

DECISION

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

FILE: B-199474

DATE: April 2, 1981

MATTER OF: Paul Spurr -- [Overtime compensation under
the Fair Labor Standards Act] -- 6-year
Limitation Period

DIGEST:

1. Employee filed FLSA complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. GAO will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it can not find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary.
2. This Office has previously held that 6-year limitations period contained in 31 U.S.C. §§ 71a and 237 applies to claims arising under § 204(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, 204(f) (1976). Thus, where agency appeals Office of Personnel Management (OPM) FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid.

The Office of the Comptroller of the Army requests that we issue an advance decision concerning the claim of Mr. Paul Spurr for overtime pay under the Fair Labor Standards Act (FLSA).

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Mr. Spurr was employed by the Army Armament Research and Development Command, Dover, New Jersey. On September 4, 1979, a complaint on behalf of Mr. Spurr was submitted to the Office of Personnel Management for overtime under the FLSA for travel performed outside his normal tour of duty for the period beginning May 1, 1974. As a result of this complaint, the Director, Eastern Region, OPM, after investigation, issued a compliance order under 29 U.S.C. § 204(f) (1976) awarding Mr. Spurr 30 hours of FLSA overtime compensation per year for the period from May 1, 1974, through August 6, 1978. The 30 hours-per-year figure was derived from evidence submitted by Mr. Spurr, substantiated by his supervisor, and confirmed by OPM during its investigation.

It appears that OPM issued the compliance order on the basis of the agency's failure to rebut certain evidence provided by the complainant, citing the responsibility imposed by the FLSA that employers maintain and preserve records pertaining to FLSA entitlements. The agency's assertion that the complainant was not entitled to compensation unless he provided documentation in the form of copies of his travel orders was specifically denied. Thus, on the basis of estimates submitted by the complainant and substantiated by the supervisor who assigned him the travel duties, OPM found that Mr. Spurr was entitled to 30 hours of overtime compensation per year. Although it does not dispute that Mr. Spurr performed travel for which he is entitled to overtime compensation under the FLSA, the agency contends that it has paid overtime for all periods of travel that can be substantiated by travel vouchers turned up by a search of its records. This amounts to 51 hours, or \$618.54. However, it requests an advance decision as to the " * * * legality of payment of overtime compensation based upon a supervisor's informal memo for record estimate as directed in the OPM compliance order * * *."

In effect, we are requested to modify the compliance order issued by OPM. For the reasons stated below we will not disturb the compliance order in this case.

Section 204(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, 204(f) (1976), authorizes the Civil Service Commission (now the Office of Personnel Management) to

administer the provisions of that Act with respect to most Federal employees. In fulfilling this responsibility, OPM has issued regulations providing for an FLSA compliance and complaint system. See Federal Personnel Manual (FPM) Letter 551-9, March 30, 1976. Paragraph 5 of that FPM Letter sets forth a procedure for processing complaints that includes an initial investigation on the basis of written presentations from all parties and also provides for onsite investigations, if necessary. The onsite investigations may include a review of time and attendance records, payroll records, and all other pertinent documents. Upon completion of the investigation, a compliance order is issued by OPM where violations are found to have occurred.

Thus, OPM's regulations provide for a formal system of gathering facts and issuing a decision in responding to complaints about possible FLSA violations. This system provides OPM with the means of obtaining all possible information upon which to base their decision. For this reason, we will not disturb OPM's factual findings unless they are clearly erroneous. See Department of Agriculture Meat Graders, B-163450.12, September 20, 1978.

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 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).

In the present case, the Army has submitted no evidence to us that would compel a finding that OPM's determination was clearly erroneous. Its only contention is that it is unable to produce travel vouchers to support OPM's award of 30 hours of overtime compensation per year.

Local 225 of the American Federation of Government Employees (AFGE), on behalf of Mr. Spurr, alleges that the agency's inability to retrieve vouchers to support the award

of 30 hours of overtime compensation per year lies in the agency's inadequate management recordkeeping system. AFGE states that:

"OPM found the same situation [i.e., poor recordkeeping] in the case of Mr. Spurr and therefore accepted evidence other than copies of the actual vouchers. We would point out that this evidence, which Mr. McCullough refers to in paragraph 5 of Inclosure 1 as a 'supervisor's informal memo for record,' was a signed statement by Mr. Spurr's supervisor (during the period of travel in question) which was submitted to and investigated by OPM. It is interesting to point out that management at no point questioned the supervisor or attempted to discredit his statement."

(We do not believe that the Army has satisfied its burden of proving that OPM's factual findings were clearly erroneous. We are particularly persuaded by the fact that the Army did not attempt to refute the supervisor's estimate of Mr. Spurr's entitlements during OPM's processing of the complaint. Clearly, the proper forum for rebutting that evidence is during OPM's investigation of the complaint. Accordingly, we will not overturn the compliance order of OPM in this case.

However, we must impose the 6-year limitations period of 31 U.S.C. § 71a on a portion of Mr. Spurr's claim, even though the issue was not raised by either party. In Transportation Systems Center, 57 Comp. Gen. 441 (1978), we held that the 6-year statute of limitations contained in 31 U.S.C. §§ 71a and 237 (1976) applied to claims for overtime under the FLSA. We also stated that:

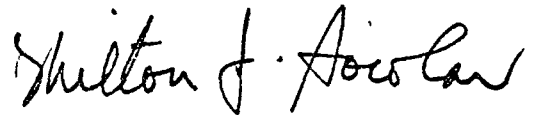
"In order to protect the interests of employees, claims which have accrued more than 4 years ago and cannot promptly be approved and paid in full amount claimed should be forwarded to the Claims Division [of the General Accounting Office] for recording."

(Since Mr. Spurr's claim accrued at the time that the overtime was performed and it was not received in this Office

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until July 3, 1980, any portion that can be shown to have accrued prior to July 3, 1974, may not be paid. See Unexcelled Chemical Corp. v. United States 345 U.S. 59 (1953).

Accordingly, with the above modification, Mr. Spurr is entitled to payment of overtime compensation under the FLSA pursuant to the compliance order issued by the Office of Personnel Management on May 20, 1980.

A handwritten signature in cursive script, reading "Milton J. Aizawa".

Acting Comptroller General
of the United States