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DECISION



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

FILE: B-203650

DATE: March 22, 1982

MATTER OF: Daniel W. McConnell

- DIGEST:**
1. Employee at dam reservation claims overtime compensation for standby duty. Although he was required to live in Government-owned housing on the dam reservation the agency determined that effective January 10, 1971, he would not be required to remain at the dam reservation after the end of his regular duty hours. Under the circumstances, he is not entitled to overtime compensation under 5 U.S.C. § 5544(a) since his off-duty movements and activities were not severely restricted. In addition, such off-duty time is not compensable as hours of work under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
 2. Employee is not entitled to overtime compensation under 5 U.S.C. § 5544(a) during period he was restricted to dam site since he has not shown that he was in effect required to be on "ready alert" as in Hyde v. United States, 209 Ct. Cl. 746 (1976). There is nothing in the record to indicate that claimant's activities were often interrupted by an emergency or other work situation requiring prompt attention.

This action results from the appeal by Mr. Daniel W. McConnell, personally and through his attorney, J. Michael Jones, of our Claims Division's denial of his claim for overtime compensation during the period from July 22, 1968, through September 4, 1975. This claim is the result of Mr. McConnell's contention that he was required to remain in a standby status while employed by the Department of the Army, Corps of Engineers, Buffalo District, as a maintenance mechanic (formerly dam repairer) at the Mt. Morris Dam, New York. Mr. McConnell now claims overtime compensation for the additional period to February 4, 1981, the date he was no longer required to occupy Government-owned housing at the site of the dam. While the Claims Division considered his entitlement to overtime compensation under 5 U.S.C. § 5544(a), he now claims overtime entitlement under that and the additional authority of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The disallowance of his claim by the Claims Division is sustained since, for the reasons set forth below,

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he is not entitled to payment of overtime compensation under either 5 U.S.C. § 5544(a) or the Fair Labor Standards Act.

The record shows that as an applicant for the position of dam repairer, grade WB-10, Mr. McConnell was advised in a letter dated June 4, 1968, from the Chief, Personnel Office, Buffalo District, Corps of Engineers, that in addition to their regular tours of 8 hours a day, 5 days a week, it was required that either the dam foreman or the dam repairer be present at the site of the dam, on call in case of an emergency. He was further advised that he would be required to live in a Government-owned dwelling located on the Mt. Morris dam site, a 5-acre, Government-owned reservation located about 5 miles from Mt. Morris, New York. By Disposition Form dated December 22, 1970, Mr. McConnell was advised that beginning on Sunday, January 10, 1971, due to a change in work schedules it would no longer be required that either he, or the other employee concerned, be present on the reservation beyond the end of the normal workday. By that same document he was notified that if he were present on the reservation after his normal tour of duty he would be expected to respond to any of the alarm systems and take necessary action and that any such work performed after the normal tour of duty would be paid at overtime rates. By Disposition Form dated February 4, 1981, the district engineer rescinded the requirement that Mt. Morris Dam employees live on the dam reservation in Government-owned housing.

On October 21, 1976, Mr. McConnell submitted his claim for overtime compensation for standby duty for the period July 22, 1968, through September 4, 1975. The claim was received by our Claims Division on October 29, 1976.

On August 2, 1979, the Claims Division disallowed Mr. McConnell's claim on the basis that it was barred in part by 31 U.S.C. § 71a and that the hours for which he claimed overtime were not compensable as time in a standby status under 5 U.S.C. § 5544(a).

Section 71a of title 31, United States Code, provides that every claim or demand cognizable by the General Accounting Office shall be forever barred unless received in this

Office within 6 years after the date the claim accrued. We have held that the date of accrual of a claim for the purposes of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, that portion of the claim which accrued prior to October 29, 1970, is barred from consideration. Mr. McConnell's attorney contends that the District Office of the Corps of Engineers was responsible for the delay in the claim being filed with this Office since he alleges that the District Office failed to properly advise Mr. McConnell that he could submit his claim to the General Accounting Office. While we recognize that the delay in filing his claim may not be fully attributable to Mr. McConnell, we are without authority to waive or modify the application of 31 U.S.C. § 71a. Matter of Moore, B-187427, June 3, 1977, and B-171774, July 2, 1971. Thus, we are unable to consider that part of his claim which accrued prior to October 29, 1970.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the Fair Labor Standards Act (Act), 29 U.S.C. § 201 et seq., for employees who are not exempt from the Act. As a prevailing rate employee Mr. McConnell's entitlement to overtime compensation under title 5, United States Code, is governed by subsection 5544(a). Under that subsection, a wage board employee who regularly is required to remain at or within the confines of his post of duty in a standby or on-call status in excess of 8 hours a day is entitled to overtime pay for hours of work, exclusive of eating and sleeping time, in excess of 40 hours a week.

In interpreting 5 U.S.C. § 5544(a) as it applies to time in a standby or on-call status, overtime pay has been allowed only where the employee's movements were narrowly limited and his activities severely restricted and where his status was in effect one of ready alert. Hyde v. United States, 209 Ct. Cl. 746 (1976); 55 Comp. Gen. 1314 (1976); and Matter of Conway, B-176924, September 20, 1976.

In the case before us, it is clear that beginning January 10, 1971, Mr. McConnell was no longer restricted to the site of the Mt. Morris Dam after his regular duty hours. Although he was still required to reside in housing on the

Government reservation, he was free to leave the site any time he wished. We have held under circumstances more restrictive than these that the employee's remaining at a reservoir site did not constitute compensable overtime duty under 5 U.S.C. § 5544(a). See Matter of Jamison, B-201628, May 21, 1981. As in Jamison, none of the documentation submitted in this case indicates that Mr. McConnell was restricted to the vicinity of his residence after January 10, 1971, and accordingly, we find that he is not entitled to overtime compensation under 5 U.S.C. § 5544(a) for the claimed standby duty during the period from January 10, 1971, to February 4, 1981.

Concerning the period from October 27, 1970, the earliest portion of his claim which is not barred, to January 9, 1971, the record shows that either Mr. McConnell or the dam foreman was required to remain at the site after normal duty hours to respond in the case of emergencies. However, the record does not establish that emergencies occurred so frequently as to substantially restrict his activities by requiring him to be on a "ready alert" status while at the site. Although Mr. McConnell states that he was on "ready alert" due to being called out a "yearly average of 253 times," several examples of the work he performed after regular duty hours do not appear to relate to emergencies or other situations which would require the prompt performance of overtime work. While in his letter of October 21, 1976, he cites as an example the opening of floodgates to substantiate his claim that he was on "ready alert" while restricted to the site, he also includes the performance of such duties as recording weather extremes for the Weather Bureau and the maintenance and upkeep of Government housing. There is nothing in the record before us which indicates that his activities were often interrupted, as in the Hyde and Conway cases, by an emergency or other work situation requiring prompt attention. We are unable to conclude that Mr. McConnell was in a state of "ready alert" while restricted to the site after his regular duty hours. Thus, the claim for overtime compensation under 5 U.S.C. § 5544(a) may not be allowed for the period prior to January 10, 1971.

We note that Mr. McConnell's attorney argues that the agency's requirement that two employees occupy Government-owned dwellings on the reservation violated 5 U.S.C. § 5911(e)

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which provides that an employee shall not be required to occupy quarters on a rental basis unless the head of the agency concerned determines that necessary service cannot be rendered or that Government property could not otherwise be adequately protected. Whether the agency properly applied the provisions of 5 U.S.C. § 5911(e) is in no way relevant to a determination as to whether an employee is entitled to overtime compensation under 5 U.S.C. § 5544(a) for standby duty. However, we note that the district engineer appears to have made the required determination under 5 U.S.C. § 5911(e) and presumably such authority was delegated by the head of the agency.

The Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to certain Federal employees effective May 1, 1974. Under 29 U.S.C. § 204(f) the Office of Personnel Management is authorized to administer the Fair Labor Standards Act. Under the Act a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week when management "suffers or permits" work to be performed. See para. 3c of Federal Personnel Manual Letter No. 551-1, May 15, 1974.

In view of the Office of Personnel Management's authority to administer the Fair Labor Standards Act with respect to Federal employees we requested and received their views on this claim for standby duty.

In its report dated January 28, 1982, the Office of Personnel Management advised that it determined that Mr. McConnell is a nonexempt employee under the Act by virtue of his appointment to a nonsupervisory prevailing rate position. In considering his claim for overtime compensation from May 1, 1974, the effective date of the Fair Labor Standards Amendments of 1974, that Office stated that the mere fact that Mr. McConnell was required to reside in Government-owned housing at the worksite does not itself qualify the employee's time at the worksite as standby duty under the Act.

In its advisory letter the Office of Personnel Management cited the following conditions set forth in FPM Letter 551-14,

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May 15, 1978, under which an employee is considered to be working for purposes of the Fair Labor Standards Act.

- "- The employee's whereabouts is narrowly limited;
- The employee's activities are substantially restricted;
- The employee is required to remain at his or her living quarters; and
- The employee is required to remain in a state of readiness to answer calls for his or her services."

See 5 C.F.R. § 551.431(a)(2) (1981) which sets forth substantially the same criteria.

The Office of Personnel Management determined as follows with regard to the present claim.

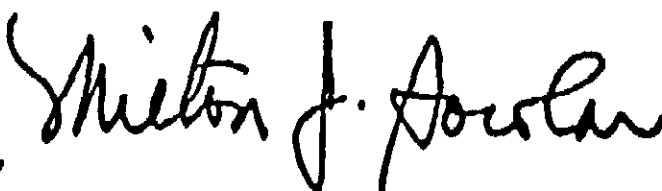
"In the instant case Mr. McConnell was informed, in writing, that effective January 10, 1971, he would no longer be required to be present on the dam reservation beyond his normal workday. Furthermore, he was informed that he would be compensated for actual work performed in emergency situations that occurred during his off duty hours or when required to 'standby' due to weather or flood conditions. He was actually compensated for such hours. Although he was required to live in government owned housing on the Mt. Morris Dam until February 4, 1981, the conditions surrounding Mr. McConnell's residency requirement fail to meet the strict requirements of the OPM FPM Letter * * *. For these reasons, we find that Mr. McConnell does not have a valid claim for overtime pay under the FLSA."

In view of the criteria applicable under the Fair Labor Standards Act, regarding payment of compensation for time spent on standby duty and in view of the facts of this case we have reached the same conclusion as the Office of Personnel Management. Accordingly, we hold that Mr. McConnell is not entitled to overtime compensation under the Fair Labor Standards Act.

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Mr. McConnell is not entitled to the payment of claimed overtime compensation under either title 5, United States Code, or the Fair Labor Standards Act, and accordingly, we uphold the action by the Claims Division which denied his claim.

We note that in addition to his appeal of the Claims Division's Certificate of Settlement, Mr. McConnell claims overtime compensation for the period from September 1975 to August 1977 for the performance of uncompensated pre-shift duties. This claim will be duly considered by our Claims Group.

for 
Comptroller General
of the United States