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

B-179908

December 20, 1973

Mr. Garrett F. Masco
c/o Thomas M. Gittings, Jr., Esq.
Suite 425, Shoreham Building
800 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Masco:

We refer to letter of August 28, 1973, wherein Mr. Thomas M. Gittings, Jr., your designated representative for the recovery of overtime compensation as an employee of the Department of the Army, requested reconsideration of the denial of your claim for 3,532 hours of overtime, Sunday, and holiday compensation which was disallowed by our Transportation and Claims Division in its Settlement Certificate dated April 13, 1972.

The pertinent facts in your claim as stated in the claim settlement read as follows:

"The record shows that your claim for the 3,532 hours of overtime worked was performed while employed as a Maintenance Program Officer, GS-13, at Headquarters, USAREUR, Heidelberg, Germany, during the period from January 2, 1968, through December 8, 1970. You state that you kept a detailed record of the hours of overtime worked and this time was recorded weekly by the office secretary who was charged with maintaining the time and attendance records. Your claim for payment of overtime was rejected by the Army as the overtime in question had not been officially ordered or approved. You contend that to accomplish the mission of your Division you were compelled to work such hours as were necessary to complete that mission."

The disallowance was based on the finding that nothing in the record showed that the overtime claimed was authorized or approved by proper authority or that active inducement to perform overtime existed. Mr. Gittings urges that the record does show the overtime in question was authorized and approved by proper authority and that you were compelled to perform it. In support of his contention Mr. Gittings in pertinent part states:

[Claim for Compensation of Overtime Not Authorized]

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"Exhibits 1-6 were attached to the original claim submitted on November 18, 1971. As these exhibits demonstrate, claimant was assigned to the Maintenance Policy Division of the Office of the Deputy Chief of Staff, Logistics. The Division's primary mission was to provide staff direction, supervision, and development of theater maintenance and budget programs. While carrying a very heavy work load and operating under extreme pressure, the Division was authorized only a small and barely adequate staff of five officers, two enlisted men, and three civilians, and it usually operated at less than full strength. Consequently, most of the staff were called on to perform frequent overtime.

* * * * *

"The Manpower Utilization Survey Report (Exhibit 2) for the period from March, 1969 through February, 1970 specifically stated that the Division's primary mission was accomplished only because of the 'many hours of overtime' worked by claimant. In this report, the Division Chief recommended that the Division be authorized an additional civilian (Grade GS-12) to, inter alia, 'reduce the amount of overtime (being) performed by the assigned DAC GS-13 Maintenance Program Officer' (claimant). The Division Chief concluded by reporting that he (a colonel) and the Logistics Staff Officer (a lieutenant colonel) averaged 'a considerable amount of overtime,' that the DAC GS-13 Maintenance Program Officer averages large amounts of overtime,' and that the two enlisted specialists and the civilian secretary 'are frequently called on for overtime.'

"During the period in issue, claimant was twice nominated for inclusion on the Army-wide potential list for promotion. The nomination dated June 5, 1969 (Exhibit 3) cited claimant for operating 'under constant pressure in an outstanding fashion' and for averaging a 14 to 16 hour workday in completing tasks and timely meeting deadlines. The nomination dated June 17, 1970 (Exhibit 4) also commended claimant for 'unfailingly obtain(ing) goals under extreme pressure and stress' and 'averaging 14 to 16 hours daily' to accomplish his work load.

"Claimant's Employee Career Appraisal dated January 1, 1969 (Exhibit 5) referred to his 'abnormally high workload' that 'would crush a normal man.' The Appraisal noted that he operated under 'constant pressure' averaging 'a 14 to 16 hour day' in 'completing tasks,' and that he was unable to teach subordinates many tasks if he was to meet designated deadlines.

"The Court of Claims, in Baylor v. United States, No. 109-67 decided May 12, 1972 (subsequent to the Claims Division's disapproval of the instant claim), summarizes the decisions under the Federal Employees Pay Act of 1945, 5 U.S.C. § 5542, upon which this claim is predicated. At issue here is whether claimant's overtime was 'officially ordered or approved.' The Court stated in pertinent part at p. 26:

' * * * 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. Anderson v. United States, 136 Ct. Cl. 365 (1956) * * * Adams v. United States, 162 Ct. Cl. 766 (1963) * * * Byrnes v. United States, 163 Ct. Cl. 167, 324 F. 2d 966 (1953) * * *'

"The Maintenance Policy Division was obviously understaffed and at the same time taxed with a heavy work load, compelling nearly the entire staff to work frequent and large amounts of overtime. The exhibits clearly show the abnormally high work load and constant pressure to meet suspense dates and complete assignments under which claimant operated. As the Maintenance Program Officer, claimant was essential to the accomplishment of the Division's mission. The record also shows a great deal

more than a mere 'tacit expectation' that claimant perform the work in question. His superiors actively induced and demanded the overtime work to accomplish the Division's mission. Claimant would have been derelict in the performance of his duties if he had confined himself to a rigid 40-hour workweek. Byrnes v. United States, supra at p. 176.

"This situation is not one in which claimant's supervisors either lacked authority to approve overtime or were unaware that overtime was being performed. Claimant was assigned to the Headquarters of the United States Army in Europe. He performed his duties under the following military officers who had authority to approve overtime, requested the performance of the overtime, and were at all times aware that it was being performed:

* * * * *

"Considering, moreover, that these overtime hours were recorded weekly on the ODCSLOG Time and Attendance Report, there is no showing that the performance of the overtime was not condoned by and fully known to claimant's supervisors. Their failure to disapprove of the overtime shown on the Time and Attendance Report constituted, in effect, its approval. Byrnes, supra at p. 179.

"The Claims Division's settlement letter of April 13, 1972 points to 5 C.F.R. § 550.111(a) which requires that overtime in excess of any included in a regularly scheduled administrative workweek be approved in writing. The Court of Claims has repeatedly held that employees are not prevented from recovering compensation for overtime hours simply because authorized officials fail to put their orders or approval in writing. Adams, supra at p. 769, 781-85, Byrnes, supra at p. 173-74. 'Once the overtime work is officially ordered or approved by responsible, authorized officials, and is performed by the employee, appropriate compensation is mandatory.' Anderson, supra at p. 371."

As set forth in the claim settlement 5 U.S.C. 5542(a) provides in pertinent part, that hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or in excess of 8 hours

B-179908

in a day, performed by an employee are overtime work and shall be paid for. Additionally it was pointed out that the applicable regulation, 5 CFR 550.111(c), provides that:

"(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated."

The administrative report on your claim denies that the overtime you claim was officially ordered or approved by competent authority. The report states that there are no official Time and Attendance records at the reporting headquarters that document the overtime work you claim.

We have reviewed the record before us and find nothing to show that those authorized to order or approve overtime actively induced and demanded that you work the overtime claimed. Nor can we find any data in the record to show that the military officers identified in your claim and under whom you state you performed your duties had authority to order or approve overtime or that they in fact requested the performance of overtime as alleged.

In Anderson v. United States, 136 C. Cls. 365 (1956) it was held that employees of the Customs Border Patrol were induced by their superiors to work overtime and the services thus performed were not voluntary. The initiative to require the employees to work beyond the basic 40-hour workweek without compensation began with the Commissioner of Customs who suggested "voluntary" overtime for the employees. The employees were told they would not be paid extra compensation for the extra hours required.

A somewhat similar situation existed in the Immigration Service. There as a part of training procedures developed by the Service journeyman employees impressed upon each trainee the importance of completing an assignment. Time was not to be considered. Where assignments required more than 8 hours a day or 40 hours a week, they had to be completed and the extra hours thus spent would not be paid for. The completion-of-assignments concept was an integral part of the Service training process. As the Court noted at page 779 in Adams v. United States, 162 C. Cls. 766 (1963), "The only difference between the Services in terms of inducement is that Immigration was subtle whereas Customs was audacious."

B-179908

Similarly in Byrnes v. United States, 163 C. Cls. 167 (1963), it was held that employees of the Alcohol and Tobacco Division of the Internal Revenue Service were induced by responsible officials to perform substantial amounts of overtime. Here the regional office in effecting instructions from the national office notified the employees " * * * it is expected that you will perform without extra compensation any overtime that may be necessary to make good cases and achieve effective results in our enforcement work." See Byrnes, supra, at page 171.

In comparison you apparently determined that massive amounts of overtime--3,532 hours in less than 3 years--were needed to achieve satisfactory performance and since management was aware of your effort and failed to stop it, you urge you were induced to work overtime. To so hold would require management to devise a system which would preclude employees working outside scheduled hours. We do not believe the law requires such a conclusion. We agree with the view that mere knowledge of overtime by an official without affirmative inducement is not sufficient to support recovery therefore by an employee in the absence of an order authorizing or approving overtime by a competent official. See Dilello v. United States, 174 C. Cls. 1253, 1257 (1966).

Since the record shows that any overtime you may have performed was neither authorized nor approved as required by law and regulation, we must affirm the disallowance of your claim.

Sincerely yours,

R.F.KELLER

[Deputy Comptroller General
of the United States