Date: December 10, 2002

Claimant: [name]

File Number: 02-0031

OPM Contact: Deborah Y. McKissick

The claimant is employed with the Pacific Branch Office (PACBO) in the Defense Contract Audit Agency of the Department of Defense (DoD). The claimant is requesting back pay for time spent traveling during non-duty hours and requesting that the agency changes the duty hours to a twenty-four hour schedule to avoid traveling during non-duty hours. He also requests that the Office of Personnel Management (OPM) conduct a review of the agency's practice of scheduling travel time during non-duty hours. OPM received the claim on June 3, 2002, and the agency administrative report on September 17, 2002. For the reasons discussed herein, the claim is denied.

The claimant stated that PACBO "routinely and repeatedly" schedules travel around the Pacific Rim during non-duty hours for employees to conduct DoD audits. The claimant believes the agency should redefine the working hours to consider all time spent traveling as duty hours.

The claimant stated that he scheduled a flight to depart on Monday, January 22, 2001. He stated that he was instructed to change the departure date to Sunday, January 21, 2001. The claimant requested the reason for the change of the departure date, and he was informed, by an administrative employee, that "the mission required Sunday travel."

The agency administrative report stated that the claimant is exempt under the Fair Labor Standards Act. The agency explained that PACBO employees travel during duty hours "when mission requirements permit it and flights on contract carriers in accordance with the Fly America Act are available." The agency further stated that PACBO management provides explanations of the mission requirement when employees request the reasons for travel during non-duty hours.

The agency administrative report addressed the claimant's suggestion that the agency "change the working hours from 0600 through 1800 hours to a twenty-four work schedule (0000 through 2400) to accommodate PACBO employees traveling during the redefined work hours." In the report, the agency explained that the hours of duty are established "to conform to the hours of the contractor, building hours or some other rational basis." The agency stated that it would be inappropriate to include evenings, nights and weekends as flexible hours for the purpose of circumventing 5 CFR 550.112.

In the agency administrative report, the agency explained that the claimant was assigned two demand audits with due dates of February 8, 2001. The two assignments were budgeted at 90 hours each for a total of 180 hours. The agency stated that the claimant used 47 hours prior to his trip. The agency believed that it was imperative that the claimant travel on Sunday, January 21, 2001, from PACBO to Australia because international flights from Japan to Australia are overnight flights that depart in the evening. The Sunday flight provided the claimant the opportunity to complete the assignment within the 133 hours remaining on the 180 hours budgeted for the two assignments. The claimant was instructed to use acclimatization rest upon his arrival, and the entrance conferences with two contactors were conducted on Tuesday, January 23, 2001.

Section 6101(b)(2) of title 5 of the United States Code (U.S.C.) states, "To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee." [Emphasis added]. The law encourages, not mandates, that agencies schedule travel within an employee's regularly scheduled workweek "to the maximum extent practicable." Sometimes it is impossible to schedule an employee's travel during his regularly scheduled workweek.

OPM has no authority to intercede in the matter of scheduling employees' tour of duty. The heads of agencies have the authority and responsibility to establish an employees' work week. *See*, 5 CFR 610.111(a). This responsibility may be delegated to the agency supervisors.

Time spent in a travel status away from the official duty station cannot be considered duty hours unless one of the statutory provisions in 5 U.S.C. § 5542(b)(2)(B) is met. 5 U.S.C. § 5542(b)(2)(B) states, that time spent in a travel status away from the official-duty station of an employee is not hours of employment unless "the travel (i) involves the performance of work while traveling, (ii) is incident 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." None of the aforementioned statutory provisions were applicable in the claimant's situation.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See, *Frank A. Barone*, B-229439, May 25, 1998. Where the record presents an irreconcilable factual dispute, the burden of proof is on the claimant to establish the liability of the United States. See, *Jones and Short*, B-205282, June 15, 1982. The claimant did not establish any liability of the United States. Hence, the claim is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.