

DECISION



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

FILE: B-209327

DATE: July 26, 1983

MATTER OF: General Services Administration - Statutory
Pay Ceiling - Compensatory Time Off for
Religious Observances

DIGEST:

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. § 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute.

The issue presented is whether certain Government employees whose pay has reached the aggregate pay limitation imposed by 5 U.S.C. § 5547, may be granted compensatory time off for religious observances, despite the fact that they are not otherwise entitled to receive premium pay. We hold that agencies may allow all of their employees, including those employees whose salaries have reached the aggregate pay limitation, to work hours in excess of the basic 40-hour workweek in order to compensate for time used when those employees remain absent from work in fulfillment of their religious obligations.

This decision is in response to a letter from Ms. Allie B. Latimer, General Counsel of the General Services Administration (GSA), requesting that we review section 5550a of Title 5, United States Code, to determine whether agencies properly may grant compensatory time off for religious observances to members of the Senior Executive

026253
122171

Service (SES) and General Schedule (GS) and Merit Pay (GM) employees who have reached the aggregate pay limitation or pay cap imposed by 5 U.S.C. § 5547. The General Services Administration brought this matter to our attention, "because of conflicting statutory and regulatory provisions and previous Comptroller General decisions which disallowed the earning and use of compensatory time" by such employees.

Specifically, GSA believes that as applied to Government employees at the statutory pay cap, Title IV of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, Public Law 95-390, September 29, 1978, 92 Stat. 755, 762, which authorized the granting of compensatory time off to employees for religious observances, may be inconsistent with certain provisions of the Civil Service Reform Act of 1978, Public Law 95-454, October 13, 1978, 92 Stat. 1111, which provide that members of the Senior Executive Service (SES) are to be excluded from receiving any form of premium pay under 5 U.S.C. Chapter 55, subchapter V. In its submission, the agency states as follows:

"* * * It is our interpretation based upon the specific exclusion of SES members from coverage under this subchapter, that they were not eligible to use the provisions of section 5550(a) for compensatory time off for religious observances. In addition, we believe that employees at or above the statutory pay cap of \$57,500 for GS and GM employees and \$58,500 for SES members should be excluded based on the rule established in 37 Comptroller General (CG) 362 and further amplified in CG Decision B-200058, dated January 28, 1981."

In essence, the agency questions how Federal employees who have reached the statutory pay cap may be authorized to earn and use compensatory time off for religious observances, since we have previously held that compensatory time which may be granted to employees in lieu of monetary compensation for irregular or occasional overtime work is subject to the aggregate salary limitations set in 5 U.S.C. § 5547.

According to the submission, the Office of Personnel Management (OPM) has informally advised GSA that employees who are now being paid at the statutory maximum are entitled to earn and use compensatory time off for religious observances, since, in OPM's view, Congress did not intend to

exclude such capped employees from the coverage of 5 U.S.C. § 5550a. The GSA now questions OPM's interpretation of Congress' intent in this matter. The agency notes that while the language of 5 U.S.C. § 5550a does not indicate any intention on the part of the Congress to specifically exclude any group of employees from entitlement to compensatory time off for religious observances, neither does it show a clear intent to include employees at the statutory pay cap, who are otherwise not entitled to earn and use compensatory time in lieu of overtime pay. Furthermore, GSA points to language in the Civil Service Reform Act of 1978 which specifically excludes members of the SES from receiving any form of premium pay. The agency maintains that since the Civil Service Reform Act of 1978 (which was enacted after the passage of Public Law 95-390) made no reference to use of compensatory time for religious observances by capped SES employees, it is doubtful that Congress intended for such employees to be able to earn and use compensatory time for religious purposes, as an exception to the general rule allowing no premium pay.

Title IV of the Federal Employees Flexible and Compressed Work Schedules Act of 1978 added section 5550a to Title 5 of the United States Code, authorizing Government agencies to grant compensatory time off for their employees' religious observances. That section provides in part as follows:

"(a) * * * the Office of Personnel Management shall prescribe regulations providing for work schedules under which an employee whose personal religious beliefs require the abstention from work during certain periods of time, may elect to engage in overtime work for time lost for meeting those religious requirements. Any employee who so elects such overtime work shall be granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons, notwithstanding any other provision of law." (Emphasis added.)

In accordance with the above statute, on October 6, 1978, the Office of Personnel Management (OPM) promulgated regulations to implement 5 U.S.C. § 5550a. Those regulations, which are contained in 5 C.F.R. Part 550, Subpart J, are said to apply to, "each employee in or under an

executive agency as defined by section 105 of title 5, United States Code." Section 105, in turn, defines an executive agency as, "an Executive department, a Government corporation, and an independent establishment."

Subpart J specifically provides as follows, at section 550.1002:

"(b) To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall in each instance afford the employee the opportunity to work compensatory overtime and shall in each instance grant compensatory time off to an employee requesting such time off for religious observances when the employee's personal religious beliefs require that the employee abstain from work during certain periods of the workday or workweek.

* * * * *

"(d) The premium pay provisions for overtime work in Subpart A of Part 550 of Title 5, Code of Federal Regulations, and section 7 of the Fair Labor Standards Act of 1938, as amended, do not apply to compensatory overtime work performed by an employee for this purpose."

We believe that the language and the legislative history of section 5550a show an intent on the part of Congress to provide all Federal employees, including those at the statutory pay cap, with the opportunity to earn and use compensatory time off for religious observances. The language of the statute itself is rather compelling in this regard, since it appears to embrace any employee who elects to work overtime hours to compensate for time lost in meeting his religious requirements, notwithstanding any other provision of law. Furthermore, the regulations implementing the statute specifically provide that 5 U.S.C. § 5550a is to be applied to each employee of an executive department, Government corporation, or independent establishment, as defined by 5 U.S.C. § 105, above. Like the statute itself, these regulations appear broad in coverage. Subpart J directs agencies to in each instance afford an employee the

opportunity to work compensatory overtime when the employee's personal religious beliefs require his abstention from work. In addition, the above statute and its implementing regulations provide only one specific limitation on Federal employees' entitlement to compensatory time off for religious purposes. That restriction states that an employee's request for religious compensatory time may properly be denied under, "such exceptions as may be necessary to efficiently carry out the mission of the agency or agencies involved." 5 U.S.C. § 5550a(c). In no place, however, do the statute or regulations state that compensatory time off for religious purposes is not to be granted to employees who are otherwise not entitled to accrue and use compensatory time off under the premium pay provisions of subchapter V of Chapter 55, Title 5, United States Code.

In this regard, the regulations at Subpart J, which were promulgated to implement section 5550a, specifically provide that the premium pay provisions contained in Subpart A of 5 C.F.R. Part 550, which implement 5 U.S.C. Chapter 55, subchapter V, above, do not apply to compensatory time off for religious purposes under that title. Thus, OPM is clearly treating compensatory time off for religious observances as a different kind of entitlement than compensatory time off which may be afforded to an employee for irregular or occasional overtime work in lieu of monetary compensation under 5 U.S.C. § 5543. We believe that the legislative history and the unique subject matter of section 5550a support such a determination.

Section 5550a is specifically concerned with the amount of freedom enjoyed by Federal employees in exercising their religious beliefs. The free exercise of such beliefs is a fundamental right guaranteed under the First Amendment of the United States Constitution. An individual's freedom both to hold a particular set of religious beliefs and to practice in accordance with those beliefs has traditionally been one of the highest values of our society. See Marsh v. Alabama, 326 U.S. 501 (1946); and Murdock v. Pennsylvania, 319 U.S. 105 (1943). Therefore, as the United States Supreme Court stated in Braunfeld v. Brown, 366 U.S. 599, 606 (1961), "when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it."

The legislative history of section 5550a shows that the provision was intended to cover all employees. In

introducing this section on the House floor as an amendment to the Flexitime Act, Representative Solarz, the sponsor of section 5550a, stated that the section, "is designed to guarantee that all Federal employees are treated equally, regardless of their religion, and to make sure that no Federal employee is discriminatorily or unnecessarily penalized because of their devotion to their faith." 124 Cong. Rec. 15435 (1978). Representative Solarz also stated that employees who elected to work overtime to make up for time lost for religious observances would, "waive their right to premium overtime pay rates for such work and are only to be granted equal compensatory time off from their schedules (sic) tours of duty." Id. at 15435-15436. Finally, Representative Solarz stated that:

"* * * The sole purpose of this legislation is to require the Federal Government, as an employer, to make reasonable accommodation to the religious needs of its employees who, because of their religious faith, are unable to work during certain periods of the normal workday or workweek." Id. at 15436.

The emphasis of Title IV, thus, is clearly to provide for flexibility in Federal personnel practices, in order to permit all Federal employees to exercise the tenets of their faiths without being forced to lose a portion of their pay or annual leave.

This legislative history of section 5550a does not specifically address the use of religious compensatory time by employees who are at the statutory pay cap and are, thus, not entitled to receive compensatory time off in lieu of overtime pay under 5 U.S.C. § 5543. However, we believe that section 5550a was enacted to provide a mechanism whereby all individuals, especially those of minority faiths, would be able to exercise their beliefs without losing pay or annual leave under the Federal personnel system. The goal of the statute was to encourage the free exercise of religious beliefs by Government employees, and the accrual and use of compensatory time off was simply a means to achieve that goal. In light of this purpose, we do not believe that Congress intended to exclude any group of employees, including those at the statutory pay cap, from exercising their entitlement to religious compensatory time under 5 U.S.C. § 5550a.

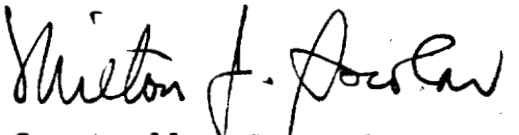
To the contrary, the specific goal of 5 U.S.C. § 5543 is simply to provide a mechanism whereby Federal employees may request compensatory time off in lieu of monetary compensation for actual overtime work performed. Under subchapter V of Chapter 55, Title 5 of the United States Code, an employee may receive such compensatory time off for overtime work he has performed, for which he would otherwise be entitled to receive premium pay. This is in marked contrast to compensatory time off for religious purposes, which does not contemplate or in any way involve the payment of premium pay for any work performed in excess of an 8-hour workday or a 40-hour workweek. Thus, an employee who earns a given amount of compensatory time for religious observances may not elect to be paid for that time. Rather, section 5550a merely allows an employee to work in excess of the basic 40-hour workweek, and thereby earn, and have credited to a special leave account, a given number of hours, which he may use in place of time lost due to fulfillment of his religious obligations. Thus, the earning and use of compensatory time off for religious purposes, in essence, involves a mere substitution of time and, unlike traditional compensatory time off granted under 5 U.S.C. § 5543, cannot replace, or result in, an employee's entitlement to premium compensation.

The GSA has correctly stated that under our decisions in 37 Comp. Gen. 362 (1957), and Donald Bodine, B-200058, January 28, 1981, compensatory time off which may be granted to employees in lieu of monetary compensation for irregular or occasional overtime work is subject to the aggregate salary limitation imposed on employees by statute. Under these decisions, an employee whose pay is set at the statutory ceiling for his position is not entitled to receive either additional compensation (premium pay) for his overtime work or compensatory time off in lieu of such compensation. See also Earl S. Barbely, B-192839, May 3, 1979.

In light of the distinctions we have drawn, above, between traditional compensatory time off in lieu of premium pay and compensatory time off for religious observances, we do not believe that the latter should be treated as normal premium pay, which is subject to the aggregate salary limitation, under the provisions of subchapter V of Chapter 55, Title 5, United States Code. Rather, we believe that in enacting section 5550a, Congress intended to provide a means whereby all employees could worship more freely, without losing their pay or accumulated leave. Thus, in authorizing

the accrual and use of compensatory time for religious purposes, 5 U.S.C. § 5550a grants employees flexibility in exercising their beliefs, rather than any form of premium pay.

Accordingly, since religious compensatory time is not premium pay which is subject to limitation by statute, Federal agencies may allow all of their employees, including those whose pay has reached the statutory limit, to work overtime hours under 5 U.S.C. § 5550a, to compensate for time lost when they must abstain from working in fulfillment of their religious obligations.

for 
Comptroller General
of the United States