

DOCUMENT RESUME

03191 - [A2273399]

[Request for Reconsideration of Denial of Claims for Overtime Compensation]. B-167602. August 11, 1977. 4 pp.

Decision re: Lorenzo G. Baca, et al.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: General Services Administration.

Authority: 5 U.S.C. 5542(2). 53 Comp. Gen. 181. B-167602 (1976).

Baylor v. United States, 198 Ct. Cl. 331 (1972). Bowling v.

United States, 181 Ct. Cl. 968 (1967).

Fifteen former General Services Administration (GSA) guards requested reconsideration of prior GAO decisions denying their claims for overtime compensation for preshift and postshift duties. The prior decisions were sustained since the guards did not show that they were "induced" to perform overtime by an authorized official. Transfer of guards to another agency did not obligate GSA to pay overtime unless approved by proper official and duties were more than de minimus. (Author/HTW)

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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20543

FILE: D-167602

DATE: August 11, 1977

MATTER OF: Lorenzo G. Baca, et al. - Overtime
Compensation

- DIGEST:
1. Former General Services Administration (GSA) guards request reconsideration of prior GAO decisions denying their claims for overtime compensation for preshift and postshift duties. Where guards have not shown that they were "induced" to perform overtime by an official who was authorized to order or approve overtime, prior decisions are sustained. See Baylor v. United States, 198 Ct. Cl. 331 (1972).
 2. Former GSA guards request reconsideration of prior GAO decisions denying their claims for overtime compensation for preshift and postshift duties. Where guards have failed to show that overtime was "ordered or approved", we do not reach the questions of whether to offset a duty-free lunch and whether the duties were more than de minimus.
 3. Former GSA guards request reconsideration of prior GAO decisions denying their claims for overtime compensation for preshift and postshift duties. Where guards were transferred to another agency which paid overtime compensation for the same duties, there is no obligation on GSA to pay overtime compensation unless such overtime was "ordered or approved" by the proper official and duties were more than de minimus.

This action is in response to a request for reconsideration of our decision B-167602, August 4, 1976, denying the claims of 15 former General Services Administration (GSA) guards for overtime compensation for duty performed prior to July 1, 1966.

The facts are fully set forth in a previous decision on these claims in 53 Comp. Gen. 181 (1973) and will not be repeated except where necessary. Our decision of August 4, 1976, and our previous decision in 53 Comp. Gen. 181 held that the guards had not presented

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sufficient evidence to establish (1) that the overtime was officially ordered or approved, (2) that the 30-minute lunch period was not duty-free and therefore could not be offset against overtime claimed, and (3) that the time necessary for these preshift and postshift duties was more than de minimus.

Under the relevant statute, 5 U.S.C. 911 (now 5 U.S.C. 5542(2)), overtime must be "ordered or approved", and in this regard the guards state on appeal that the necessity to perform preshift and postshift duties "induced" the performance of overtime. The guards argue that overtime compensation should be paid in accordance with the decision in Baylor v. United States, 198 Ct. Cl. 331 (1972), and they point out that the requirements for preshift and postshift duties remained the same before and after July 1, 1966, the date the Atomic Energy Commission (AEC) took over complete control of the guards and allowed 12 minutes of overtime compensation per day.

The Court of Claims decision in Baylor held, on the question of whether the overtime was ordered or approved, that:

"* * * if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes 'officially ordered or approved' but, at the other extreme, if there is only a 'tacit expectation' that overtime is to be performed, this does not constitute official order or approval.

"In between 'tacit expectation' and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as 'more than a tacit expectation.' Where the facts show that there is more than only a 'tacit expectation' that overtime be performed, such overtime has been found to be compensable as having been 'officially ordered or approved,' even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been 'induced' by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been 'officially ordered or approved,' and therefore compensable.* * *"

In the absence of a regulation specifically requiring overtime, it must be ascertained in this case whether an official authorized to order or approve the overtime "induced" the performance of overtime. There must be an assessment as to the knowledge and/or endorsement of the individual who had authority to order or approve overtime of any requirement that the employees report early or leave late for work related reasons. See Baylor, at 357. In addition, it must be shown that the official who "induced" the overtime is properly authorized to order or approve such overtime. Baylor, supra; Bowling v. United States, 181 Ct. Cl. 968 (1967).

The record indicates that on at least two occasions (in 1963 and 1964) the guards requested overtime compensation but were advised that the GSA policy was not to allow overtime for guards for preshift and postshift duties. There is no evidence of any regulation or directive from GSA requiring the guards to report for duty early or remain late for any specific amount of time nor is there any evidence in the record before us that an official with the authority to order or approve overtime specifically ordered these guards to report early or remain late. It appears that at one point the GSA Region 8 Buildings Manager "suggested" that the guards report 15 minutes early to provide for a more orderly transition between work shifts, but the guards have not shown that this individual was vested with the authority to order or approve overtime.

On appeal the guards have argued that they were "induced" to perform certain preshift and postshift duties by the very nature of their duties and by the requirements of the GSA Guard's Handbook that they be at their duty post in uniform and with all necessary equipment at the beginning of their 8-hour shift. However, absent a regulation specifically requiring overtime or the identification of an individual authorized to order or approve overtime who "induced" the performance of overtime as shown in the Baylor case, we must conclude that the guards in this case have not shown that the overtime was "officially ordered or approved" and is therefore compensable.

With regard to the question of offsetting a duty-free lunch period, the guards have submitted statements regarding whether they were provided a duty-free lunch period. However, we do not reach the question at this time of whether a lunch period may be offset against the overtime claimed since the guards have not met their burden of proof with regard to the question of whether the overtime was "ordered or approved." Similarly, we need not consider the question of whether

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the overtime claimed constitutes more than a de minimus amount since the overtime has not been shown to be "ordered or approved", by a proper official but we note that the guards have not submitted any additional evidence upon which we might reconsider our prior decisions on this question.

Finally, the guards have again emphasized on appeal that their duties were unchanged when AEC assumed complete control over the guard force on July 1, 1966, and that AEC compensated the guards for 12 minutes of overtime per day. As we stated in our prior decision B-167602, August 4, 1976, by authorizing overtime, AEC acquired control over the activities of the guards during these periods and could require the performance of additional duties. In addition, we know of no basis by which GSA could be obligated by the subsequent actions of AEC unless it can be shown that the overtime performed prior to July 1, 1966, was "ordered or approved" by the proper official and that the duties were more than de minimus.

Accordingly, we sustain the prior denials of these claims.


Deputy Comptroller General
of the United States