HRDG 4500a - APHIS Imports and Exports Overtime Interpretation - Appendix

Last Modified:

Supplement 4500A
APHIS Imports & Exports Overtime Interpretation
APPENDIX - RELATED OVERTIME DOCUMENTS

- APHIS Directive 402.3, 3/16/84 (46.44 KB)
- TOD Extension - Frey/Finamore, 4/23/84
- Multiple Callout/Back - Smith/Ehnis, 4/07/86
- Sunday Tour - Robertson/Finamore, 7/06/87
- 8-Minute Rule - Havens/Burgess, 10/12/89
- Pay for Travel Time under Title 5 of the U.S. Code - King/Burnett, 3/28/97

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Request for Clarification of AD-402.3

April 23, 1984

Arnold J. Finamore
Assistant Area Director
JFK International Airport, Arrivals Bldg.
Jamaica, NY 11430

This is in reference to your memorandum dated April 16, 1984, and the questions presented therein for clarification. The answers given you earlier on the phone are materially correct. We shall try to discuss each of your questions as you have presented them in your memorandum.

Situation 1

"TOD ends at 2130. A continuous overtime job (stayover) is in progress. Another arrival at the same location is due at 2230.

Question - What is compensation for 2230 arrival?"

Answer - To properly answer this question it would be necessary to know the length of the continuous overtime job. Depending upon what time the continuous stayover job ends, (which would then equate to the end of the TOD) if the same officer is used, you would apply the entitlements indicated in Attachment 2 to AD 402.3. If the break between the end of the continuous assignment and 2230 was at least 30 minutes, the employee would receive a 2-hour minimum period plus 1/2 CTT. The important thing to remember is that the end of the continuous service becomes the end of the previous tour of duty for entitlement calculation purposes.

If another employee is called in to handle this 2230 assignment, it probably would be a full call-back situation.

Situation 2

"TOD ends at 2130. There is a **stayover** at 2200. There is a job at a different location on the airport at 2300. The person on the stayover is the first "volunteer" for night overtime duty.

Question - How would this officer be compensated?"

Answer - We presume there is continuous service until 2200. If so, 2200 becomes the end of the tour of duty purposes of this example. 2300 is 1 full hour (60 minutes) after the end of TOD. Thus, the employee would be entitled to a 2-hour minimum

period starting at 2300 plus 1/2 CTT. If the job were a two person assignment and the other officer was entitled to a full call back by virture of being called in more than 60 minutes after the end of his previous tour of duty, person two would receive the 2-hour minimum plus full CTT.

Situation 3

"An officer is assigned a cut flower inspection job 60 minutes after the end of TOD. The broker arrives late and the first box of flowers is not ready for inspection until 75 minutes after the end of the TOD. The officer was on time.

Question - Does the phrase "when work begins" mean that the officer is compensable at full CTT or does the order time prevail, mandating 1/2 CTT?"

Answer - The ordering time (ETA) prevails unless it is given within the TOD. Overtime clock hours start at ETA not ATA. When the employee was ordered to report, not when the flowers arrived.

Situation 4

"The TOD ends at 2130. An officer is working a stayover at that location which ends at 2145. Another arrival is due at 2215, 45 minutes after the normal TOD ends and 30 minutes after the completion of the 15 minute stayover.

Question - How is the officer compensated for the 2215 arrival?

Answer - Using 2145 as the revised end of the TOD, the overtime assignment begins 30 minutes afterwards, thus the officer is entitled to a 2-hour minimum overtime period plus 1/2 CTT.

Situation 5

"TOD ends at 2130. There is an ETA for 2215 which is assigned as a 2-hour minimum plus 1/2 CTT and finishes at 2300. At 2400 there is another job for which this person is available as a nighttime volunteer.

Question - What is the compensation for the officer?"

Answer - For the job at 2215 ending at 2300, the officer would be entitled to a 2-hour minimum plus 1/2 CTT. To figure the entitlement for the job beginning at 2400, you refer to Section G of Attachment 3. Since the job beginning at 2400 is less than

2 hours after the beginning of the previous job, the entire period is considered as continuous from 2215 to the completion time of the job starting 2400. Charges for the entire period plus the 1/2 CTT would be prorated among the recipients of the services. Employee would receive continuous OT pay from 2215 until the 2400 assignment is completed plus 1/2 of the prescribed CTT allowance.

Note: Situation 5 is different than the other four situations in that Situation 5 involves multiple call-back assignments whereas the other four situations either are single call-out situations or involve contiguous or continuous service situations. Thus, for Situation 5 you use Section G to Attachment 3 of AD 402.3. For the other situations, you use Attachment 2.

Other Matters

There is not meant to be any disparity between the phrase "If on a single holiday or at any other time outside the employee's tour of duty" and the phrase "If there is involved on a single holiday or other nonworkday". They mean the same and application of either results in the same compensation.

Concerning Attachment 1 precluding the payment of overtime under AD-402.3 for spraying airports and aircraft for Japanese Beetles, that is exactly what it does. Japanese Beetle program is a domestic program and not a quarantine service. Spraying of airports or aircraft bound for domestic inland airports may or may not involve overtime but it would not be overtime paid under the provisions of the Act of August 28, 1950 (7 U.S.C. 2260), as described in APHIS Directive 402.3. It would be paid under the provisions of APHIS Directive 402.2. This means that commuted travel time and Sunday double time would not apply. On the other hand, if a foreign bound aircraft is to be sprayed as a condition of entry into the foreign port, this might be considered an auxiliary service relating to exports from the United States and if a request is received from a carrier to spray an aircraft for Japanese Beetle on a reimbursable basis, and it is the program decision so to do, such overtime could be paid under AD-402.3.

Reference [b], line 5 on Attachment 2 is placed in a peculiar place. It refers, however, to the entire column and not to the line to which it is opposite. We acknowledge it to be a bit awkward but it is really not incorrect, just incorrectly placed.

Thank you for giving us the opportunity to provide you with staff answers to some of the situations that may well arise. It is good to be upfront on these matters so that they can be handled with dispatch if and when they should arise.

\S\

John C. Frey
Program Analyst
Classification, Employment and
Executive Resources Program
Human Resources Division

cc:

R. Strong, FOSS, PPQ, Hyattsville, MD
G. A. Smith, LRP, Hyattsville, MD
C. Nigro, PPQ, Moorestown, NJ

April 7, 1986

Mr. Leo Ehnis
P.O. Box 1260
Charleston, SC 29402

Dear Leo:

As we discussed last Friday, I am providing you with updated information regarding your earlier question to John Frey. I am basically re-sending John' March 27, 1986, letter with corrections.

Section G, page 5, of Attachment 2, to APHIS Directive 402.3 states, "If the second or any subsequent job..." Subsequent job means any job following the second job.

Now, this is a nonworkday so no daily tour of duty is pertinent.

First call back job started at 1300 hours and apparently ran continuously until 1610.

Job #1 then pays 2 hours CTT plus 3 1/4 hrs. overtime for a total of 5 1/4 hours overtime.

Job #2 starts (ETA) at 1715, which is not continuous with 1610 and which begins more than 3 hours after the beginning of the first job (1300) Job 15 apparently continuous to 1900 hours. So Job #2 pays an additional 2 hours CTT plus a 2-hour minimum for a total of an additional 4 hours.

Job #3 apparently ETA starts at 2038 which is more than 3 hours after the beginning of the previous job (1715) entitling the employee to an additional 2 hours minimum plus full CTT. It is not known when this job is completed so Job #3, based on information supplied, would carry 2 hours CTT plus 2 hour minimum or a total of 4 hours overtime.

Under present regulations, if the supervisor knows about this type of work load in advance, it should be scheduled as one continuous period of overtime service, complete with call back entitlements and all of these ETA's would not mean anything. Supervisor would be required to schedule such service and there should not be such repeated call back situations. These are not a series of independent jobs but more like an evening of plant quarantine coverage at an international airport, certainly one subject to scheduling. Since charges are to be prorated anyhow, regular scheduled overtime could also be prorated.

Sincerely,

\S\

Alan Smith
Program Manager
Staffing, Analysis, and
Classification Programs
Human Resources Division

Request for Clarification of AD-402.3

July 6, 1987

Arnold J. Finamore
Assistant Regional Director

Plant Protection and Quarantine
Jamaica, NY 11430

This is in reference to your memorandum dated May 20, 1987. As Renny Leps discussed with you last week, our initial response to your predecessor, Mr. Walden, was provided verbally. The decision not to respond in writing at that time was based (in consultation with PPQ headquarters officials) on reasons beyond the scope of the instant discussion.

Both you and Mr. Walden have expressed concerns regarding the application of commuted travel time (CTT) in connection with periods of overtime work performed on Sundays. Each of you has asked for an interpretation of the provisions of AD-402.3 in answer to the specific questions: Is a Sunday assignment a scheduled tour (of duty) which happens to receive double pay and commuted travel time pay? Or, Is a Sunday assignment a call-back of a predetermined duration?

The answers to these questions determine whether employees are to receive overtime and CTT compensation as determined under the provisions of Attachment 2 to AD-402.3, or whether they will receive such compensations as determined by Section G of Attachment G of the Directive.

As we discussed with Mr. Walden, the crucial question to be answered in each case is: what constitutes a "schedule tour of duty" in light of the provisions of AD-402.3, and consequently in light of the Act of August 28, 1950 (7 U.S.C. 2260), from which the Directive derives its authority.

From our review of the Directive and the intent of its provisions, we conclude that a "scheduled tour of duty" consists of the specific days and hours of duty which are established for a specific employee and which are scheduled and posted in advance. This interpretation agrees with previous interpretations made by PPQ headquarters officials in the course of providing advice and assistance to Regions. It should therefore be regarded as the officially recognized interpretation to be used when determining premium pay entitlements for duty performed on Sundays.

In answer to your specific questions, we offer the following:

-- A Sunday tour of duty is a scheduled tour of duty when an employee is assigned in advance to work specific hours on that Sunday. Therefore, an employee who performs duty on Sunday which was established, scheduled and posted in advance for that employee, is considered to be engaged in duties which are part of the employee's "scheduled tour of duty."

Entitlements to compensation for work which is performed by that employee before the scheduled tour of duty begins or after the scheduled tour of duty ends are to be determined in accordance with Attachment 2 of AD-402.3.

Entitlements to compensation for any second or subsequent period of work performed by the employee (i.e., work in addition to a period of work already performed after the scheduled tour of duty ends), are to be determined in accordance with Section G of Attachment 3 (Multiple Call-Back Assignments) of AD-402.3.

--Work performed by an employee on a Sunday which is not established, scheduled, and posted for that employee in advance is considered duty other than a "scheduled tour of duty."

Entitlements to compensation for such work are to be determined in accordance with Paragraph 6 A. of AD-402.3.

Entitlements to compensation for any additional period (or periods) of performed duty subsequent to the initial period are to be determined in accordance with Section G of Attachment 3 of AD-402.3.

We hope our response has been of some help to you. Should you have any further questions, please contact Renny Leps at (301) 436-6466.

\S\

George S. Robertson
Director
Human Resources Division

cc:

J. O. Lee, Jr., PPQ/NER
B. W. Granberry, PPQ/SER
A. S. Elder, PPQ/SCR
B. Glen Lee, PPQ/WR
John Good, HRD
Pat McFaden, VS
Leo Ehnis, NAAE
Ted Havens, PPQ
Charles Havens, PPQ

Clarification of Overtime

October 12, 1989

G. Burgess
South Central Region
Brownsville, Texas

This is in response to your memorandum of May 26, 1989, regarding clarification of overtime. We reviewed the five situations in your memorandum with the Human Resource Development staff. After this review, it was determined that the South Central's overtime committee was correct in its interpretation of all five situations.

\S\

Charles A. Havens
Chief Operations Officer
Port Operations
Operational Support
Plant Protection and Quarantine

Subject: Pay for Travel Time under Title 5 of the U.S. Code

To: John Burnett
Washington State Plant Health Director

Plant Protection and Quarantine

This is in response to questions raised in Washington concerning PPQ officers' entitlement to overtime pay for certain travel time away from the official duty station, outside the tour of duty, which is not covered by commuted travel time.

In the situations presented here, we find that the travel time is payable as overtime under Title 5 of the U.S. Code, because the travel results from an event which cannot be controlled administratively.

Background and Issue

These issues arise from two recurring situations in Washington, as raised by Seattle Port Director Jerry Levitt and Blaine Port Director Scott Bishop. State Operations Support Officer Linda Stark provided further details.

The Seattle Work Unit must, on occasion, dispatch an officer to Port Angeles, Washington, a 3-hour trip by car, to board arriving high-risk Asian gypsy moth vessels. Seattle officers' tours of duty (TOD) are 0730 to 1600, Monday through Friday. The Work Unit normally receives approximately 24-hour notice of the estimated time of arrival (ETA) of a vessel, and it is a mission necessity for the officer to arrive at Port Angeles by the ETA. The agency has no control over the ETA, but it can, in some cases, arrange for a small amount of leeway with the shipping agent. The actual time of arrival (ATA) of ships at Port Angeles can be delayed due to weather or other factors not controlled by APHIS.

In a similar situation, the Blaine Work Unit receives 24-hour notice of the arrival of overseas military flights at the Whidbey Naval Air Station, and dispatches an officer to clear the aircraft on arrival. The one-way driving time is 2 hours.

In some of these cases, because of the ETA or ATA, some of the actual inspection work takes place outside the tour of duty and is paid as overtime under the special premium pay provisions established by USDA and APHIS under the authority of 7 U.S.C. 2260 (Title 7). **1** In such cases, the officer's travel time between Seattle and Port Angeles (or Blaine and Whidbey) is compensated under the commuted travel time (CTT) provisions of Title 7.

In other cases, all the actual inspection work occurs during the regular TOD, and no overtime inspection work occurs. CTT is not payable in this situation, even where

some or all of the officer's travel time between the duty station and the temporary duty site occurs outside of the TOD. **2**

In these situations, the issue is whether the officer can be paid for any travel time which occurs before 0730 or after 1600, even though the time is not compensable under Title 7.

Applicability of Title 5 Overtime Rules

Most PPQ officers--those above grade GS-7--are exempt from the Fair Labor Standards Act (FLSA), so FLSA overtime rules are not an issue here. **3** However, FLSA-exempt officers are covered by 5 U.S.C. 5541-5549 and 5 C.F.R. Part 550, Subpart A (Title 5), except for services with are covered by the special Title 7 premium pay rules. 5 C.F.R. 550.101(a) and (d).

In the situations we are concerned with here, if an officer's travel time outside the TOD is not payable as overtime under Title 7, it may be payable as overtime under Title 5.

5 U.S.C. 5542(b) states:

> *(2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless--*
>
> *(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or*
>
> *(B) the travel*

(i) involves the performance of work while traveling,

(ii) is incidental to travel that involves the performance of work while traveling,

(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 duty station.

See also the Office of Personnel Management's (OPM) implementing regulations at 5 C.F.R. 550.112(g).

The Comptroller General, General Accounting Office (GAO), has issued an extensive body of pay claim decisions which interpret these provisions. **4** Under GAO case law, officers' travel from Seattle to Port Angeles and from Blaine to Whidbey Naval Air Station does not meet the requirements of paragraphs (2)(B)(i), (ii), or (iii). **5**

We will apply the GAO case law to several examples to determine if the travel time outside the TOD is payable as overtime under Title 5 because it “results from an event which could not be scheduled or administratively controlled,” under paragraph (2)(B)(iv).

Examples

In these examples, the FLSA-exempt officer's TOD is 0730 to 1600; the travel is by car. The office has received 24 hours notice of the vessel or airplane ETA. **6**

Example 1.

- A vessel's ETA at Port Angeles is 1230 on Wednesday.
- As directed, the assigned officer leaves Seattle via government-owned vehicle (GOV) at 0900 and arrives in Port Angeles at 1200.
- The ship arrives on time, the inspection is completed, and the officer starts back to Seattle at 1430.
- The officer is delayed in traffic and does not drop off the GOV until 1800, 2 hours after the end of the TOD.

Example 2.

- A vessel's ETA at Port Angeles is 0900 on Wednesday.
- As directed, the Officer leaves Seattle via GOV at 1300 on Tuesday and arrives at temporary lodgings in Port Angeles at 1600.
- The officer reports in Port at 0730 on Wednesday, and learns that the vessel will be delayed.
- The ATA is 1200; the officer clears the vessel at 1500; and drives back to Seattle, dropping off the GOV off at 1800, 2 hours after the end of the TOD.

Example 3.

- An aircraft's ETA at Whidbey is 0900 on Wednesday.
- Due to workload considerations in the Blaine office, the Port Director determines that no officer is available to travel to Whidbey during the TOD on Tuesday to meet the work requirement at Whidbey on Wednesday.
- As directed, the assigned officer picks up a GOV in Blaine at 0630 on Wednesday and drives to Whidbey, arriving there at 0830.
- The plane arrrives on time, and the officer finishes clearing it at 1030. The officer drives back to Blaine, arriving at 1230.

Example 4.

- The aircraft's ETA at Whidbey is 0900 on Wednesday.
- On Tuesday, the Port Director determines that an officer can be spared to travel to Whidbey during the TOD on that day to be available the next morning to clear the plane.
- However, the Port Director determines that the per diem (lodging and meals and incidental expenses) would exceed the cost of 2 hours of overtime pay.
- The officer is directed to travel on Wednesday, leaving Blaine at 0630 and arriving at Whidbey at 0830.
- The officer clears the plane and returns to Blaine by 1230.

Discussion

GAO interprets 5 U.S.C. 5542(b)(2)(B)(iv) to require that, in order to be payable as overtime, the travel outside regular hours must result from an event which could not be scheduled or controlled administratively, and there must be “an immediate official necessity” requiring the travel to be performed outside the employee's

regular duty hours. *John B. Schepman, et al.*, 60 Comp. Gen. 681, 684 (1984) [81 FPBR 1185].

In all four examples, the event which necessitates the officer's travel--the arrival of a ship or plane from overseas--is clearly not an event which can be controlled or scheduled administratively. Commercial vessel arrival times are completely outside the control of the Government. While the arrival of military aircraft is controlled by the Federal Government, APHIS does not participate in, or share control over, such scheduling.

Because of the nature of its mission, APHIS must perform its inspections before the vessel or aircraft, and their passengers, baggage, and cargo, can be cleared through the port. Inspections must be carried out as soon as possible after the vessel or ship arrives, both to maximize the effectiveness of the inspection, and to minimize delays to passengers, baggage, and cargo. Thus, the inspections occur at the time of arrival, and the officer's travel is scheduled to accommodate the ETA.

Examples 1 and 2. In both these scenarios, the officer's travel **to** Port Angeles and the inspections occur during the TOD, but part of the return travel occurs outside the TOD. Since the event necessitating the travel--the arrival of the ship requiring inspection--is not administratively schedulable or controllable, any **return** travel time outside regular hours **which is directed by the agency** is payable as overtime under Title 5.

In Example 1, the officer is entitled to 2 hours of overtime, from 1600 to 1800. In this case the return travel took 30 minutes longer than the time that would be allowed for the trip under Title 7 CTT; however, under Title 5, the actual travel time is payable.

In Example 2, the officer is entitled to 2 hours of overtime, from 1600 to 1800.

Examples 3 and 4. If an ETA at Whidbey is 0900 on Wednesday, the Blaine Port Director has just two options. The officer can either travel before the start of the TOD on Wednesday, or travel on Tuesday.

In Example 3, operational necessities prevent the Port Director from sending an officer to Whidbey during regular hours on Tuesday. The travel must begin before the TOD on Wednesday. Thus, there is clearly “an immediate official necessity” requiring that the travel occur outside regular hours. The officer is entitled to 1 hour

overtime from 0630 to 0730.

In Example 4, the officer's travel could be scheduled during regular hours on Tuesday. However, the cost of lodging and per diem would exceed the cost of paying the officer for travel overtime, so the employee is directed to start the travel an hour before the beginning of the TOD on Wednesday.

Does this mean that there is no “immediate official necessity” requiring that the travel occur outside regular hours, and that, therefore, the officer cannot be paid for this travel time? Does it mean that the Port Director must direct the travel on Tuesday, even though this involves per diem expenses, increases costs, and might be less convenient for the officer? In our view, either of these results would be absurd and contrary to the intent of the law.

The legislative history of 5 U.S.C. 5542(b)(2)(B)(iv) reflects that:

The law was intended to minimize circumstances where Federal employees would be required to travel on off-duty time and to pay them for travel time in the event of emergencies requiring them to travel during off-duty time.

In addition, it was Congress' intent that Federal agencies and the GAO interpret the law with “common sense as well as equity.” The result would be that:

When emergencies occur or when events cannot be controlled realistically by those in authority, travel time must be paid for.

(Emphasis added.] *Congressional Record--Senate*, October 2, 1984, p. 28330.

In scenario 4, we find that “common sense as well as equity” allows the Port Director to direct the officer on the travel before the TOD on Wednesday, **and** allows the officer to be paid for the travel time outside the TOD. In scenario 4, the officer is entitled to 1 hour overtime, from 0630 to 0730.

Pay Considerations under Title 5

If an officer is entitled to premium pay under Title 5, rather than Title 7, then the number of hours of overtime work and the overtime pay will be calculated entirely under Title 5.

Conclusion

We will amend Examples 24 and 25 in the Title 7 overtime interpretation guide (HRDG Supplement 4500A) to reflect this opinion.

Thank you for raising these issues. Please call Craig Lambert or Nella Kusmenko on (202) 720-5209 if further discussion or documentation is needed.

[signed]

Ellen Y. King, Chief
Employment and Program Development
MRP Human Resources

cc: PPQ Regional Administrative Officers
James Smith, Port Operations

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1. Department Personnel Manual 550-1-11(b) (1989); APHIS Directive **402.3** (46.44 KB), *Premium Pay for Employees Performing Inspection and Quarantine Services Relating to Imports into and Exports from the United States*(1984). See also, **Human Resources Desk Guide, Supplement 4500A** (1995).

2. See Examples 24 and 25, *APHIS Imports and Exports Overtime Interpretation*, p. 2.16.

3. Under the FLSA, except for normal home to work travel, travel time in which the employee is required to drive a vehicle is hours of work. 5 C.F.R. 551.442.

4. OPM now carries out the claims settlement function for personnel pay and allowances under a delegation from the Office of Management and Budget, due to a legislative change which took effect June 30, 1996.

5. **Performance of work while traveling** means that the employee's primary function can only be performed while traveling. Traditional examples are: a nurse caring for a patient while traveling; guarding prisoners in transit; and diplomatic couriers traveling "bag in hand." However, where transportation of equipment, files, documents, supplies, etc. is merely incidental to the employee's travel, and the main purpose of the travel is for other reasons (such as to travel to or from a temporary work site), then carrying the equipment or files does not constitute the performance of work while traveling. **Travel incidental to work while traveling** primarily covers "deadhead" travel, e.g., a driver's travel as a passenger to a depot to pick up

a truck to deliver supplies elsewhere. **Travel under arduous conditions** means travel over adverse terrain or during severe weather conditions, as distinguished from travel on paved roads, or by rail, commercial airline, or other common carrier. See generally *Civilian Personnel Law Manual*, Title 1--Compensation, GAO/OGC-91-6, pp. 4-7 to 4-11.

6. Thus, the Port Director did not have the opportunity to reschedule an officer's workweek in advance to ensure that all the necessary travel time would be "within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours."

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