



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

E-178653

August 6, 1973

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Lieutenant General Samuel Phillips, USAF
Director
National Security Agency
Fort George G. Meade, Maryland 20755

Dear General Phillips:

We refer to the letter of May 2, 1973, serials M3/86/73, from your Director of Civilian Personnel, requesting our decision as to whether certain employees of the National Security Agency are entitled to night differential pay for work they are performing under stated circumstances. Specifically questioned is whether the night work involved comes within the meaning of "regularly scheduled work" as that term is used in section 5545(a) of title 5 of the United States Code.

The Director of Civilian Personnel states the situation as follows:

1. Work starts in every case after 6 p.m. Work could start as late as 12 p.m., but usually begins between 8 p.m. and 10 p.m. However, the specific starting time varies due to circumstances beyond our control. These General Schedule employees work 8 hours per night, 5 nights per week.

2. This work arrangement has been in existence since February 1973 and will continue indefinitely. The employees have been working regularly Sunday through Thursday nights, but this is subject to possible change and may not necessarily be consecutive nights (the employees would know generally 24 hours in advance of any change). Additionally, the employees are generally provided 24 hours advance notice as to the specific time to report for duty.

Because the statutory authority for the payment of night differential, 5 U.S.C. 5545(a), provides that such differential may be paid only for the performance of "regularly scheduled work" between the hours of 6 p.m. and 6 a.m., doubt exists as to whether employees working under the above-stated circumstances are entitled to night differential since they are not starting work at the same time every night, even though they are performing such work on a regular basis.

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As noted by the Director of Civilian Personnel, we pointed out in 38 Comp. Gen. 657 (1957) that the legislative history of the night differential statute indicates that Congress intended night differential to be "extra pay for working abnormal hours regularly." We have defined the term "regularly scheduled work" as used in that statute (now 5 U.S.C. 5545(a)) to mean work duly authorized in advance and scheduled to recur on successive days or at specified intervals. 42 Comp. Gen. 326 (1962); 40 id. 397 (1961). Further, in 41 Comp. Gen. 8 (1961), we held that night differential could be paid in a situation where the night work recurred regularly although not according to a fixed hours-of-work pattern.

Accordingly, we believe that in the situation presented, night differential may properly be paid for work performed between 6 p.m. and 6 a.m. even though it is administratively impossible to schedule the work to begin at the same time every night.

As to the second part of the related circumstances, it is our understanding that the current work arrangement, which has been in existence since February 1973, may change in the future so that, while the employees involved will still be working a basic workweek which consists primarily of work performed between the hours of 6 p.m. and 6 a.m., the actual nights worked may not necessarily be consecutive nights. In such event you point out that the employees generally would be given 24 hours advance notice of the change. While we may not render an authoritative decision at your request upon the hypothetical question raised by a "possible change" in the nightly working arrangement, it appears to us that should such a change occur, payment of the night differential would be consistent with the intent of the statute, 5 U.S.C. 5545(a). In the event an authoritative decision is desired, a further request for a decision may be made when the "possible change" materializes.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States