



United States
**Office of
Personnel Management**

Washington, DC 20415

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

Claimant: [name]

Organization: [agency component]
United States Marshals Service
United States Department of Justice
[city & State]

Claim: Request for Overtime Pay

Agency decision: Denied

OPM decision: Denied

OPM contact: Robert D. Hendler

OPM file number: 05-0026

/s/ for

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

6/26/2006

Date

The claimant occupies a Criminal Investigator, GS-1811-12, position in the [agency component], United States Marshals Service (USMS), United States Department of Justice (DoJ), in [city & State]. He requests reconsideration of his agency's decision to pay him premium pay subject to the biweekly pay cap under 5 U.S.C. § 5547(a) for the period of December 15, 2002, to September 6, 2003. The U.S. Office of Personnel Management (OPM) received the compensation claim on December 22, 2004, and the agency administrative report (AAR) on September 27, 2005. For the reasons discussed herein, the claim is denied.

The claimant believes his protection detail work is critical to the mission of the agency for purposes of applying title 5, United States Code (U.S.C.), section 5547, as amended by section 1114 of Public Law (P.L.) 107-107. He filed a grievance with his agency on January 28, 2004, requesting a \$4,940.06 payment for monies he had not received from December 15, 2002, to September 6, 2003, due to the limitations imposed by the biweekly cap. His grievance cites changes to 5 U.S.C. § 5547 that provide criteria by which law enforcement officers may be exempted from biweekly premium pay earning limits while performing mission-critical work. The claimant states he has

...been informed by law enforcement officers of other agencies that their agencies began applying changes to U.S.C. 5547 last year [and the]...protective assignments I have been assigned required long hours and many nights away from home, and I feel that I should be compensated accordingly.

The agency denied his request for payment by memorandum dated October 14, 2004. Based on directions in the agency's grievance decision, he filed a claim on December 7, 2004, with the General Services Administration, Board of Contract Appeals, (GSABCA). GSABCA subsequently forwarded the action to OPM based on OPM's authority to settle such claims (see 31 U.S.C. § 3702).

The claimant states:

I travel to Washington D.C. to work on these protection details at the request of the United States Marshals Service, in doing so, I have come in contact with protection details from other federal agencies, all of which seem to consider the protection of its assigned dignitaries, mission critical....The denial of my grievance was based in part, on the fact that the Director of the Marshals Service has not requested approval of an annual limitation for protective details. Obviously the Director of the Marshals Service is aware of the hours required to staff protection details, therefore, I fail to understand his reluctance to compensate those employees based on the hours they are required to work.

The claimant makes statements regarding the manner in which the agency handled his request for payment. 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 concern is to make our own independent decision about eligibility for premium pay by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimant's statements only insofar as they are relevant to making that comparison.

Title 5, Code of Federal Regulations (CFR) Part 550, subpart A, sections 550.105-107, which became effective May 5, 2002, were the governing regulations implementing 5 U.S.C. 5547, as amended by section 1114 of P.L. 107-107, during the period of this claim. These regulations provide for a biweekly maximum earnings limitation not to exceed the greater of the maximum biweekly rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law); or the biweekly rate payable for level V of the Executive Schedule (5 CFR 550.105) except under the circumstances defined in 5 CFR 550.106(a) or (b). The claimant's request and rationale are based on 5 CFR 550.106(b), which states:

(b) (1) For any pay period in which the **head of an agency (or designee), in his or her sole discretion**, determines that an employee is needed to perform **work that is critical to the mission of the agency**, the agency **may** pay premium pay under the limitations described in paragraph (c) of this section and 550.107 instead of under the biweekly limitation described in 550.105(a) (emphasis added).

(2) Entitlement to premium pay under this annual limitation becomes effective on the first day of the pay period designated by the head of the agency (or designee).

The claimant's rationale appears to be based on his belief that an agency is obligated to implement the provisions of 5 CFR 550.106(b) and that it should be applied to protection details. However, these regulations implement 5 U.S.C. § 5547(b)(3) which states;

...Subject to regulations prescribed by the Office of Personnel Management, the head of an agency **may** [emphasis added] determine that subsection (a) shall not apply to an employee who is paid premium pay to perform work that is critical to the mission of the agency. Such employees may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would not, in any calendar year, exceed the greater of—

The record shows the Attorney General delegated authority to the Assistant Attorney General for Administration (AAG/A) to determine if work performed by DoJ employees is "critical to the mission of the agency," thereby exempting them from the biweekly pay limitation. However, there is nothing in the record to indicate that the AAG/A has ever made such a decision. The record supports the claimant's statement that the Director, USMS has not requested approval of an annual limitation for protective details, but he is not required to do so. The record also shows the Director, USMS did not receive delegated authority to make such decisions for the USMS until after the period of time covered by this claim, on March 26, 2004, and having been delegated the authority, he has not designated protection detail work as mission-critical.

The pertinent statutory and regulatory languages are permissive and give agency heads, and those they delegate, considerable discretion in determining whether or not work is considered critical to the mission of the agency. Absent an affirmative decision on the part of the head of the agency, or their duly appointed designee that USMS protective detail assignments are critical to the mission of the agency, or that an emergency exists, there is no basis to exempt the

performance of such work from established biweekly premium pay limitations imposed by statute (5 U.S.C. § 5547(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.