



of the middle phalanx of the right index finger. On September 26, 2008 appellant received a schedule award for one percent impairment of the right upper extremity. He also received an award on July 6, 2010 for an additional 12 percent impairment. Under both awards, OWCP paid compensation based on appellant's December 28, 2004 date-of-injury weekly pay rate of \$866.52.<sup>3</sup>

On July 17, 2010 appellant requested reconsideration. He challenged the July 6, 2010 schedule award on the basis that OWCP had not included overtime (OT) pay in calculating his weekly pay rate. Appellant did not take issue with the additional 12 percent impairment OWCP awarded.

OWCP subsequently contacted the employing establishment to determine if appellant's job required mandatory OT and, if so, the amount of OT he worked during the one-year period preceding his December 28, 2004 employment injury.

By letter dated December 3, 2010, the employing establishment advised OWCP that OT was not a mandatory component of appellant's position as a detention enforcement officer. The employing establishment explained that OT was flexible and granted on an as-needed basis according to the needs of the agency at the time. The employing establishment documented 197.5 hours of work beyond appellant's regular 40-hour weekly schedule. The OT was sporadic and covered 15 of 26 pay periods in the year that preceded his employment injury.<sup>4</sup>

In a letter dated January 3, 2011, appellant indicated that he was aware that his employer did not consider OT mandatory. However, he noted that there were plenty of times when he and other detention officers were instructed by supervisors not to leave at the end of their shift until court was done for the day and the last inmate was out of the cellblock. Under the circumstances, appellant considered the OT "mandatory" despite his employer's statement to the contrary. He later submitted various provisions from the Union contract indicating, *inter alia*, that OT must be worked when scheduled. The master agreement also recognized that there would be situations where advance notice of an OT assignment could not be provided.

In a February 15, 2011 letter, appellant reiterated that there were numerous occasions when he was prohibited from leaving at the conclusion of his shift if court was still in session or when inmates or new arrests remained in the cellblock. He also noted that other instances where he was required to work OT when transporting prisoners to and from jail. Appellant continued to argue that OT was mandatory.

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<sup>3</sup> At the time of injury, appellant was a GS-7, Step 5, with an annual base salary of \$45,059.00. Appellant's December 29, 2004 Form CA-1 indicated that he regularly worked weekdays (Monday to Friday), 7:00 a.m. to 3:30 p.m. The employing establishment provided similar information on appellant's July 26, 2007 schedule award claim (Form CA-7). The CA-7 also noted an OT hourly rate of \$32.39.

<sup>4</sup> There was no OT reported for pay periods 1 to 7 and 18 to 21. Some of the OT (48.5 hours) was reported as night differential, but with the same \$32.39 hourly rate. There is no indication that appellant regularly worked the night shift. It appears that a night differential was reported because his OT occasionally extended into the evening hours. Based on the data provided by the employing establishment, appellant averaged 3.79 hours of OT per week.

By decision dated March 25, 2011, OWCP denied modification of the July 6, 2010 schedule award decision. The senior claims examiner explained that, while it was evident the employing establishment at times required appellant to work OT, FECA nonetheless precluded OT when computing one's pay rate for compensation purposes.

### **LEGAL PRECEDENT**

The amount of compensation paid is a function of the injured employee's pay rate.<sup>5</sup> Monthly pay for compensation purposes means the "monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, whichever is greater."<sup>6</sup> Pursuant to 5 U.S.C. § 8114(e)(1), "[OT] pay" shall not be taken into account in determining the employee's effective pay rate.<sup>7</sup> OWCP has administratively determined that certain premium pay, such as night and shift differentials, holiday and Sunday pay and premium pay for administratively uncontrollable overtime (AUO), shall be included for purposes of computing an employee's pay rate.<sup>8</sup>

### **ANALYSIS**

Appellant did not specifically challenge OWCP's decision to grant an additional 12 percent impairment of the right upper extremity. He has not submitted any competent medical evidence demonstrating a greater impairment than the combined 13 percent he already received. But while appellant did not challenge the percentage of impairment awarded, he questioned OWCP's calculation of his date-of-injury pay rate. OWCP utilized his base weekly pay rate of \$866.52, which was in effect on December 28, 2004. Appellant believed that OWCP should have taken into account his OT pay when determining his rate of pay for compensation purposes. The employing establishment documented 197.5 hours of OT in the one-year period preceding his December 28, 2004 employment injury. That represented an average of 3.79 hours per week or an additional \$123.02 in weekly pay.

In various communications with OWCP, appellant argued that he considered OT mandatory because he was ordered by his supervisor to remain on duty and essentially had no choice in the matter. On appeal, he continues to argue that OT was mandatory and, therefore, should have been included in calculating his pay rate for compensation purposes.

FECA is specific as to the preclusion of OT pay in calculating an injured employee's pay rate. OWCP clearly explained this point in its March 25, 2011 decision. However, it has

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<sup>5</sup> 20 C.F.R. §§ 10.401(b) and 10.404(b).

<sup>6</sup> 5 U.S.C. § 8101(4); *see Samuel C. Miller*, 55 ECAB 119, 120 (2003).

<sup>7</sup> *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rate*, Chapter 2.900.7a(1) (March 2011).

<sup>8</sup> *Id.* at Chapter 2.900.6b. AUO arises where an employee is in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled OT duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. FECA Program Memorandum No. 280 (issued February 11, 1991).

administratively determined that it will include in the pay rate calculation certain “premium pay” for AUO. This type of premium pay arises where an employee is in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled OT duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty.<sup>9</sup> Such OT is paid on an annual basis and included in the employee’s base pay.

The Board finds that appellant’s OT did not constitute AUO as it was not part of his annual pay rate. As such, OWCP properly excluded OT pay when calculating his date-of-injury pay rate.

**CONCLUSION**

OWCP properly excluded appellant’s OT pay when determining his effective pay rate for compensation purposes.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 25, 2011 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: April 13, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees’ Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees’ Compensation Appeals Board

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<sup>9</sup> *Id.*