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Michael Volpe
Civ. Pers./

DECISION



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

FILE: B-73005

DATE: January 28, 1977

MATTER OF: Donald Macnab--Claim for overtime compensation

DIGEST: Customs employee claims overtime pay under Customs overtime laws, 19 U.S.C. 267 and 1451 (1970), for work performed in addition to regular tour of duty and between the hours of 5 p.m. and 8 a.m. Employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in O'Rourke v. United States, 109 Ct. Cl. 33 (1947), will not be followed.

This action is in response to the request for reconsideration of the settlement issued January 27, 1975, by our Transportation and Claims Division (now Claims Division) denying the claim of Mr. Donald Macnab for overtime compensation under sections 267 and 1451 of title 19, United States Code, while employed by the U.S. Customs Service, Department of the Treasury, as a Customs Inspector at Naco, Arizona.

Briefly stated, the record indicates that the employee worked an 8-hour shift from either 4 p.m. to midnight or midnight to 8 a.m. on 48 days during the period June 22, 1959, and June 24, 1963, which were his scheduled days off duty. This work was in excess of his basic 40-hour workweek, and he was compensated for this overtime duty under the provisions of the Federal Employees Pay Act of 1945, 5 U.S.C. 5541 et seq. (1970). Mr. Macnab claims that he should have been compensated for such duty under the provisions of the Customs overtime laws set forth in 19 U.S.C. 267 and 1451 (1970), and he seeks the difference between the overtime compensation actually received and the amount payable under sections 267 and 1451.

The Settlement Certificate of January 27, 1975, denied the claim on the ground that since the employee had not worked more than eight hours on the days claimed and since none of the days fall on a Sunday or holiday, the employee is not entitled to overtime under the Customs overtime laws as interpreted in United States v. Myers, 320 U.S. 561 (1944), modified, 321

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U.S. 750 (1944), and O'Rourke v. United States, 109 Ct. Cl. 33 (1947). On appeal, the U.S. Customs Service argues that the Settlement Certificate has misinterpreted the Myers case and that the O'Rourke case incorrectly interprets the Customs overtime laws.

Sections 267 and 1451 of title 19, United States Code, provide, in part, that there shall be extra compensation for the overtime services of customs employees "who may be required to remain on duty between" 5 p.m. and 8 a.m., "or on Sundays or holidays." In United States v. Myers, *supra*, the United States Supreme Court addressed the question of whether such compensation is payable for any authorized duty rendered between 5 p.m. and 8 a.m. regardless of whether the duty is within the employee's regular duty hours, and the Court held, as noted in the settlement certificate:

"The legislative history of the various acts makes clear the intention of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the twenty-four hours when the regular daily tour is performed."

In O'Rourke v. United States, *supra*, the Court of Claims considered whether a Deputy Collector of Customs stationed on a free public highway at the border between the United States and Canada was entitled to recover extra compensation under the Customs overtime laws. The Court in O'Rourke held that such an employee was entitled to such compensation as interpreted in Myers for work on Sundays and holidays and work "after a full day's work of eight hours." 109 Ct. Cl. 33, 41 (1947). The Court in O'Rourke held further that overtime work during weekdays was compensable at the special rate without regard to the hours such duty was performed. However, our Office has declined to follow the O'Rourke case on this latter point since we construe the statute as limiting payment of such compensation to overtime performed between 5 p.m. and 8 a.m. 27 Comp. Gen. 655 (1948); 27 *id.* 148 (1947); and 24 *id.* 140 (1944).

Our prior decisions have interpreted the Customs overtime laws and the Myers decision as holding that a customs employee who works between 5 p.m. and 8 a.m. in addition to his regular tour of duty may receive such additional compensation. See 49 Comp. Gen. 577 (1970), 27 *id.* 655, *supra*; 24 *id.* 140 *supra*; and 10 *id.* 487 (1931). Our decisions do not require that when an employee has worked his regular tour of duty and then performs additional duty between 5 p.m. and 8 a.m. that he must

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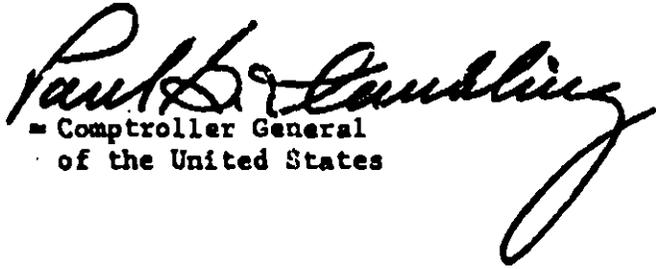
first have performed 8 hours of duty that day before claiming overtime. See 16 Comp. Gen. 757 (1937).

As cited in our settlement certificate of January 27, 1975, the Court of Claims stated in the O'Rourke case that:

"The extra compensation to customs employees given by the Act of February 13, 1911 was based, not upon a 40-hour week, but, regardless of the length of the work week, upon work in excess of eight hours in any one day, or work on Sundays or holidays." 109 Ct. Cl. 33, 48, supra.

However, the context from which that language is taken pertains to whether additional pay received by the plaintiff under the War Overtime Pay Act of 1942 and based upon work in excess of 40 hours per administrative work-week would be set off against pay received under the Customs overtime laws. While it is not clear that the O'Rourke case stands for the principle that an employee must work more than 8 hours in any one day even if beyond his regular tour of duty in order to receive compensation under the Customs overtime laws, we decline to follow such an interpretation and the O'Rourke case to the extent it stands for that principle.

Accordingly, our prior determination regarding this claim is reversed, and a settlement will be issued in the amount found due.


For the Comptroller General
of the United States