters are being

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compensated at a regular rate well above the minimum wage and their overtime wages are computed in a manner consistent with prior interpretations of the FLSA made by the Department of Labor.

Accordingly, we uphold the Civil Service Commission's computation of Federal firefighters' overtime pay under the Fair Labor Standards Act.

R.P. KEELE

Comptroller General
of the United States