

entitlements. With OPM's approval, the agency administratively established the claimant's pay. See *Appendix V, OPM's Operating Manual, dated 1996*. As a result, the agency discontinued pay practices that the claimant was receiving when he was changed from WB to XE status. As of January 31, 1995, the agency has compensated the claimant and established his premium pays and differentials in accordance with Title V rules and regulations.

The agency administrative report establishes that the claimant has been exempt from the Fair Labor Standards Act since May 31, 1981, when he became a supervisor. The claimant is not a member of, or covered by a bargaining unit. The agency states that the claimant is not entitled to penalty pay because it is a form of payment reserved for the agency's negotiated bargaining unit employees, and not prescribed in Federal statute or regulations for non-union employees. The agency acknowledges that until recently, the claimant and other Supervisor II, Hydro-maintenance employees in Reclamation received penalty pay for working six days in an administrative workweek. The agency has since determined that the payment of penalty pay is a legal payment only for union employees represented by the Columbia Basin Trades Council.

The agency reported that the nature of the claimant's work is not conducive to a traditional Sunday through Saturday workweek schedule and used a varied administrative workweek of 10 straight days on and 4 days off. The agency reported that it established this schedule in accordance with Reclamation Instructions, R610.1.1, Subchapter 1, *Weekly and Daily Scheduling of Work*.

The agency contends that the claimant is not entitled to overtime because he has not worked six consecutive days in his designated administrative workweek. The agency referenced 5 CFR 532.501, 5 CFR 610.111(a)(1), and 5 CFR 610.121(b)(1) to support their decision. The agency provided a cyclical schedule of several 14-day pay periods that employees such as the claimant worked. A review of pay period 6, (February 24, 2002 through March 9, 2002), revealed that the claimant worked 5 days on, 4 days off, and 5 days on. During pay period 7, (March 10, 2002 through March 23, 2002), the claimant's administrative workweek included 6 days on, 4 days off, and 4 days on. The evidence of record reflects that, contrary to the agency's belief, the claimant worked six consecutive days in his designated administrative workweek during pay period 7.

Section 6101 of title 5, United States Code (U.S.C.), requires agencies to establish a basic workweek of 40 hours of work performed within a period of not more than 6 of any 7 consecutive days. Section 6122 authorizing agencies to use flexible schedules and section 6127 authorizing agencies to use compressed schedules are exceptions to this requirement. Section 6121(3) specifies that for employees working on flexible and compressed work schedules, the basic work requirement consists of the number of hours, excluding overtime, which the employee must work or account for through leave or otherwise. Under 5 U.S.C. § 6121(5), the term "compressed schedule" means an 80-hour biweekly basic work requirement which is scheduled for *less than* 10 workdays. The cyclical schedule provided by the agency does not meet the statutory requirements for a compressed schedule because

the basic work requirement for one biweekly pay period is ten days. Accordingly, the claimant did not work on a compressed schedule.

According to 5 U.S.C. § 6122, an agency may establish programs that allow the use of flexible schedules. 5 U.S.C. § 6122 specifies that flexible schedules must include designated hours and days during which an employee must be present for work, as well as designated hours during which an employee may choose the time of his arrival at and departure from work, solely for such purpose. According to 5 U.S.C. § 6121, overtime hours, when used with respect to flexible schedules under sections 6122 through 6126, means all hours exceeding eight hours in a day or 40 hours in a week that are officially ordered in advance.

The agency has not approved compressed work schedules or maxi-flex schedules within Reclamation. The claimant worked according to an agency-generated schedule that included work in excess of 40 hours per week. The claimant did not have the option of choosing or declining to work the extra hours. The claimant, a full-time employee, was not working on a compressed schedule or a flexible schedule. Therefore, the agency must apply the basic workweek described in 5 U.S.C. § 6101 in computing the hours of overtime that the claimant worked. The claimant is covered by the overtime pay provisions in 5 U.S.C. § 5544(a), and as such, he is entitled to overtime pay for overtime work in excess of 8 hours in a day or 40 hours in a week.

The Back Pay Act, 5 U.S.C. § 5596, applies to circumstances where an appropriate authority finds that an employee was affected by an unjustified or unwarranted personnel action and that the personnel action resulted in the withdrawal or reduction of all or part of the employee's pay, allowances or differentials. 5 U.S.C. § 5596(b)(1)(A)(i) specifies that, on correction of the personnel action, an employee is entitled to receive for the period that the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials which he normally would have earned or received during the period if the personnel action had not occurred.' The claimant is entitled to interest on the back pay that he is owed for overtime.

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. The claimant has the burden of proving that he or she actually worked overtime that was officially ordered or approved, or actively induced, by an agency official with authority to order or approve overtime work. *Matter of Jim L. Hudson, supra*. The agency reported that the claimant received his work schedule in advance. The claimant is entitled to overtime pay during pay period 7 because he worked a total of 48 hours during the first administrative workweek in that pay period. The claimant is also entitled to receive interest for the overtime pay for which he has not yet been paid in accordance with section 5596(b)(1)(A)(i) of the Back Pay Act. Since the claimant is a full-time employee, he is entitled to 40 hours of basic pay for the second administrative workweek during pay period

¹OPM regulations, at 5 CFR 550.803, specify that the term "pay, allowances, and differentials" means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a federal function. Section 550.803 also specifies that the term "unjustified or unwarranted personnel action" includes personnel actions and pay actions, alone or in combination.

7 and he may not be charged annual or sick leave for hours during which he was not scheduled to work. Hence, this claim is granted.

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

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