

DECISION

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

118696

FILE: B-205282

DATE: June 15, 1982

MATTER OF: Jones and Short, et al.

DIGEST: 1: Claimants argue that claims for overtime compensation for standby duty which accrued more than 6 years from date claims were filed in GAO should not be barred by 6-year limitation set forth at 31 U.S.C. § 71a on the basis that delay in filing claims with GAO was due to agency's fault. General Accounting Office is without authority to waive or modify the application of 31 U.S.C. § 71a, which provides that every claim cognizable by GAO is barred forever if it is not received in GAO within 6 years after the date it accrued.

2: Claim for additional overtime pay for standby duty may not be allowed where there is an irreconcilable dispute of facts between Government agency and the claimant as to whether claimant performed standby duty for which he has not been compensated. Claims are settled in GAO on basis of the written record only and the burden of proof is on the claimant to establish the liability of the United States and his right to payment. See 4 C.F.R. § 31.7 (1981).

Messrs. James L. Jones, Melvin B. Short and 24 other former lock operators and/or lock foremen employed by the Vicksburg District, Corps of Engineers in the Ouachita River lock and dam system through their attorneys, Messrs. Paul Flaherty and Bernard J. Hasson, Jr., have appealed the determination by our Claims Group dated August 3, 1981, that their claims were barred under 31 U.S.C. § 71a for the period prior to 6 years from the date that the claims were first received in this Office. For the reasons set forth below, we uphold the determination by our Claims Group that the portions of these claims which accrued more than 6 years from the date that the claims were first received in this Office are barred from consideration.

The record shows that Messrs. Jones and Short and the other claimants filed claims for overtime compensation under 5 U.S.C. § 5544(a) incident to their alleged performance of compensable standby duty. Under that subsection a wage board employee who regularly is required to remain at or within the confines of his post of duty in a standby or on call status in excess of 8 hours a day is entitled to overtime pay for hours of work, exclusive of eating and sleeping time, in excess of 40 hours a week. Messrs. Jones' and Short's claims were first received by this Office on December 14, 1976. The other claims were submitted at various times beginning December 14, 1976. These claims are for standby duty which the claimants state that they performed in connection with their duties as lock operators and/or lock foremen.

By Personnel Information Bulletin No. 76-40, dated October 18, 1976, the Vicksburg District Office advised all employees that in decision B-176924, dated September 20, 1976 (Matter of Conway), the Comptroller General ruled that lock and dam personnel were entitled to overtime pay for standby duty. In that decision we held that overtime pay under 5 U.S.C. § 5544(a) was allowable where the employee's movements were narrowly limited and his activities severely restricted and where his status was in effect one of ready alert. See Hyde v. United States, 209 Ct. Cl. 746 (1976) and 55 Comp. Gen. 1314 (1976). The Bulletin advised employees that claims for overtime should be submitted in writing through organizational channels to the District Engineer and further advised that claims for standby pay for duty more than 4 years prior to the date of the claims would be submitted to the General Accounting Office for "registration" because of the 6-year statute of limitations.

On October 26, 1976, and on November 2, 1976, Messrs. Jones and Short respectively submitted their claims for overtime compensation for standby duty to the District Engineer for forwarding to this Office. Mr. Jones' claim was for the period from March 31, 1968, to November 26, 1972, and Mr. Short's claim was for the period from October 1, 1952, to March 19, 1972. The first group of claims submitted in writing to the District Engineer, including those of Messrs. Jones and Short, were forwarded to this

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Office by the Vicksburg District on December 9, 1976, and were received by our Claims Group (formerly the Claims Division) on December 14, 1976. The claims were recorded and returned to the agency for further administrative action on December 16, 1976. The record indicates that many of these claims as well as subsequently filed claims have been determined to be properly allowable in whole or in part by the Corps of Engineers for the period not barred by the statute of limitations.

The Act of October 9, 1940, 54 Stat. 1061, as amended by section 801 of Public Law 93-604, 88 Stat. 1965, approved January 2, 1975, 31 U.S.C. § 71a, provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in that Office within 6 years from the date it first accrued. We have held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues on a daily basis, 29 Comp. Gen. 517 (1950). Thus, under 31 U.S.C. § 71a that portion of a claim which accrued prior to 6 years from the date that the claim was first received by this Office is barred from consideration. In Mr. Jones' and Short's case their claims would be barred for the period prior to December 14, 1970.

The attorneys for the claimants contend that the claims should be considered for the period from March 30, 1965, 10 years prior to March 30, 1975, the date by which they argue the Corps of Engineers should have filed their claims with this Office. This argument is based on a letter dated March 14, 1975, from the Director of our Transportation and Claims Division to the heads of all agencies which advised that effective July 2, 1975, Public Law 93-604, would reduce the limitation period set forth at 31 U.S.C. § 71a from 10 years to 6 years. The letter instructed the heads of all agencies that claims received by them 4 years after the date of their accrual should be forwarded to this Office to be recorded. This instruction was later incorporated in an amended section 7.1 of title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies. Attorneys for the claimants allege that the Corps of Engineers disregarded and suppressed the GAO letter keeping the matter concealed from them indefinitely, solely for the purpose of preventing the

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plaintiffs from filing their claims with this Office. Accordingly, they claim that the plaintiffs are entitled to overtime compensation for standby duty which accrued within 10 years prior to March 30, 1975, the date by which they contend the claims should have been filed with this Office. The attorneys for the claimants have advanced a number of legal arguments in support of their view that the filing date of these claims in this Office should be regarded as March 30, 1975.

Their arguments in favor of extending the period for which the claims may be considered beyond 6 years prior to the date the claims were first received in this Office are unpersuasive since we are without authority to waive or modify the application of 31 U.S.C. § 71a. See Matter of Shepard, B-204542, November 30, 1981, and Matter of Baker, B-190841, February 15, 1978, and decisions cited therein. Filing a claim with the agency does not toll the statute of limitations even if the delay is the fault of the agency. See B-200112, December 21, 1981, and decisions cited therein. Thus, the fact that the Corps of Engineers did not advise the claimants until October 18, 1976, that they should file their claims for compensation for standby duty, in writing, for submission to this Office would not affect the 6-year statute of limitations. Although the record does not establish whether any of the claimants had filed written claims with the agency prior to July 2, 1975, we note that an agency's failure to promptly forward claims to this Office for recording in accordance with the instructions contained in the March 14, 1975 letter and subsequently incorporated at 4 GAO 7.1 does not affect the application of the 6-year limitation set forth at 31 U.S.C. § 71a. See Baker and Matter of Courson, B-200699, March 2, 1981. Accordingly, the claims of Messrs Jones and Short are barred for the period prior to December 14, 1970, since their claims were first received in this Office on December 14, 1976. Likewise, the claims of the other claimants are also barred where the claims accrued more than 6 years prior to the date they were received in this Office. Accordingly, we uphold the August 3, 1981 action by the Claims Group.

We note that by letter dated April 26, 1979, the Claims Division advised the Vicksburg District that Mr. Short's claim was received in this Office on December 16, 1976, so that the

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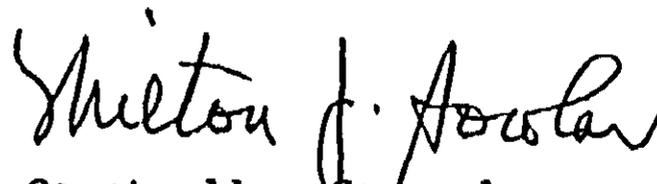
part of his claim for the period before December 16, 1970, was barred. As stated above, his claim was first received in this Office on December 14, 1976, and his claim is for consideration from December 14, 1970. Thus, the agency may now consider the merits of Mr. Short's claim for overtime compensation for December 14 and 15, 1970.

Attorneys for claimants also contend that Mr. Short's overtime entitlement as a lockmaster was improperly computed by the Army for the period subsequent to December 16, 1970. The Corps of Engineers based its computation of Mr. Short's overtime entitlement on its investigation which indicated that Mr. Short was assigned to standby duty for 7 out of every 21 days, whereas, Mr. Short claims that he was required to be in standby duty almost every day and has submitted a list of hours for which he claims overtime compensation for standby duty. The agency determination was based in part on a statement dated April 19, 1977, by Mr. Short's supervisor from 1970 to 1972 who stated that the primary purpose of having a lock and dam employee on standby duty was to call for assistance should the need arise and that as a matter of policy only one employee was required to be on standby duty on a rotating schedule. This statement is consistent with the Resident Engineer's memorandum of February 24, 1967, which indicates that only one individual was designated to be on call between the hours of 5:00 p.m. and 8:00 a.m. We note that the record indicates that normally one resident lockmaster and three resident lock operators were assigned to each lock and dam site.

Claims are settled in this Office on the basis of the written record only and the burden of proof is on the claimant to establish the liability of the United States and the claimant's right to payment. See 4 C.F.R. § 31.7 (1981). Where the written record before us presents an irreconcilable dispute of fact between a Government agency and individual claimants we are bound to accept the agency's statement of the facts. Accordingly, we have no alternative on the basis of the record before us but to accept the agency's determination as to the number of days on which Mr. Short performed compensable standby duty.

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Lastly, attorneys for the claimants allege in general terms that claimants have not been paid for all standby duty worked for the period ending September 20, 1976, and request payment therefor. No documentation has been submitted to support the contention that claimants are entitled to additional compensation for standby duty. This Office does not conduct investigations of claims but, as stated above, decides them on the basis of the written record. 4 C.F.R. § 31.7. Since there is nothing in the record to suggest that the agency has not properly computed claimants' entitlement to compensation for standby duty, the claims for additional compensation are disallowed.



Acting Comptroller General
of the United States