

Compensation Claim Advance Decision
Under sections 3702 and 3529 of title 31, United States
Code

Claimant: [name]

Organization: Organization and Labor Relations
Office of Human Resources
Nuclear Regulatory Commission
Washington, DC

Claim: Request for Advance Decision;
Whether Time Spent Traveling is
Compensable as Administratively
Uncontrollable

Agency decision: N/A

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 05-0052

/s/ Robert D. Hendler

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

9/11/2006

Date

The Nuclear Regulatory Commission (NRC) requests an advance decision regarding whether employees are entitled to overtime pay for time spent traveling to or from inspections to nuclear power facilities. The specific instance used to illustrate the issue involved an employee who traveled on Sunday, April 6, 2003, from Chicago, Illinois, to Toledo, Ohio, to observe in process nondestructive examinations performed by a licensee operating a nuclear power plant. NRC asks whether the time spent traveling to Toledo, Ohio, outside the employee's regularly scheduled administrative workweek is compensable as overtime. The Office of Personnel Management (OPM) received the request on October 25, 2004. For the reasons discussed herein, we find the employee is not entitled to overtime pay.

Under section 5542(b)(2)(B) of title 5, United States Code (U.S.C.), time spent in a travel status away from the employee's official duty station is only considered to be hours of work where, the travel: (i) involves the performance of work while traveling; (ii) is incidental to travel that involves the performance of work while traveling; (iii) is carried out under arduous conditions; or (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station. NRC believes the employee should be compensated for the time spent traveling outside the inspector's administrative workweek to observe in process nondestructive examinations performed by a licensee operating a nuclear power plant based on 5 U.S.C. § 5542(b)(2)(B)(iv) and its implementing regulation 5 CFR 550.112(g)(2)(iv), which states time in travel status is deemed employment when the travel "results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of the employee to his or her official duty station." It references the Comptroller General's two-pronged test that established "overtime entitlement depends on both (1) the existence of an event that cannot be scheduled or controlled administratively and (2) an immediate official necessity in connection with the event requiring that travel be performed outside an employee's regular hours."

NRC asks us to review the decision reached in *Dr. L. Friedman*, B-222343, 65 Comp. Gen. 772 (1986) (*Friedman*) since the situation did not meet the standard for a "total lack of Government control" because the employee had attended and observed an event that was scheduled and conducted by a licensee whose license was issued by the agency and the agency received advance notice of the event. NRC states the Comptroller General relied on its own prior decision in *James M. Ray*, B-202694 (1982) (*Ray*) which held that an employee who was required to attend a meeting scheduled with foreign representatives was not entitled to overtime compensation for travel time to and from the meeting because there was not a total lack of control on the part of the Government, noting that "scheduling was a matter of accommodation between the agency and the foreign government." Both *Ray* and *Friedman* rely on *Barth v. United States*, 568 F.2d 1329 (Ct. Cl.1978) (*Barth*).

In *Barth*, the court held an employee was not entitled to overtime compensation for time spent traveling to attend a weapons test performed by a contractor with the Navy. It concluded the time spent traveling to the tests was scheduled by the Navy in advance of the tests and the Navy controlled the employee's schedule since the contractor advised the Navy sufficiently in advance of any test phase so that the Navy was able to schedule personnel on shifts to observe the tests. The court found the testing was administratively controllable, reasoning that even though the

event was not “technically” within the Navy’s control because the testing was actually performed by the contractor, “the testing remained controllable by the Government in certain essential aspects.” That is, the testing was conducted under contract with the Navy; the contractor advised the Navy well in advance of the projected events and the “contractor was not at liberty to run its tests free from all constraints, but was cognizant of the Navy requirements that called for testing to be observed by the Navy’s civilian engineers.” The court also found a compelling inference “that the tests were to be run [during the hours when the engineers performing the observations were on duty] and that the contractor was thus subject to administratively imposed controls.” The court noted even though the testing occasionally took place outside the normally scheduled hours, the rarity of such events only served to underscore the pervasive nature of the administrative control.

NRC asserts that:

In the present case and in Friedman, the travel was necessitated by a licensee controlled event that was not contractually controlled by the Agency. The tests were performed as necessary based on the licensee’s needs, primarily the power plant’s refuel outage schedule, and were not influenced by the inspector’s work hours. Accordingly, the event’s scheduling was not subject to this Agency’s agreement. We therefore contend that there was a total lack of control over the scheduling of the licensee activity necessitating travel.

In support of its rationale, NRC also asks us to review the decision reached in *Phillip J. Jordan*, 72 Comp. Gen. 286 (1993) (*Jordan*) which it believes does not correctly characterize the facts in *Friedman*. While we may decline to follow a Comptroller General decision with which we disagree, 31 U.S.C. § 3702 does not include authority to review such decisions and, therefore, we must decline to do so.

NRC’s rationale rests, in part, on *William A. Lewis*, et al, 69 Comp. Gen., 545, June 29, 1990, (*Lewis*) which concluded the “immediate official necessity” test (i.e., the second prong of the two prong test) has limited utility in situations where an employee must be present at an event scheduled for a particular time without any control by the Government. In *Lewis*, the Comptroller General concluded in these situations the scheduling of the event itself supplied the official immediate necessity, depending on the timing, for travel outside regular duty hours. *Lewis* overturned *Gerald C. Holst*, B-222700, October 17, 1986, (*Holst*) which held that if there is adequate notice of the event to permit scheduling of the travel during normal duty hours, then overtime is not payable if the travel takes place outside duty hours. The event in *Lewis* was the claimants attending:

training courses...offered by a private institution which any person interested in certain skills could attend and were not subject to government scheduling or control. Thus, these training courses were not conducted for the benefit of the government and must be considered events which could not be scheduled or controlled administratively.

The Comptroller General distinguished *Lewis* from *Jordan*, in which the Comptroller General concluded the Government had “indirect” control of the scheduling of the tests in question. The contract provided that the contractor would schedule the tests, but was required to give the agency up to seven days’ advance notice (the case actually says “not less than 7 calendar days advance notice”) of the testing date so the agency representative could witness the tests. The Comptroller General concluded because the purpose of the testing was to ascertain whether the agency representative could permit release of the contractor’s equipment for shipment to the agency, the agency could have readily obtained a reasonable rescheduling of a test date when necessary to permit its representative to attend a particular test, concluding that *Friedman* controlled, noting that in *Friedman*, the travel was not wholly outside the control of the agency because the event was scheduled and conducted by a licensee and the agency received advance notice of the scheduled event. The Comptroller General found the facts in *Jordan* to be similar to those in *Friedman* because, even though the contractor scheduled the tests, the contractor was required to give advance notice to the agency when the tests would be conducted and to allow the agency representative to witness the tests.

NRC states:

...in both Friedman and the present case, the performance of the licensee’s tests was not influenced by the inspector’s work hours. The Agency is given notice of the power plant’s refuel outage schedule, what activities are being performed and when in the outage they are scheduled. *This is done so that inspectors have the opportunity to plan to attend tests that they wish to observe* (emphasis added). The licensee does not reschedule the tests to accommodate the inspector’s schedule. Accordingly, the scheduling of the licensees’ tests is totally beyond the control of the agency.

Both claims and advance decisions are settled on the basis of the written record (5 CFR 178.105). In the instant case, we assume the processes performed by a licensee operating a nuclear power plant are subject to NRC inspection and the licensee is obligated to give notice to NRC of its scheduled activities carrying out these processes. As such, we find *Lewis* is not applicable since such events are not open to the general public and are subject to Government control with NRC functioning in an oversight capacity. NRC also cites Federal Labor Relations Authority (FLRA) decision 54 FLRA 1495. In that decision, the arbitrator held the grievant was entitled to overtime pay for travel outside of duty hours since the agency did not have control over the contractor’s tests necessitating the grievant’s travel. The decision is not helpful in addressing the case at hand since it does not provide sufficient factual information on how the tests were scheduled or the agency’s arrangements with the contractor concerning the testing process.

We also find NRC has not addressed the most directly applicable case at hand which was also overruled, by inference, in *Lewis*; i.e., *Aimee A. Stover*, Comp. Gen. B-229067, November 29, 1988 (*Stover*). We note Ms. Stover also appears to have been a party in *Lewis*. In *Stover*, the claimant inspected ships loading fuel products purchased by the Government. She was given blanket travel orders and instructed to keep informed of the arrival dates of ships in the area for which she was responsible. Upon receiving that information, she was required to make her own

travel arrangements and arrive two to three days in advance of the ship's estimated arrival in order to fulfill her duties at the refinery. The Comptroller General restated its position in *Holst* that the claimant had adequate notice of events to permit the scheduling during normal duty hours.

However, *Lewis*' reversal of *Holst* and, by inference, *Stover*, does not address key differences with the instant case. In those cases, attendance at the events to which the claimants traveled was not under Government control as defined in *Barth*. While NRC opines the licensee "does not reschedule the tests to accommodate the inspector's schedule," it fails to address the underlying premise in both *Barth* and *Jordan* that the very nature of NRC's oversight relationship with the licensees infers there is "not a total lack of Government control." NRC has failed to provide adequate information undermining the premise, derived from *Barth*, that NRC licensees are "not at liberty to run...tests free from all constraints."

All cited cases deal with situations in which attendance was mandatory, including *Lewis* in which the claimants were directed by the agency to attend a training course. In the instant case, NRC states the inspectors "attend the tests they wish to observe." We note, however, *Lewis* found the second prong, "immediate official necessity in connection with the event requiring the travel," had "limited utility in the instant case where an employee *must* (emphasis added) be present at an event that has been scheduled for a particular time without any control on the part of the government." Since the inspectors apparently are not *required* to attend any particular tests, we decline to conclude the instant case falls under the conditions set forth in *Lewis*. Because NRC has failed to provide information that would cause us to decline to follow *Friedman*, we must conclude the inspector in the instant case is not entitled to overtime compensation under 5 U.S.C. § 5542(b)(2)(B)(iv) and its implementing regulation 5 CFR 550.112(g)(2)(iv).

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.