

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
United States Marshal Service
[city & State]

Claim: Request for Overtime Pay

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0045

/s/ Robert D. Hendler

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

February 26, 2007

Date

The claimant occupies a Criminal Investigator, GS-1811-12, Deputy U.S. Marshal (DUSM), position in the [agency component], United States Marshal Service (USMS) in [city & State]. He requests reconsideration of his agency's decision that he is ineligible to receive overtime (OT) pay for his work between September 4, 2005, and September 17, 2005, while assigned to Hurricane Katrina emergency relief efforts. The Office of Personnel Management (OPM) received the claim on July 19, 2006, and the complete agency administrative report (AAR) on November 16, 2006. For the reasons discussed herein, the claim is denied.

The claimant believes his agency owes him \$3042.74 for 40 hours of OT and 43 hours of OT with night differential due to time he worked beyond his scheduled hours of duty during the period of the claim. He states his supervisor, [name], Supervisory DUSM, WDT contacted him at 5:00 p.m. on September 2, 2005, to direct him to report to the USMS Office in San Antonio, TX by 3:00 a.m. on September 3, 2005, for further travel to Baton Rouge, Louisiana (LA) to attend a briefing at noon on Hurricane Katrina relief efforts. Upon arrival in San Antonio, a coworker, DUSM [name] informed him his scheduled duty hours for the emergency relief efforts had been set by Assistant Chief DUSM Gary Brown from 6:00 am to 12:00 midnight. The claimant attended the noon briefing, given by three Chief DUSMs ([names]) and Federal Emergency Management Agency (FEMA) personnel, on September 3, 2005, at the Emergency Operations Center (EOC) in Baton Rouge, LA. He states he and the other DUSMs were told "...they would be guarding FEMA personnel heading out into the disaster areas" and "...you guys will go wherever the FEMA personnel you are assigned to go." At this briefing, the claimant also states Chief Irwin said "look on the bright side, its all overtime."

The claimant cites USMS Directive 3.14, Law Enforcement Availability Pay (LEAP), section (D)(2)(a) as the basis for his claim, which states:

A Criminal Investigator who is receiving LEAP shall not receive overtime or night differential pay for unscheduled duty hours: **to be compensated for overtime, it must be scheduled before the administrative workweek, by person, with definitive start and stop time** (*emphasis added*).

Based on the events, as described above by the claimant, he contends he was assigned to work 12 hour shifts from 6:00 a.m. until 12:00 midnight, on September 3, 2005, and was told he would receive OT at the briefing that day. He believes his duty hours were established before the start of the administrative workweek on September 4, 2005, and he is, therefore, entitled to OT pay, and OT with night differential based on the cited USMS Directive. The claimant filed a formal grievance with his agency on October 4, 2005, requesting OT pay for the period of the claim. The agency denied his request by memorandum dated June 19, 2006, and the claimant filed this claim with OPM.

The agency does not disagree with the claimant's description of the events. However, they state he is a Federal law enforcement employee who receives LEAP pursuant to 5 United States Code (U.S.C.) § 5545a. The AAR states:

As a result of what little USMS management initially knew about the work they would be doing regarding the Katrina relief effort and when they knew it, all eight hours worked per day by GS-1811 employees during the period from September 3, 2005, through September 10, 2005, were administratively unscheduled overtime hours, that is, not scheduled in advance of the workweek. This was an

emergency response without an opportunity for advanced planning or scheduling. LEAP was authorized to provide for just such situations and these hours were properly characterized as LEAP hours worked.

For the period September 11, 2005, through September 17, 2005, because overtime had been administratively scheduled in advance as a result of a change to the administrative workweek [i.e., the second week of the claim period], claimant was entitled to premium pay for those hours of scheduled overtime but not for the first two hours after eight in each weekday or any hours in excess of 12 worked any day in that period. Those hours were covered by LEAP. Claimant received overtime pay for work outside of his administrative workweek during the period between September 11 and 17 as well as for two hours of overtime for each day he worked at least 12 hours Monday through Friday of that week for a total of 34 hours of overtime. Any additional hours he worked during the period between September 11 and 17 beyond 12 hours per day were properly characterized as LEAP hours.

The record includes a memorandum dated September 20, 2005, to Operational Personnel, WDT, Hurricane Katrina Relief Efforts, signed by [name], the Chief DUSM, WDT, subject Regular and Overtime Hours. For GS-1811, Criminal Investigators, it states:

All time, inclusive of travel, pertaining to the emergency response from September 3rd (Saturday) to September 10th (Saturday) will be coded on your timesheet (USM-7) as either regular hours, holiday/other (Labor Day, September 5), or Law Enforcement Availability Pay (LEAP). No overtime during this period is authorized for GS-1811s; and

Please note that after the **establishment of 12 hour shifts by the EOC beginning Sunday September 11th** (emphasis added), the following guidelines will be observed:

Sunday, September 11th, 6 am to 6 pm hours worked will be coded on your USMS-7 as overtime, with all hours over 12 hours coded as LEAP.

Monday-Friday, September 12th – 16th, time worked will be coded on your time sheet as 8 hours regular, 2 hours LEAP, and two hours overtime, with hours in excess of 12 coded as LEAP.

Saturday, September 17, will be coded as 12 hours of overtime.

The claimant makes statements regarding the manner in which the agency handled his request for payment of OT. OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. § 3702 which is narrow and restricted to those matters. In adjudicating this claim, our only responsibility under OPM's authority in these matters is to make an independent decision about eligibility for premium pay by applying Federal law, regulations, and other Federal guidelines to the facts in the case. Therefore, we have considered the claimant's statements only insofar as they are relevant in that analysis.

USMS Directive 3.14 effective October 6, 2003, provided the agency's policy concerning LEAP during the period of the claim. The directive, in addition to the particular section cited by the claimant, states:

The [USMS] Director's authority to supervise the allotment of LEAP is set forth in 5 U.S.C. 5545, Section A, and 5 [Code of Federal Regulations] CFR 550.181 – 186; and

The USMS will provide LEAP to Criminal Investigators who have annual average unscheduled duty hours of two or more hours beyond the regular eight-hour workday. LEAP equals 25 percent of the Criminal Investigator's basic pay rate, to include special pay and locality pay. LEAP will be authorized to ensure the availability of a Criminal Investigator for unscheduled duty.

Subpart A of part 550 of title 5, Code of Federal Regulations, revised as of January 1, 2005, was the governing regulation during the period of the claim. The pertinent sections state:

§ 550.181(a):

Each employee meeting the definition of criminal investigator in § 550.103, and fulfilling the conditions and requirements of 5 U.S.C. 5545a and § 550.181 through 550.186, **must receive availability pay to compensate the criminal investigator for unscheduled duty in excess of the 40-hour workweek based on the needs of the employing agency** (emphasis added).

§ 550.182:

(a) **Unscheduled Duty Hours.** For the purpose of availability pay, unscheduled duty hours are those hours during which a Criminal Investigator performs work, or is determined by the employing agency to be available to perform work that are not:

(1) Part of the 40-hour basic work-week of the investigator, or

(2) Regularly scheduled OT hours compensated under 5 USC 5542 and 5 CFR 550.111.

(b) **Regularly scheduled Overtime Hours.** For criminal investigators receiving availability pay, regularly scheduled overtime hours compensated under 5 USC 5542 and 5 CFR 550.111 **are those overtime hours scheduled in advance of the investigator's administrative workweek excluding the first two hours of overtime work on any day containing a part of the investigator's basic 40-hour workweek, as required by § 550.111(f)(1)** (emphasis added).

§ 550.111:

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved **only in writing by an officer or employee to whom this authority has been specifically delegated** (emphasis added).

(f)(1) Except as provided in paragraph (f)(2) of this section [which covers U.S. Secret Service Agents and Special Agents of the Department of State and foreign service], **for any criminal investigator receiving availability pay under § 550.181, overtime work means actual work that is scheduled in advance of the administrative workweek** (emphasis added)—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40-hour workweek; or

(ii) On a day not containing hours that are part of such investigator's basic 40-hour workweek.

§ 550.186(a):

...a criminal investigator receiving availability pay **may not be paid any other premium pay based on unscheduled duty hours** (emphasis added).

§ 550.121:

...night-work is **regularly scheduled work** (emphasis added) performed by an employee between the hours of 6 p.m. and 6 a.m....

§ 550.103:

Regularly scheduled work means work that is scheduled in advance of the administrative work week under an agency's procedures for establishing workweeks...**excluding any such work to which availability pay under § 550.181 applies** (emphasis added).

Hurricane Katrina made landfall in LA on August 29, 2005, and dissipated two days later. On September 2, 2005, the claimant was contacted by his supervisor and directed to report for work in response to the emergency caused by the hurricane, a storm that displaced over a million people and caused an immense amount of damage. He reported to work on September 3, 2005, only three days after the end of the storm. The record contains no evidence to show the time worked by the claimant, beyond his regularly scheduled hours of duty from September 4, 2005, to September 10, 2005, was scheduled in advance, in writing, by an employee of the USMS specifically authorized to make such a decision. *Doe v. U.S.*, 463 F3d 1314 (September 11, 2006). Accordingly, this time was unscheduled duty hours for which the claimant received LEAP.

The September 20, 2005, memorandum, states the EOC initiated 12 hour shifts for USMS Criminal Investigators on September 11, 2005, and the record shows the claimant was compensated by the agency, for the remainder of the claim period, following guidelines established in accordance with USMS Directive 3.14, 5 U.S.C. § 5545a, and 5 CFR § 550.181 through 186. As a Federal law enforcement officer receiving LEAP, the claimant may not be paid any other type of premium pay, including night differential based on unscheduled duty hours (5 CFR § 550.186(a)).

According to 5 CFR § 178.105, claims are settled on the written record and the claimant has the burden of proving the liability of the Federal Government and his or her right to payment. OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, *supra*. We are required to settle claims only in accordance with the applicable laws and regulations. Accordingly, the claim is denied.

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.