



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

Monday, December 30, 1996

CPM 96-19

MEMORANDUM FOR: Other Stakeholders

FROM: Donald J. Winstead, Assistant Director for Compensation Policy

Subject: Guidance on Administratively Uncontrollable Overtime (AUO) Pay

As part of the Office of Personnel Management's (OPM) continuing effort to assist Federal agencies in administering the pay entitlements of Federal employees and to ensure that such entitlements are administered in a manner consistent with applicable law and regulation, the following guidance has been prepared on the payment of annual premium pay for administratively uncontrollable overtime (AUO) work. OPM requests that agency personnel officials provide a copy of this memorandum and of your individual agency policy directives or regulations on AUO pay immediately to each personnel manager at the local level in your agency where employees receive AUO pay.

Background

Section 650 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of Public Law 104-208, the Omnibus Consolidated Appropriations Act, 1997, requires the Inspector General of any agency that pays annual premium pay for AUO work to conduct an audit of the use of AUO pay at the agency. The audit must include an examination of policies, extent, cost, and other relevant aspects of the use of AUO pay at the agency. The audit must include a determination as to whether agency eligibility criteria and AUO payments comply with Federal laws and regulations. Each Office of Inspector General is to report its findings and conclusions to the Governmental Affairs Committee of the Senate, the Government Reform and Oversight Committee of the House of Representatives, and OPM.

Section 650 also requires OPM to issue revised guidelines to agencies within 30 days after the reports by the Inspectors General are submitted to OPM and the congressional committees. The OPM guidelines must address limiting the use of AUO pay to those employees meeting the statutory requirements for AUO pay and must expressly prohibit the use of AUO pay for customary and routine work duties, duties that are primarily administrative in nature, or duties that occur in non-compelling circumstances (e.g., work that should have been regularly scheduled).

Under an agreement reached with Inspectors General, the deadline for Inspector General reports has been extended until the end of January 1997, and the deadline for OPM's guidance to agencies has been extended until the end of February 1997. Nevertheless, at the request of Senator John McCain, OPM is providing interim guidance at this time on the proper and

improper payment of AUO pay. Additional guidance to agencies will be provided as needed after we have reviewed the Inspector General reports.

General Statutory and Regulatory Requirements for AUO Pay

The head of an agency may approve AUO pay for an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. AUO pay is a substitute form of payment for such irregular, unscheduled overtime work and is paid on an annual basis instead of on an hourly basis.

AUO pay is determined as a percentage, not less than 10 percent nor more than 25 percent, of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee, including any applicable special pay adjustment for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), locality-based comparability payment under 5 U.S.C. 5304, or continued rate adjustment under subpart G of 5 CFR part 531, before any deductions and exclusive of additional pay of any other kind. (See 5 CFR 550.151.)

Under OPM regulations, the rate of AUO pay which is authorized for a position is based on the average number of hours of irregular or occasional overtime work performed per week. For example, a 25 percent rate is authorized for a position that requires an average of over 9 hours per week of irregular or occasional overtime work. (See 5 CFR 550.154.) Agency reviews of the percentage of AUO pay paid to employees must be conducted "at appropriate intervals" and are typically completed every 3 to 6 months by Federal agencies in accordance with their policy directives or regulations. If the results of these reviews indicate that the employee is not receiving AUO pay in accordance with the law and regulations, the percentage of annual premium pay must be revised or, if appropriate, AUO pay must be discontinued. (See 5 CFR 550.161(d).)

Relationship to Other Premium Pay Entitlements

An employee who receives AUO pay for irregular or occasional overtime work may also receive overtime pay on an hourly basis for regularly scheduled overtime work. Regularly scheduled overtime work creating an entitlement to overtime pay on an hour-for-hour basis must be officially ordered or approved by authorized supervisory or management officials. (See 5 U.S.C. 5542(a).) In addition, an employee who receives AUO pay and is nonexempt from (covered by) the overtime pay provisions of the Fair Labor Standards Act of 1938, as amended, is entitled to additional overtime pay of 0.5 times the employee's rate of basic pay for all hours of work over 42.75 hours in a week, including meal periods.

An employee receiving AUO pay is also entitled to night, Sunday, and holiday pay when the requirements for these types of premium pay have been met. (See 5 U.S.C. 5545(c)(2).) However, hazardous duty pay may not be paid for hours of work that are compensated by payment of AUO pay, since AUO pay is provided in lieu of other types of premium pay except overtime, night, Sunday, and holiday pay. (See 5 U.S.C. 5545(c)(2).)

Work Scheduling Requirements

Whenever possible, work for Federal employees must be scheduled on a regular basis, and AUO pay generally cannot be paid for work that has been regularly scheduled. Regularly scheduled work means work that is scheduled in advance of an administrative workweek. An administrative workweek means a period of 7 consecutive calendar days designated in advance by the head of an agency (e.g., Sunday through Saturday midnight). (See 5 U.S.C. 6101 and subpart A of 5 CFR part 610.)

The Comptroller General has determined that while the conditions for AUO pay in 5 U.S.C. 5545(c)(2) "generally" require that an employee's hours of duty not be subject to administrative control, this does not mean that overtime work must be compensated on an hourly basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time. (See B-168048, August 19, 1970.) Also, the courts have ruled that work is not regularly scheduled when an agency cannot predict the beginning or the end of an event (such as a prison riot) that leads to assignment of employees to a temporary period of predictable tours of overtime work until the event ends. (See Robert A. Buchan v. United States, 92-505C (Cl. Ct.), March 30, 1995.)

AUO Pay Restrictions

A law enforcement officer may receive AUO pay only to the extent that the payment will not cause the total of the employee's basic pay and premium pay (including AUO pay; regularly scheduled overtime pay; night, Sunday, or holiday pay; or hazardous duty pay) for any biweekly pay period to exceed the lesser of--

- (1) 150 percent of the minimum rate for GS-15, including a locality-based comparability payment under 5 U.S.C. 5304 or special pay adjustment under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509) and any special salary rate established under 5 U.S.C. 5305; or
- (2) the rate payable for level V of the Executive Schedule. (See 5 CFR 550.107.)

There is also a lower biweekly pay cap applicable to employees who are not law enforcement officers. (See 5 CFR 550.105 and 106.)

A criminal investigator who is entitled to receive availability pay may not receive AUO pay. (See 5 U.S.C. 5545a(g).)

Payment Provisions

When the requirements for payment of AUO pay are met by an employee during only part of a year, such as during a given season, an agency may pay AUO pay only during the period when all requirements for AUO pay are met. Further, an agency may continue AUO pay for not more than 10 workdays when an employee receiving AUO pay has been temporarily assigned to duties that do not warrant payment of AUO pay, and such payments for performance of nonqualifying duties may not exceed 30 workdays in a calendar year. One exception is that AUO payments may continue for up to 60 workdays at any one time and cumulatively in a calendar year while

an employee is on temporary assignment to a formally approved program for advanced training directly related to the duties for which AUO pay is paid. (See 5 CFR 550.162(c).)

An employee is entitled to continuation of AUO pay during any period of paid leave. (See 5 CFR 550.162(e).)

Examples of Abuse of AUO Pay Authority

Pending the results of Inspector General reviews of AUO payments in affected agencies, OPM strongly encourages agencies to begin their own reviews designed to determine whether agency AUO policies, practices, and payments are in accord with law, regulations, and good personnel management practices.

Examples of potential abuses of the AUO pay authority which should be identified and corrected are--

- (1) payment of AUO pay to an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work;
- (2) crediting of hours of work for AUO pay that are clerical or administrative in nature, can be easily scheduled in advance, and do not involve independent investigative or other administratively uncontrollable work;
- (3) payment of a rate of AUO pay that is unauthorized because the average number of hours of irregular or occasional independent investigative work is too low;
- (4) payment of AUO pay that causes total basic pay and premium pay received by the employee to exceed the applicable biweekly pay cap for the employee;
- (5) payment of both AUO pay and overtime pay on an hourly basis for the same hours of work;
- (6) payment of AUO pay to a criminal investigator;
- (7) for an employee who receives AUO pay and is not exempt from the Fair Labor Standards Act of 1938, as amended, failure to pay an additional 0.5 times the hourly rate of basic pay for each overtime hour in excess of the special overtime standard (42.75 hours per week, including meal periods); and
- (8) payment of AUO pay for an entire period of 90 consecutive workdays in one calendar year during which the employee was assigned to perform only regularly scheduled administrative duties.

For further information or assistance concerning the administration of AUO pay, please contact OPM's Compensation Administration Division at (202) 606-2858 or FAX: (202) 606-0824.