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DECISION

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

FILE: B-194568

DATE: February 15, 1980

MATTER OF: Michael J. Murphy, Frank R. Doud - [Claim for Overtime Compensation]

DIGEST: Customs Dog Handlers not entitled to 2 extra days overtime pay for work performed on Sundays and holidays under provisions of 19 U.S.C. §§ 267, 1451, where duties assigned are investigative in nature and not directly related to Customs services required by law. Agency has historically drawn distinction between enforcement duties and required customs inspection functions, and determination to pay overtime based on position classification when duties are not clearly inspectional is within discretion of the Secretary of the Treasury.

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This action is in response to a claim by Michael J. Murphy and Frank R. Doud for overtime compensation at the rate specified in section 5 of the act of February 13, 1911, ch. 46, 36 Stat. 901, 19 U.S.C. § 267 (1976), as extended by the act of June 3, 1944, ch. 233, section 1, 58 Stat. 269, 19 U.S.C. § 1451 (1976) (1911/1944 Act overtime). Mr. Murphy and Mr. Doud are United States Customs Service Dog Handlers. As such, they contend that they are entitled to overtime at a higher rate than that paid them under the provisions of the Federal Employees Pay Act of 1945 (FEPA), 5 U.S.C. §§ 5542 and 5546 (1976), for work performed on Sundays and holidays in 1975. The employees, whose regular tours of duty do not include Sunday, are claiming the difference between the two rates of compensation, or \$1,550.24, for Mr. Murphy and \$3,174.20 for Mr. Doud.

Section 267 of Title 19 provides in pertinent part that:

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit

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of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unloading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock ante-meridian), and two additional days' pay for Sunday or holiday duty. * * *

If entitled to compensation under this authority, the employees would receive 2 additional days pay for Sunday or holidays in lieu of a lower rate equal to one and one-half times or twice their hourly rate, as appropriate, for hours actually worked.

Mr. Murphy and Mr. Doud are stationed at the Port of Champlain, New York. The positions of both men were classified as "Customs Dog Handler" with duties involving the utilization of a dog in the detection of narcotics and other controlled substances. This task consisted of "running" the dog through vehicles as well as performing work in a secondary search area. People and baggage are referred to the secondary search area when some degree of suspicion exists that there may be a violation of law.

The two employees filed a grievance with their agency and contended that at least 50 percent of their time was spent assisting inspectors during secondary searches without the use of the dog, and that they performed the normal duties of a Customs Inspector in the secondary search area, which should entitle them to 1911/1944 Act overtime compensation. In connection with the grievance, they pointed out that individuals in other regions of the Customs Service, whose positions are classified as "Customs Inspector/Dog Handler," receive 1911/1944 Act overtime. The Grievance Examiner concluded that the employees were entitled to the overtime if it was properly documented.

In response to our request for a report, the agency explained that it denied the claims based on the long-standing

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Customs policy that enforcement duties do not qualify as inspectional duties so that the employees may be compensated for 1911/1944 Act overtime. The agency based its policy on our holding in 2 Comp. Gen. 512 (1923). In that case, 1911 Act overtime was denied to Customs Inspectors who were performing guard duty at night and on Sunday to prevent the unlawful landing of liquor from a particular vessel.

The agency further states in its letter of September 25, 1979, that:

"It is often difficult to determine where inspectional-type work ends and enforcement-type begins. We agree that the dog handlers in the present matter assisted inspectors both when they were using their dogs and when they were not. Nevertheless, this is not determinative since inspectors do not always get 1911/1944 overtime as is seen in the above-cited decision of the Comptroller General. The assistance in the present case was performed in the 'secondary' search area. People and baggage are referred to this area when some degree of suspicion exists that there may be violation of law. The dogs are trained to detect contraband (drugs). For these reasons, we have always held that the dog handler's job is not directly related to the lading or unlading of cargo, merchandise or baggage but, rather, is a distinct enforcement assignment. * * *"

Thus, historically, the agency has drawn a distinction between customs inspection and enforcement-type duties, and court decisions as well as decisions of this Office recognize that such a distinction is pertinent to a determination of the overtime entitlement of Customs Service employees. The Court of Claims in Greene v. United States, 118 Ct. Cl. 248 (1951), considered a case involving a similar statute applicable to Immigration Officers, the act of March 2, 1931, ch. 368, section 1, 46 Stat. 1467, codified at 8 U.S.C. § 1353a (1976). The statute allows immigration officers and employees 2 additional days pay for Sunday and holiday duty performed in connection with the examination and landing of passengers

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desiring to enter the United States. The court held that Border Patrol Inspectors were not performing an examination contemplated by the Act--examination preliminary to the giving or refusal of permission to enter--because they had no authority to give an alien permission to enter the United States. This could only be done by an Immigration Inspector, or in certain cases by a board of special inquiry, upon examination at the port of entry. Subsequently, in Bishop, et al. v. United States, 174 Ct. Cl. 31 (1966), the same court discounted the port of entry limitation on payment of 1931 Act overtime and indicated that it was unfortunate that the Greene case had not been decided simply on the basis that Board Patrol Officers did not perform services qualifying under the 1931 Act. While concerned primarily with the issue of whether their overtime work was officially ordered or approved, the decision in Anderson v. United States, 358 Ct. Cl. 365 (1956) indicates that the Customs Service has similarly considered that its Border Patrol Officers were not entitled to overtime under the 1911/1944 Act while performing border patrol functions.

The distinction between inspectional and enforcement-type duties and the fact that Customs Service employees may be called upon to perform duties that are related to other than the customs inspection function has been recognized by decisions of this Office, including 2 Comp. Gen. 512, cited above. In 10 Comp. Gen. 176 (1930) we held that Customs Inspectors who examined vessels under the Passenger Act of 1882, 22 Stat. 191, were not entitled to 1911/1944 Act overtime. The decision in that case turned on the fact that while the duties to be performed under the Passenger Act might or might not prevent clearance of the vessel, they did not pertain to the actual customs clearance. Similarly, in 50 Comp. Gen. 703 (1971) we held that Customs Inspectors assigned to conduct pre-departure inspections of passengers under the Presidential program for dealing with the problems of air piracy did not perform duties pertaining to customs functions required by law and thus were not entitled to 1911/1944 Act overtime.

There is some judicial recognition of the fact that overtime for Immigration Inspectors under the 1931 Act and Customs Inspectors under the 1911/1944 Act was intended to apply to inspections in the nature of those performed in the primary inspection area. See Wiley v. United States, 136 Ct. Cl. 778 (1956), holding that supervisory Immigration Officers were

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entitled to the special overtime since they performed the same duties as primary inspectors. The court referred, at page 787, to the fact that the Bureau of Customs did not limit payment of 1911/1944 Act overtime to primary inspectors to the exclusion of supervisory personnel and stated:

"* * *Ostensibly, the work they did was the work of a customs inspector engaged in primary inspection."

In this case, the Grievance Examiner indicated that in his opinion the dog handlers were performing inspectional-type duties while assisting the inspectors in the secondary area without the use of dogs. People and baggage are referred to the secondary area when some degree of suspicion exists that there may be a violation of law. The violation may be an attempt to avoid the payment of customs duties or it may be an attempt to bring a substance such as narcotics through the customs point contrary to the drug import and export restrictions of subchapter II of chapter 13 of title 21 of the United States Code. The record indicates that as a practical matter the search in the secondary area is often performed jointly by a Customs Inspector and the Dog Handlers. While the work performed by the two types of customs officers may, in this context, be difficult to distinguish, the Customs Service has in effect determined that a distinction is to be drawn based on the classification of the customs officers position as inspectional or enforcement when the individual is not clearly assigned to an inspectional function. While this unfortunately results in individuals who are working alongside of each other receiving differing pay, we are unable to conclude that the distinction drawn is one that is beyond the considerable discretion of the Secretary of the Treasury to define overtime services under the 1911/1944 Act. Callahan v. United States, 122 F.2d 216 (D.C. Cir. 1941).

Accordingly, Mr. Murphy and Mr. Doud may not be paid for the 1911/1944 overtime compensation in the amounts requested.


Deputy Comptroller General
of the United States