

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179412

FEB 25 1974

Mr. Elmer T. Druyor
c/o Mr. Edward Katze
Assistant General Counsel
International Association of Machinists
and Aerospace Workers
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Druyor:

Reference is made to letters dated June 28 and July 24, 1973, submitted on your behalf by Mr. Edward Katze, Assistant General Counsel, International Association of Machinists and Aerospace Workers (IAM), in which he requests reconsideration of the settlement issued by our Transportation and Claims Division on March 13, 1973, which disallowed your claim for overtime compensation during the period December 13, 1965, through December 13, 1971, as an employee of the Department of the Army, Aberdeen Proving Ground, Aberdeen, Maryland.

The record discloses that during the period covered by your claim you were employed as a pilot and subsequently as a patrol boat captain engaged in patrolling danger areas of the Proving Ground's Chesapeake Bay firing range and in transporting personnel and equipment to and from observation or test sites. The boat operates with a two-man crew. Your duty day started at 7:45 a.m. and ended at 4:15 p.m., a period of 8-1/2 hours, but because a 30-minute lunch period was included in your duty day you were not normally paid any overtime for service performed during those hours. Prior to June 10, 1970, the lunch period was not scheduled at any specific time but was left to the crew's discretion. Effective June 10, 1970, specific lunch breaks were scheduled from 11:45 a.m. to 12:15 p.m. for one member and 12:15 p.m. to 12:45 p.m. for the second member.

Your claim is for overtime compensation for the 30-minute lunch period each day served at sea based upon (1) the fact that you were required to remain on the boat during lunch periods which prevented you from going and coming at will and (2) the fact that you were subject to interruption for duty reasons at any time during such lunch periods and did at times perform certain duties during such lunch periods.

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The statutory authority for payment of overtime compensation to wage board employees as contained in 5 U.S.C. 5544, in force during the period in question is, in pertinent part, as follows:

"(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. * * *"

With respect to your contention that you were required to remain on the boat during lunch periods and subject to interruption for duty during such periods, the rule is well settled that the mere fact that an employee is required to eat lunch on the employer's premises and to be in a duty status and subject to call during such period does not automatically make such period overtime. The actual performance of substantial duties during such period is a prerequisite to recovery. Lovling v/ United States, 181 C. Cls. 968, 980 (1967). See also Bennett v/ United States, 194 C. Cls. 889 (1971) (which concerned boat captains working in circumstances similar to those here involved); Ayers v/ United States, 186 C. Cls. 350 (1968); Banton v/ United States, 165 C. Cls. 312 (1964), cert. denied 379 U.S. 890; Armstrong v/ United States, 144 C. Cls. 659 (1959), cert. denied 361 U.S. 825. The Court in Armstrong, supra, at page 664, stated, in substance, that it did not believe that Congress intended to compensate an employee merely because he was required to sleep and eat on the employer's premises instead of at home even if he was subject to call during his sleeping and eating time. Therefore as to the aforestated contention, there appears to be no basis for allowance of your claim.

Your second contention presents more difficulty as there appears to be some conflict in the record. Here, it is your contention that during the lunch periods under consideration you did in fact perform certain duties such as maintaining watch for unauthorized surface craft, pursuing intruding private vessels, monitoring the radio, and observing

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weather conditions. In a letter dated June 28, 1973, your representative stated that he has seven affidavits which state, in effect, that you and other employees similarly situated continued to monitor the area from 11:45 a.m. to 12:45 p.m. and that during the monitoring the boat required movement which required the attention of both employees assigned to the boat. On the other hand, a report concerning your original grievance prepared by the Director, Material Testing Directorate, Aberdeen Proving Ground, dated May 19, 1970, states that it has been the practice in the past that one member of the crew would stand watch during the lull from 11:45 a.m. to 12:45 p.m. while the other member relaxed and ate his lunch in the cabin of the launch, and that they would change at the middle of the firing lull or as otherwise mutually agreed. This practice was followed except when a private boat attempted to penetrate the patrol boat screen, then both members would go into action. It was concluded that but for that "exception" the lunch period in question is no different than that allowed an individual working at the lower end of the range or any other place where the characteristics of the job require the worker to carry his lunch with him.

There would appear to be no question that the pursuit of an intruder is a substantial enough duty so as to warrant overtime compensation. The Department of the Army concurs and takes the position that overtime will be paid for each such instance properly reported. This position is in consonance with the Court of Claims decisions cited above.

In order to go beyond this position, however, and establish your entitlement to overtime compensation for lunch periods on each day served at sea, there must be a showing that such intrusions occurred with a reasonably high degree of regularity and were in fact more than an infrequent event. The only evidence available in the record is contained in a document entitled "FACTS AND CIRCUMSTANCES CONCERNING THE CLAIM OF ELMER T. DRUYOR--FINGS-AA-143," apparently prepared by personnel at the Aberdeen Proving Ground in 1972 in response to the request of this Office for a report on the case. This document states, in pertinent part, that during the lull in firing management did not require both members of the crew, at the same time, to maintain constant surveillance and attention to duty and that after June 1970, only four overtime requests for working during the specified lunch period were submitted by the boat crews (an average of seven boat crews worked each day). It was concluded that the boat crew had ample time to eat lunch and be free from duty during the lunch period. In the absence of evidence showing a reasonably frequent recurrence of intrusions requiring

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pursuit, and in view of the Army's willingness to pay overtime for each reported instance, we find no basis for allowance of your claim as to this facet of your duties.

As to maintaining watch for unauthorized surface craft, monitoring the radio and observing weather conditions, these duties appear to involve visual surveillance rather than physical activity. The document previously referred to, FINCS-AA-143, indicates that, in the absence of an intrusion or other emergency, one crew member could maintain adequate surveillance during the firing lull while the second member ate lunch. However, even assuming that you were required to maintain some degree of surveillance during your lunch period, the decisions of the Court of Claims previously cited clearly establish that employees are not entitled to a lunch period entirely free of duty responsibility, but to a lunch period free of substantial duty. While we do not suggest that the distinction between visual surveillance and physical activity should be the universal test for compensability, it is our view that the record before us does not support the conclusion that the visual surveillance you indicated that you performed, even though it may have been regularly recurring, was so substantial as to warrant the payment of overtime compensation.

We are aware of the decisions of the Court of Claims in Farley v United States, 131 C. Cls. 776 (1955), and England v United States, 133 C. Cls. 768 (1956) in which overtime compensation was awarded. In these cases, plaintiffs were correctional officers at a Federal reformatory and were required to remain there several nights a week. The Court held that they were entitled to overtime compensation for the time authorized for eating and sleeping because substantial labor was performed during that time. However, the present record fails to demonstrate that you performed substantial duties during the lunch periods under consideration.

We are unaware of the facts and circumstances surrounding your employment for the Department of the Army at Erie Proving Ground with reference to which you state you performed the same work as you now perform at Aberdeen and received compensation for 30 minutes of overtime work. We therefore are unable to comment thereon.

The evidence as submitted by your representative and reported by the administrative agency does not show that you were directed to perform and did in fact perform substantial duties during the whole of the 11:45 a.m. to 12:45 p.m. lull periods during which you were authorized to take a 30-minute lunch break. Therefore, in view of all

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the evidence presented, there is no authority for the payment of overtime covering the lunch periods under consideration. Accordingly, we must sustain our settlement of March 13, 1973, disallowing your claim.

Sincerely yours,

Deputy Comptroller General
of the United States

COMPENSATION
Overtime
Standby, etc., time

COMPENSATION
Overtime
Standby, etc., time
Two-thirds rule
Aboard vessels

COMPENSATION
Overtime
Standby, etc., time
Two-thirds rule
Eating and sleeping

COMPENSATION
Overtime
Duty officers
"Hours of work" requirement