



United States
**Office of
Personnel Management**

Washington, DC 20415

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

Claimant: [name]

Organization: [region]
U.S. General Service Administration
Great Lakes Region
[city & State]

Claim: Sunday Premium Pay and Night Pay

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 06-0008

/s/ Judith A. Davis for

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

5/8/2006

Date

The claimant is employed in a [position] in Office of the [region], U.S. General Services Administration (GSA), in [city & State]. In his initial claim, which we received on December 5, 2005, the claimant requested the Office of Personnel Management (OPM) reconsider his agency's decision regarding his entitlement to Sunday premium pay. In a December 30, 2005, e-mail clarifying his claim, the claimant expanded his request to cover his claim for night pay differential also denied by his agency. We received the agency administrative report on January 3, 2006, and additional information from the claimant and the agency on April 21, 2006. For reasons discussed herein, the claim is denied.

The claimant was deployed by his agency to GSA Region 4, in Atlanta, Georgia, in support of Hurricane Wilma response efforts. The claimant stated he was informed in advance of the requirement to work 12-hour shifts, seven days per week, and:

My assignment was of known duration in that I had a set number of days to be there. My assertion is that I was scheduled in advance of the start of the workweek to work 7am to 7pm on Sundays and that the first 8 hours of time spent on Sundays became "regularly scheduled work." My workweek began on Sunday, therefore, I believe that the first 8 hours of work were not overtime and were "regularly scheduled" by the definition, and therefore I should receive Sunday premium pay for those hours.

Therefore, he requested Sunday premium pay for October 23, 2005, and October 30, 2005, and night pay for hours worked during the night shift from October 20, 2005, to October 30, 2005.

The agency denied the claim on the basis the claimant was required to work 12-hour shifts, seven days per week; however, the claimant's regularly scheduled tour of duty was not officially changed in connection with the emergency work efforts in advance of the regularly scheduled administrative workweek. This decision was also supported by guidance given to the agency in an e-mail by OPM's Pay and Leave Administrative Group on November 28, 2005, which stated:

In general, an agency is required to designate the 40 hours of an employee's regularly scheduled basic workweek and any hours of regularly scheduled overtime work in advance of the workweek. When an employee is required to work 7 days per week on a temporary basis, the agency does not have to designate hours of work on Sunday as part of the employee's 40-hour basic workweek. Under 5 USC 6101(a)(2) and 5 CFR 610.111(a)(2), an agency has the authority to determine the 40-hour basic workweek so that additional hours of work outside that timeframe become overtime hours.

Therefore, under the circumstances you described, management may decide not to change the employee's 40-hour basic workweek of Monday through Friday while he or she is on temporary duty travel and the additional hours of work on both Sundays would constitute overtime hours. The employee would not be entitled to Sunday premium pay (for the overtime work on Sunday) since Sunday premium pay is paid for non-overtime hours within an employee's basic 40 hours of duty.

Therefore, the agency's position is that work performed on Sunday, outside of the claimant's regularly scheduled tour of duty, does not entitle the claimant to Sunday premium pay; but does entitle the claimant to receive overtime pay, and therefore, the claimant was compensated appropriately.

Neither the claimant nor the agency initially specified his regularly scheduled tour of duty or the type of work schedule he was working: compressed, flexible, or the basic 40-hour workweek. As clarified in his April 21, 2006, e-mail, the claimant stated:

I normally work the first week of a pay period from 7am to 4:30pm M-Th. The second week of the pay period I work 7am-4:30pm M-Th – 7am-3:30pm on Friday. I don't recall seeing any paperwork to confirm this, but that has been my schedule since I started in 2004.

The agency cited 5 CFR 532.501 in its December 21, 2005, administrative report in defining Sunday work. Although the definition is the same for prevailing rate employees (Federal Wage System (FWS)) and General Schedule (GS) employees, citation 5 CFR 532.501 pertains to the FWS. The claimant is a GS employee and is covered under 5 CFR 550.103.

The Sunday premium pay provisions in 5 USC § 5546(a) state:

An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.

5 CFR 550.103 defines *regularly scheduled work* as "work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with 5 CFR 610.111."

The claimant's temporary assignment from October 20, 2005, to October 30, 2005, overlaps two pay periods; pay periods 22 (October 16, 2005, – October 29, 2005) and 23 (October 30, 2005, – November 12, 2005). The claimant began travel to perform his temporary assignment on Thursday, which was after the beginning of the administrative workweek. In responding to a natural emergency, there was no way the agency could have planned for this event and changed the claimant's regularly scheduled tour of duty or scheduled regular overtime for this period.

Information provided by the claimant undermines his assertion that he was scheduled to work 12-hour days in that his "actual hours of work" which he provided in a November 1, 2005, e-mail to the regional Director of Human Resources for his temporary assignment included:

Friday	10/21/2005	7:00am – 5:30pm (I was able to leave early)
Saturday	10/22/2005	7:00am – 5:00pm (I was able to leave early)
Sunday	10/23/2005	6:45 – 7:45 (I had to work longer)
Monday	10/24/2005	6:30am – 7:30pm (I had to work longer)

Thus, the actual hours of work performed force us to conclude that the claimant did not work 12-hour shifts, but worked within the broad parameters of his normal compressed work schedule (5/4/9) as defined in controlling agency instructions:

Under the 5-4/9 AWS schedule, the flexitime arrival and departure hours are different for the 8 and 9-hour days. On the 9-hour day, employees may begin work as early as 6:30 a.m., and may depart as early as 4:00 p.m. This same flexibility, however, is not allowable on the 8-hour day. Any 8-hour workday is governed by the 8-hour time band, and may begin no earlier than 7 a.m., in order to ensure that employees meet the minimum core-time departure requirement of 3:30 p.m.

and

When an employee is required to travel or participate in a training course where the hours of work are different than the employee's schedule, or in other unusual cases including emergencies, the employee and his/her supervisor will make individual adjustments in work hours on a case by case basis for that pay period.

Based on the circumstances and the information provided by the claimant and his agency, hours worked on both Sundays are overtime hours worked to the extent that they exceed the 80-hour biweekly compressed work schedule and are treated as premium pay as provided under 5 U.S.C. § 6128(b). Therefore, we affirm the agency's decision for denying compensation for Sunday premium pay.

Night pay differential, authorized under 5 U.S.C. § 5545, and 5 CFR 550.121, is payable for nightwork that is regularly scheduled work performed by an employee between the hours of 6 p.m. and 6 a.m. An employee who performs nightwork is entitled to pay for that work at his or her rate of basic pay plus a night pay differential amounting to 10 percent of his or her rate of basic pay.

However, 5 CFR 550.122(d) also states an employee is entitled to a night pay differential when he or she is temporarily assigned during the administrative workweek to a daily tour of duty that includes nightwork. This temporary change in a daily tour of duty within the employee's regularly scheduled administrative workweek is distinguished from a *period of irregular or occasional overtime work* (emphasis added) in addition to the employee's regularly scheduled administrative workweek.

The claimant provided documentation of actual hours worked, which shows he performed work during the night shift outside his regularly scheduled administrative workweek. As discussed previously, the claimant's official work schedule did not change and the day-to-day changes to the hours that he worked beyond that schedule preclude us from considering those hours as "regular overtime work" as defined in 5 CFR 550.103; i.e., "overtime work that is part of an employee's regularly scheduled administrative workweek" and covered by night pay differential under 5 CFR 550.122(c). Instead, the overtime hours must be treated as "irregular or occasional overtime work" as defined in 5 CFR 550.103; i.e., "overtime work that is not part of an employee's regularly scheduled administrative workweek" and not eligible for night pay differential as discussed previously.

OPM does not conduct adversary hearings, but settles claims on the basis of the written record involved in the claim. 5 CFR 178.105; Matter of *John B. Tucker*, B-215346, March 29, 1985. 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.

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