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1993 U.S. Comp. Gen. LEXIS 569, \*

Matter of: **Hurricane Andrew**

B-250889

Comptroller General of the United States

1993 U.S. Comp. Gen. LEXIS 569

April 28, 1993

**CORE TERMS:** travel, temporary, arduous, duty, site, overtime, lodging, traffic, station, hurricane, relief effort, hours of work, time spent, blocked, qualify, commuting, traveling, scheduled, commute, considerable distance, travel time, partially, assigned, traveled, regular, debris, administratively, contemplation, unusually, improved

**HEADNOTES:**

**[\*1]**

Employees were assigned to temporary duty in Florida in the aftermath of **Hurricane Andrew** to help in the cleanup effort. Conditions of travel in the early days of the effort were chaotic. Roads from the employees' temporary lodgings to the temporary work sites were often partially blocked by debris and clogged with traffic because other roads were completely blocked; the work sites varied daily and often at considerable distance from each other; and the employees, who were working as much as 12-14 hours daily, sometimes had to travel round-trip as much as 4 hours a day commuting. In these circumstances, the agency may pay overtime to employees who traveled under these arduous conditions, in accordance with 5 U.S.C. § 5542(b)(2)(B) (iii) or § 5544(a).

**OPINIONBY:**

SOCOLAR

**OPINION:**

**DECISION**

This decision responds to a request for an advisory opinion from the South Atlantic Division of the Corps of Engineers, Department of the Army. n1 The question asked is whether the time spent by employees traveling between their places of temporary lodging and their work sites while on temporary duty in Dade County, Florida, after **Hurricane Andrew** may be considered hours **[\*2]** of work under 5 U.S.C. § 5542(b)(2)(B)(iii) and (iv) or 5 U.S.C. § 5544(a).

n1 Colonel James H. Simms, USA, Division Engineer.

The agency has asked for our opinion only on the title 5 overtime provisions; thus we have limited this decision to those provisions and have not addressed the issue of Fair Labor Standards Act overtime. We conclude that the agency may pay overtime to those employees whom it finds commuted to work under the conditions described below as hours of work carried out under arduous conditions within the meaning of the title 5 overtime provisions cited above.

## BACKGROUND

**Hurricane Andrew** struck Dade County, Florida, on August 24, 1992. Its 160-mile-per-hour winds resulted in an estimated \$ 15 billion in damages making it, from a property damage standpoint, possibly the largest natural disaster in American history.

In the aftermath of **Hurricane Andrew**, the Corps of Engineers was one of several federal agencies that responded to the emergency. Since Dade County, Florida, is within the civil works jurisdiction of the Jacksonville District of the Corps of Engineers, many employees [\*3] of the Jacksonville District headquarters were assigned to the Dade County area in a temporary duty status to work on the relief mission. In addition, hundreds of Corps of Engineers employees from other districts around the country who volunteered to help in the cleanup efforts were sent there in a temporary duty status as well. Nearly 600 Corps of Engineers employees were on temporary duty in the Dade County area working under the direction of the Jacksonville District. n2

n2 The Corps of Engineers employees participating in the disaster relief effort include both exempt and nonexempt employees under the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et seq. (1988). Under Title II, section 210(1) and (3) of the Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, Nov. 5, 1990, 104 Stat. 1439, employees to whom the FLSA applies are excluded from the overtime provisions of 5 U.S.C. § 5542(a) and 5 U.S.C. § 5544(a).

The agency reports that because of the widespread devastation, the reduced numbers of hotels and motels available to hold the massive [\*4] influx of personnel, many Corps employees had to be housed at a considerable distance from their work sites. Additionally, many roads that had to be used by them to commute from their temporary lodgings to their work sites were at least partially blocked by debris and clogged with traffic, in part because other roads were completely blocked. Also, because of the work required, the work sites for many of those employees varied daily and often at considerable distance from each other. As a result, many of these employees, who were working as much as 12-14 hours daily, sometimes had to travel round-trip as much as 4 hours a day commuting between their work sites and their lodgings.

## DISCUSSION

Ordinarily travel by an employee from his temporary lodging to his temporary duty station is equivalent to home to work commuting and, thus, is not compensable as hours of work. However, time spent in a travel status away from the employee's official duty station may be considered hours of work if the specific conditions stated in the statute are met. Therefore, the question is whether the travel time performed by those employees near their temporary duty station would qualify as hours of work [\*5] under 5 U.S.C. § 5542(b)(2)(B)(iii) and (iv) or § 5544(a) (1988).

Section 5542(b)(2) of title 5, United States Code, as amended, n3 provides that time spent in a travel status away from the official-duty station of an employee is not hours of employment unless "(B) the travel . . . (iii) is carried out under arduous conditions, or (iv)

results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official station." Section 5544(a) contains essentially the same provisions.

n3 Title I, section 101(c) of Pub. L. No. 98-473, Oct. 12, 1984, 98 Stat. 1874.

First, we point out that the so-called "uncontrollable event" exception (exception (iv)) does not apply here. Once an employee has performed compensable travel from his official station to the temporary duty location in response to an uncontrollable event, e.g., **Hurricane Andrew**, including his return travel to his official station, any other travel performed must requalify under the statute for it to be deemed hours of employment. That is, unless a new emergency [\*6] arose while the employee was at the temporary duty location that caused him to travel outside his scheduled duty hours, and that could not be scheduled or controlled administratively, any travel performed in and about the temporary duty location incident to the employee's assigned duties there would not qualify as travel that could not be scheduled or controlled administratively. U.S. Army Corps of Engineers, B-237852, June 18, 1990.

The remaining question is whether the travel was carried out under arduous conditions within the contemplation of exception (iii), above. In guidance provided by the Office of Personnel Management (OPM), travel under arduous conditions is described as travel over unusually adverse terrain, during severe weather conditions, or to remote, barely accessible facilities by foot, horseback or truck. n4 The guidance goes on to say that a distinction should be drawn between arduous conditions of travel and hazardous conditions of travel, keeping in mind that the latter may contribute to the former.

n4 Federal Personnel Manual Supplement 990-2, Book 550, S1-3b(2)(b).

The OPM guidance is consistent with our decisions. For example, in 26 Comp. Gen. 433 (1946), [\*7] we agreed with the Secretary of Agriculture that the time spent by his employees outside their regular duty hours in traveling to and from the site of a fire, including as a parachute jumper in an airplane, may be classified as work. n5 In 41 Comp. Gen. 82 (1961), we held that travel by automobile outside the employee's regular workweek, even for a long period, absent unusual circumstances, does not constitute travel under arduous conditions. We have also held that neither the time when travel is performed, nor the amount of time spent traveling, make the conditions of travel arduous, and that hazardous conditions of travel are not necessarily arduous conditions of travel. Dr. Saul Narotsky, B-217685, May 31, 1985, and decisions cited. See also Eunita Davis, B-231800, Feb. 3, 1989.

n5 Then, the compensation statute merely stated that an employee could be paid overtime for work performed outside the employee's regular tours of duty.

Thus, as the OPM guidance indicates, to qualify travel time as arduous, the conditions of the travel must be unusually adverse. It is not sufficient that the employee encounter heavy traffic, bad weather, and [\*8] long delay. B-199646, Aug. 11, 1981; B-168948, Sept. 8, 1970. These adverse conditions are encountered by many commuters. It is not within the contemplation of the statute that an employee should be paid overtime for traveling under such common, although adverse, conditions.

We are persuaded, however, that during the early stages of the **hurricane** disaster relief

effort at least some of the employees did commute to and from work under unusually adverse conditions. As the Corps reports, the conditions encountered in the early days of the effort were chaotic, at best. Many public roads in the devastated area were blocked, either entirely or partially, because of debris, causing heavy traffic in the area; there were inoperable traffic signals on many major highways in the area, and the employees had long commutes between their temporary lodgings and their work sites in the devastated area, along with extremely long work days. In addition, work locations were constantly changing from day-to-day. While perhaps none of these conditions, standing alone, would qualify the travel time of these employees as arduous, together the effect of these conditions was to make the travel arduous, within [\*9] the contemplation of the OPM guidance.

The agency reports that conditions in the area gradually improved as the relief effort progressed. Although the agency reports that traffic continued to be a problem at the end of September, it also reports that the conditions of the public roads had improved. Moreover, we are informally advised that the agency was able as the relief effort continued to obtain lodging for the employees much closer to the work areas.

We are not in a position to decide exactly when conditions in the disaster area improved to the point that the travel stopped being arduous. While it appears to us that the adverse travel conditions did not last too long, we recognize that the agency is in the best position to make this determination. In accordance with this decision, the agency should determine a cut-off date when the conditions of travel could no longer be considered arduous within the meaning of the statute.

Moreover, for establishing entitlement to arduous travel pay, a distinction must be made between those employees who traveled each day to work at the sites of the damage (usually as inspectors) and those who worked elsewhere, usually in administrative [\*10] support functions. In this connection, we understand that some of the employees performed administrative duties at a temporary headquarters established by Corps at the Miami Airport. We appreciate that these latter employees also contributed to the relief effort and may have had to commute a long distance each day. However, as stated above, a long commuting time, even under conditions of heavy traffic, is not sufficient by itself to qualify the travel as arduous.

Accordingly, we remand the matter to the Corps of Engineers to determine on a case-by-case basis whether an employee actually traveled under arduous conditions and the time spent in such travel. Any doubtful or disputed cases may be submitted to this Office for decision based on a full and complete record.

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