

DECISION

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

C. Brown
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FILE: B-190734

DATE: October 2, 1978

MATTER OF: Richard P. Barnitt - Overtime Compensation

- DIGEST: 1. Employee of the National Security Agency covered by Fair Labor Standards Act (FLSA) overtime pay requirements pursuant to solicitation by agency volunteered to work overtime. He knew that in lieu of overtime compensation he would receive compensatory time off under 5 U.S.C. § 5543. He is not entitled to additional pay under FLSA, since he is also entitled to overtime pay under title 5, United States Code, equal to or greater than his FLSA entitlement. In such cases regulations provide that employee may voluntarily accept compensatory time as full remuneration for overtime performed.
2. National Security Agency solicited non-exempt employee under FLSA to volunteer to work overtime supervising cleaning crews in restricted area with understanding he would receive compensatory time off in lieu of overtime. No funds were available to pay overtime, and overtime would not have been performed without a volunteer willing to accept compensatory time off. There is no violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (Supp. IV, 1974), in giving compensatory time off under such circumstances.

By letter of November 15, 1977, Serial N41/0664, with enclosures, Mr. W. Smallets, Chief, Finance and Accounting, National Security Agency, requested an advance decision regarding the entitlement of Mr. Richard P. Barnitt to overtime compensation under the provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (Supp. IV, 1974). Mr. Barnitt is a nonexempt employee under FLSA. His entitlement to overtime under title 5, United States Code, is equal to or greater than his entitlement under FLSA.

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The record shows that between May 5, 1974, and August 9, 1975, and between September 21, 1975, and March 20, 1976, the claimant worked overtime supervising cleaning crews in a restricted area. The overtime was solicited by the agency and worked with the understanding that the claimant would receive compensatory time off in lieu of overtime. There were no funds available to pay overtime for this work and in the absence of a volunteer supervisor willing to receive compensatory time off in lieu of overtime, the area was not cleaned.

Mr. Barnitt now claims overtime compensation for the overtime which he worked. He contends that under FLSA he cannot be required to take compensatory time off. Thus, he urges that since he was never given an opportunity to choose between overtime and compensatory time off, he is entitled to overtime.

Under the provisions of 29 U.S.C. § 204(f) the Civil Service Commission is authorized to administer the provisions of the Fair Labor Standards Act. Accordingly, by letter of February 27, 1978, we requested a determination from the Commission's Pay Policy Division with regard to Mr. Barnitt's entitlement to overtime compensation. In its reply, dated April 12, 1978, the Commission stated that it has held that there is no violation of FLSA in similar situations, where employees worked overtime with the understanding that they would receive compensatory time off as no funds to pay overtime were available. Thus, it found Mr. Barnitt was not entitled to overtime.

Overtime for Federal employees is authorized by title 5, United States Code, and by the Fair Labor Standards Act for non-exempt employees. An employee's entitlement to overtime may be based on title 5, FLSA, or both.

Section 5542 of title 5, U.S.C. provides in pertinent part as follows:

"(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 (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) 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."

* * *

The Fair Labor Standards Act at section 207 of title 29 U.S.C. contains the following pertinent provision:

"(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

There are no provisions for compensatory time off under FLSA. However title 5 permits compensatory time off in lieu of overtime at section 5543(a) which states:

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"(a) The head of an agency may--

"(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

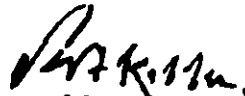
"(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title."

The Civil Service Commission has issued instructions in Attachment 1 to FPM Letter 551-6, dated June 12, 1975, covering the use of compensatory time off where title 5 and FLSA overlap. Paragraph A1d(2) of Attachment 1 states that compensatory time off may be substituted for overtime pay if an employee's entitlement to overtime under title 5 is equal to or greater than his entitlement to overtime under FLSA. As stated earlier, the record in the present case shows that Mr. Barnitt's entitlement to overtime under title 5 is equal to his entitlement under FLSA. Therefore, there was no requirement under FLSA that he must receive overtime pay. And, there was no prohibition against giving Mr. Barnitt compensatory time off at his request in lieu of overtime pay.

Mr. Barnitt's contention that he is entitled to overtime pay is apparently based on the fact that he was not given a choice between receiving overtime pay or taking compensatory time off as is provided in applicable NSA regulations and para. A3b(2) of attachment 1 to FPM Letter 551-6. However, FPM Letter 551-6 does not address situations where no funds are available for payment of overtime and employees are invited to work overtime for time off only. As stated earlier, the Civil Service Commission has determined that under such circumstances there is no violation of FLSA if an employee is not given a choice between overtime pay and compensatory time off.

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Consistent with the Civil Service Commission report of April 12, 1978, we find that the claim of Mr. Barnett is not compensable under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.


Deputy Comptroller General
of the United States