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MEMORANDUM FOR: The General Counsel

SUBJECT : Agency Regulation on Payment of Night Differential

1. We have received complaints from personnel resigning from the Photographic Laboratory Branch of the National Photographic Interpretation Center (NPIC) concerning payment of night differential by NPIC. Upon inquiring into the complaints we found they had their bases in faulty application of Agency regulation [redacted] within NPIC, which can be readily corrected.

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2. In examining NPIC's policies and practices on payment of night differential, we found what we consider to be an inequity, which derives from the wording [redacted]. The regulation specifies that night differential is payable in conjunction with compensation for overtime only when the overtime falls within another regularly scheduled tour of duty. The night shift of the Photographic Laboratory Branch normally works from 1600 until 0030 hours. When large shipments of film are received, which happens two or three times per month, the night shift works from 2000 until 0800 hours. If this happens on a weekend, and it often does, night shift personnel do not receive night differential pay, because they have already worked their basic 40-hour workweek, and the weekend overtime hours are on their own shift--not on "another regularly scheduled tour of duty." If the night shift goes onto the 2000-to-0800 schedule during its normal Monday-through-Friday workweek, night differential is payable only from 2000 until 0400, because personnel are considered to be in overtime hours after 0400 and not on another regularly scheduled tour of duty.

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3. This seemed to us to be unfair, and we looked for a possible means of justifying payment of night differential during overtime hours worked on the night shift's own schedule. Our search leads us to question the validity of the provision of [redacted] concerning payment of night differential in conjunction with compensation for overtime.

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a. The Federal Employees Pay Act of 1945 provides that night differential may be paid and does not distinguish between regular and overtime hours.

b. The Federal Employees Pay Act of 1946 is specific in providing that night differential is payable during overtime hours.

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GROUP 1
Excluded from automatic
downgrading and
declassification

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c. The Court of Claims held, in *Juan Aviles, et al. v. United States*, Ct. Cl. No. 278-56, that, if overtime is regularly scheduled, any part of that overtime occurring after 6:00 p.m. must be compensated at the night differential rate.

d. The Comptroller General held, in 40 Comp. Gen. 397, that, for entitlement to night differential, work must be duly authorized in advance and must be scheduled to recur on successive days or after specified intervals.

e. The Comptroller General held, in 41 Comp. Gen. 8, that security couriers assigned to night work, although not according to a fixed hours-of-work pattern, may have the time worked considered as part of the regularly scheduled tours of duty and be paid night differential for any time worked between 6:00 p.m. and 6:00 a.m. in either basic workweek hours or in the overtime hours.

4. It appears to us that the Agency requirement that the employee must be working on another regularly scheduled tour of duty --in other words, on a shift other than his own--in order to be paid night differential in conjunction with overtime compensation is contrary to the intent of the law. It could be argued that the Agency is not bound by the law but only by its own internal regulations; however, it seems to us that, when a provision of the law is written into Agency regulations, then the Agency must be governed by the interpretations of the law made by the courts or by the Comptroller General.

5. I would appreciate receiving your views on this matter. I am also asking for the views of the Director of Finance and of the Director of Personnel.

/S/ J. S. Earman

J. S. Earman
Inspector General

cc: D/DPIC via Ex Dir + DDI

O/IG/KEG:lcp (12 Sept. 1966)

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