

NATIONAL GRIEVANCE

NG-04/09/2010

Date: April 09, 2010

To: Leslie Wiggins
Deputy Assistant Secretary,
Labor – Management Relations
Department of Veterans Affairs
1575 I Street, NW, Suite 250
Washington, D.C. 20420

From: Ami Pendergrass, Attorney, National Veterans Affairs Council (#53) (NVAC), American Federation of Government Employees (AFGE), AFL-CIO

Subject: National Grievance in the matter of the Department of Veterans Affairs (VA) improperly denying and failing to reimburse part-time employees eligible for Sunday premium pay as ordered by the Federal Circuit Court in Fathauer v. United States, 566 F.3d 1352 (Fed. Cir. 2009) and OPM guidance CPM 2009-2.

2010 APR 9 PM 2 25

STATEMENT OF CHARGES

Pursuant to the provisions of Article 42, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (1997) (MCBA), AFGE/NVAC (Union) is filing this national grievance against you and all other associated VA officials and/or individuals acting as agents on behalf of the VA for violations as it relates to the improper denial of compensation and failure to reimburse those part-time employees eligible for Sunday premium pay as ordered by the Federal Circuit Court in Fathauer v. United States, 566 F.3d 1352 (Fed. Cir. 2009) and OPM guidance CPM 2009-21 dated December 08, 2009

Specifically, on an ongoing and continuous basis, the VA, by and through its representatives and/or agents, has:

- (1) Improperly refused to notify employees (active, retired, separated, and/or beneficiaries of affected employees) who were affected by the decision in Fathauer v. United States and refused to afford these affected employees the opportunity to notify the VA of his or her eligibility for monies owed for Sunday hours worked;
- (2) Failed and refused to compensate affected employees for monies owed for eligible Sunday hours work which were earned within six years as allowed by the Barring Act;
- (3) Failed and refused to pay premium pay to all part-time employees who currently work eligible Sunday hours.

In doing so, the VA has violated the following provisions:

- (1) The holding in Fathauer, et al v. United States, 566 F.3d 1352 (Fed. Cir. 2009);
- (2) 5 U.S.C. §§ 5544 and 5546;
- (3) 5 U.S.C. § 7102 *et. al*;
- (4) 5 C.F.R. §§ 532.509; 550.171; and 550.172;
- (5) OPM guidance, CPM 2009-21 issued 12/08/2009; and
- (6) Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE:

I. Background

In May 2009, the United States Court of Appeals for the Federal Circuit decided Fathauer v. United States, 566 F.3d 1352 (Fed. Cir. 2009) (Fathauer), which expanded the payment of Sunday premium pay authorized in 5 U.S.C. §§5544 and 5546 to those part-time employees working eligible Sunday hours.¹ The Court held that Congress, because it failed to specify otherwise in the statute, intended that the definition of employee should be its ordinary usage and reversed the 1966 Comptroller General opinion, where OPM found that the definition of employee only included full-time employees since the word “employee” was ambiguous. Fathauer at 6. The Court found that the common definition of employee included all employees who “work for pay” and that the common definition makes no reference to whether that work be performed full-time. *Id.* at 7. The Court found further support in the United State Supreme Court’s decision, Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), which, in determining what made an individual an “employee”, held that factors determining the level of control exercised by the employer was to be examined; among those factors, the number of hours worked was not a factor of consideration. *Id.* at 8.

In December 2009, OPM Director, John Berry, issued a memorandum offering guidance to all agencies in response to the Fathauer decision. (Att. A). Director Berry stated that, effective May 26, 2009, agencies are required to pay part-time employees Sunday premium pay “when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. 5546(a).” OPM, *Administrative Claims for Sunday Premium Pay as a Result of Decision in Fathauer v. United States* (Dec. 08, 2009) www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2623.

In order to comply with the ruling, OPM advised agencies to notify employees of the Fathauer decision and, in compliance with the Barring Act of 1940, review claims that go back six years from the date the claim was filed and compensate the employee for all eligible hours the employee lost monies. *Id.* To prove the claim, the employee must establish with the agency that he or she “(1) worked part-time, (2) worked on a Sunday during the claims period, and (3) did not receive an appropriate amount of premium pay. If the agency was following OPM’s regulations, no independent proof the third element should be required.” *Id.* Each claim should

¹ The decision does not address the provisions in the statutes related to overtime or holiday hours.

be supported by documentation but “[a]gencies may have relevant information in their own records that would negate the need for the employee to submit documents in support of his or her claim.” Id. Retirees and those who have since separated are eligible and shall get a lump-sum payment. Id. For those employees who are deceased or incompetent, the employee’s representative may apply for the benefit. Id.

II. Violation

On a continuing and on-going basis, the VA has failed to institute the change effective May 26, 2009; failed to notify affected employees of the Fathauer decision; and failed to afford an opportunity for those affected employees to submit a claim and to be made whole.

III. Remedy Requested

The Union asks that to remedy the above situation, the VA agrees to the following:

- (1) Effective immediately, to begin compensating those part-time employees working eligible Sunday hours at the Sunday premium pay rate as found in 5 U.S.C. §§ 5544 and 5546 and in compliance with the above cited CFR and OPM regulations and guidance;
- (2) To agree to work with the Union in developing an arrangement whereby affected bargaining unit employees can efficiently and effectively notify the VA about potential eligibility for past monies due and to make affected employees whole for their lose.
- (3) To agree to utilize the VA’s own records in determining whether the affected employee received the appropriate amount of premium pay as stated in OPM guidance.
- (4) To agree to grant the arbitrator exclusive jurisdiction for 120 days after any final decision in order to assist with any issues raised concerning enforcement and/or compliance.

IV. Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at (202) 306-3664.



Ami Pendergrass
Attorney
AFGE/NVAC

Cc: Alma L. Lee, President, AFGE/NVAC
William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC

ATTACHMENT A

Chief Human Capital Officers Council



Home About the Council Transmittals

12/08/2009
CPM 2009-21



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

**FROM: John Berry
Director**

**Subject: Administrative Claims for Sunday Premium Pay as a Result of Decision in
Fathauer v. United States**

This memorandum provides U.S. Office of Personnel Management (OPM) guidance to assist agencies in processing employees' administrative claims for Sunday premium pay as a result of the decision in *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009). In a May 26, 2009, decision, the United States Court of Appeals for the Federal Circuit ruled that part-time employees are entitled to Sunday premium pay for work performed on Sundays under 5 U.S.C. 5546(a). This memorandum serves as notification that agencies are required to pay part-time employees Sunday premium pay when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. 5546(a). This memorandum also includes guidance to assist agencies in processing employees' administrative claims for Sunday premium pay as a result of this decision.

Based on the *Fathauer* decision, part-time employees are entitled to Sunday premium pay under 5 U.S.C. 5546(a) and accompanying regulations. *See* 5 CFR 550.171, 550.172.¹ Based on the Federal Circuit's reasoning in the *Fathauer* case, OPM has also determined that agencies are required to pay part-time prevailing rate systems employees Sunday premium pay when such employees meet the requirements for entitlement to such payments pursuant to 5 U.S.C. 5544(a) and 5 CFR 532.509.² Agencies should immediately begin to pay Sunday premium pay to all eligible part-time employees effective as of May 26, 2009.

In anticipation of additional claims for Sunday premium pay which may be filed following the *Fathauer* decision, we are advising agencies to inform employees of the holding under the *Fathauer* decision in order to give notice to potential claimants. Agencies may use OPM's memorandum to notify employees. Under the Barring Act of 1940, a pay claim against the Government must be received by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues. (*See* 31 U.S.C. 3702(b).) As a result, employing agencies should go back 6 years from the date the claim was filed and pay claims for any unpaid Sunday premium pay owed part-time employees for Sundays worked during that period. Appropriate interest on backpay under 5 U.S.C. 5596(b)(2) may be calculated using the tools found at <http://www.opm.gov/oca/pay/backpay/backpay.asp>.

As in all pay claims, the burden of proof is on the employee. In this instance, the employee's burden is to establish that he or she (1) worked part-time, (2) worked on a Sunday during the claims period, and

(3) did not receive an appropriate amount of premium pay. If the agency was following OPM's regulations, no independent proof of the third element should be required. The employee should, however, provide documentation to the agency employing him or her showing when the Sunday work was performed. Such documentation includes, but is not limited to, the employee's orders, certification of attendance, time and attendance records, or other documentation, such as employee affidavits or supervisory records, which indicate that he or she engaged in part-time Sunday work during the applicable claims period described in the preceding paragraph. Part-time employees should specify the dates they performed Sunday work without receiving Sunday premium pay, and should provide evidence that in fact they were not paid Sunday premium pay for those Sundays. All claims should be made in writing and employing agencies should evaluate any relevant evidence provided by the claimant or in their possession to see if it supports the claim. Agencies may have relevant information in their own records that would negate the need for the employee to submit documents in support of his or her claim.

Employees who have retired or separated may file a claim with their former employing agency and must receive a lump-sum payment for any Sunday premium pay found to be unpaid as a result of that claim. Claims may also be accepted from representatives of current employees and of deceased or incompetent employees.

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency human resources offices for information on procedures for filing a claim. Further guidance on Sunday premium pay may be found at <http://www.opm.gov/oca/WORKSCH/HTML/sunday.htm>.

¹ Although the current regulation at 5 CFR 550.171(a) limits the entitlement to Sunday premium pay to full-time employees, agencies are instructed to disregard this limitation based on the decision in *Fathauer*. OPM will amend this regulation, consistent with the *Fathauer* decision. Both full-time and part-time employees may receive Sunday premium pay (where otherwise eligible), and all regulatory provisions relevant to the administration of Sunday premium pay apply for both full-time and part-time employees.

² Although 5 CFR 532.509 does not specifically limit entitlement to Sunday premium pay to full-time prevailing rate employees only, a limitation to full-time prevailing rate employees is contained in the Federal Wage System Appropriated Fund and Nonappropriated Fund Operating Manuals at subchapters S8-4e(3). Agencies are instructed to disregard this limitation. OPM will revise the Operating Manuals, consistent with the *Fathauer* decision.

www.opm.gov

Our Mission is to Recruit, Retain and Honor a
World-Class Workforce to Serve the American People

www.usajobs.gov

[Home](#) [Other Councils](#) [Search](#) [Privacy](#) [Web Accessibility](#)

Official website of the U.S. Government operated by the Office of Personnel Management