

DECISION

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

FILE: B-167804

DATE: January 23, 1976

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MATTER OF: Charles Gulliford, Joseph Jenkins, and Allen Benjamin - request for waiver of overpayment of pay

DIGEST: Where employees have knowledge of erroneous payment of overtime compensation but do not set aside amount of overpayment in anticipation of refunding it to the United States, employees are guilty of "lack of good faith" and waiver is prohibited by law. 5 U.S.C. § 5584(b)(1) (1970).

This action is in response to the letter of Assistant Commissioner John A. Hurley of the Department of the Treasury, United States Customs Service, dated October 2, 1974, requesting reconsideration of the determination of our Transportation and Claims Division (TCD) on August 14, 1974, denying a waiver of erroneous overtime compensation to Messrs. Charles Gulliford, Joseph Jenkins, and Allen Benjamin under the provisions of 5 U.S.C. § 5584 (1970).

The record shows that Messrs. Gulliford, Jenkins, and Benjamin were employed as part-time when-actually-employed (WAE) employees of the U.S. Customs Service. Prior to April 30, 1970, it had been the policy of the Customs Service to compensate part-time WAE employees under the provisions of the Customs overtime laws for services performed between 5 p.m. and 8 a.m. on weekdays. However, on March 11, 1970, the Comptroller General, in decision B-167804, ruled that part-time immigration inspectors employed by the Immigration and Naturalization Service, on an intermittent basis similar to the basis on which part-time WAE employees are employed at the Customs Service, were not entitled to overtime pay for services performed between the hours of 5 p.m. and 8 a.m. on weekdays under provisions of 8 U.S.C. § 1353a (1970). The Customs Service was notified of that decision by letter from the Comptroller General on March 11, 1970. Furthermore, the Customs Service was advised by the Comptroller General that since the language of 19 U.S.C. § 267 (1970), the statutory provision under which the Customs Service's part-time WAE employees were being paid overtime compensation, was similar to the language of 8 U.S.C. § 1353a (1970), the statutory provision under which the Immigration and Naturalization Service part-time employees had unsuccessfully claimed they were entitled to overtime pay, appropriate action should be taken to bring the pay practices of the Customs Service into conformance with the decision.

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Notification of the change in compensation policy required by our decision B-167804 was issued to all principal Customs Service field offices by Customs Service Circular FIS-4-FASxPER-6-FAS, dated April 30, 1970. Subsequently, the Chicago Regional Commissioner of Customs, by letter dated August 19, 1970, notified all part-time WAE employees within his jurisdiction, including Messrs. Gulliford, Jenkins, and Benjamin, of the change in compensation policy and sent them a copy of Customs Service Circular FIS-4-FASxPER-6-FAS explaining the policy change.

Upon notification of the policy change, Messrs. Gulliford, Jenkins and Benjamin asked their district director numerous questions regarding the change in overtime compensation policy. He was unable to provide reasonable answers to these questions nor was he able to give a definite date upon which the compensation policy change would take effect. The district director wrote to the Chicago Regional Commissioner for clarification on September 3, 1970. Pending clarification the three part-time WAE employees in question continued to collect overtime pay for services performed between 5 p.m. and 8 a.m. on weekdays. Upon reply from the Chicago Regional Office indicating that the policy change was to be implemented immediately, the district director notified the employees that the compensation changes were to take effect no later than September 28, 1970. On September 28, 1970, the payment of overtime compensation to Messrs. Gulliford and Benjamin ceased, but Mr. Jenkins continued to collect overtime pay until December 26, 1970. The occurrence of the aforementioned erroneous overpayments was disclosed by the Customs Service's Internal Auditors and reported to the Regional Commissioner at Chicago on May 6, 1971. Subsequently, the Regional Commissioner ordered a review of all overtime payments made to WAE employees within his jurisdiction during the period from August 1, 1970, to December 26, 1970, and the overpayments were discovered.

On June 8, 1972, the Customs Service demanded repayment of all erroneous extra compensation paid for overtime work after August 19, 1970, the date on which the part-time WAE employees were officially notified of the change in overtime pay policy. By excluding overtime payments earned prior to August 19, 1970, and deducting the amount of regular pay properly earned for time worked after August 19, 1970, from the gross amount paid the employees after August 19, 1970, the Customs Service arrived at a net claim against each of the three part-time WAE employees involved in the following amounts: Charles Gulliford - \$897.32; Joseph Jenkins - \$1,332.24; Allen Benjamin - \$174.72. By letter dated November 27, 1973, the Customs Service recommended that our

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Transportation and Claims Division waive these overpayments under the provisions of 5 U.S.C. § 5584 (1970), with the exception of \$234.72 earned by Mr. Jenkins after September 28, 1970, the date the district director stated that the new policy would be implemented. However, TCD denied the waivers on August 14, 1974, on the ground that since the overpayments were discovered on August 19, 1970 (the date the employees were notified of the policy change) and the request for waiver was not made by Customs until November 27, 1973, the Comptroller General had no authority to waive the claims because the statute, 5 U.S.C. § 5584(b)(2) (1970), requires that application for waiver be received in the Office of the Comptroller General or in the Office of the Secretary concerned within 3 years after the date the erroneous payment was discovered.

The authority to waive erroneous overpayments of pay and allowances is found in 5 U.S.C. § 5584 (1970). Subsection (b) of that statute provides, in pertinent part, that:

"(b) The Comptroller General or the head of the agency, as the case may be, may not exercise his authority under this section to waive any claim—

* * * * *

"(2) except in the case of employees of the Government Printing Office, the Library of Congress, the Office of the Architect of the Capitol, or the Botanic Garden, if application for waiver is received in his office after the expiration of three years immediately following the date on which the erroneous payment of pay was discovered * * *"

Under this provision, an application for waiver is not authorized unless the application is made within 3 years after the discovery of the erroneous payment. In finding that the Comptroller General had no authority to waive the overpayments in this case, TCD used August 19, 1970, the date the employees were notified that the overtime policy of the Customs Service was to be changed, as the date of discovery. The Customs Service contends that the actual date of discovery was on May 6, 1971, the date its Internal Auditors found that overtime payments continued to be paid even after the notification of August 19, 1970, and notified the Regional Commissioner at Chicago.

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Our Office has interpreted a similarly worded limitation imposed upon the Comptroller General's authority to waive overpayments made to members of the military under provisions of 10 U.S.C. § 2774(b)(2) (Supp. II, 1972) in our decision B-172885, May 15, 1973. In that case we stated that the date of notice to the member is not relevant in fixing the date that the erroneous payment "was discovered" by the administrative office with regard to the running of the 3-year limitation. Accordingly, although the employees concerned were officially notified of a change in policy on August 19, 1970, we do not recognize that date as definitive. The Customs Service was aware that its overtime pay policies were in error as of March 11, 1970, the date on which the Comptroller General notified them of decision B-167804. However, due to confusion on the part of the district director, overpayments continued to be made in accordance with the old pay policies. These overpayments were not, in fact, discovered until they were revealed by an internal audit on May 6, 1971. Since the statute specifically speaks of the discovery of the erroneous payment, we agree with Customs that the May 6, 1971 date is the date the 3-year limitation begins to run, and therefore, the application for waiver was made within the 3-year limit. Also, in cases in which it is not clear as to when the erroneous payment was discovered, any reasonable doubt should, we believe, be resolved in favor of the debtor.

Although the application for waiver was submitted to the Office of the Comptroller General within the prescribed time limitation, the employees are still precluded from having their debts waived by subsection (b) of 5 U.S.C. § 5584 (1970) which prohibits exercise of waiver authority by the Comptroller General:

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim;"

Implementing the statutory provision cited above, section 91.5 of title 4, Code of Federal Regulations (1975), provides, in pertinent part, for waiver of an erroneous payment whenever:

"(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous

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payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. * * *

Messrs. Gulliford, Jenkins, and Benjamin clearly are not chargeable with any fraud or misrepresentation. However, the record indicates that they knew or should have known of the erroneous nature of the payments they were receiving. On August 19, 1970, they were sent notification of the change in overtime policy necessitated by Comptroller General decision B-167804. Enclosed with the letter of August 19, 1970, was a copy of Customs Service Circular FIS-4-FASxPER-6-FAS which very clearly explained the effects of the policy change and stated in paragraph 3b: "Compensation for work performed between 5 p.m. and 8 a.m. of the following day of any day other than a Sunday or a holiday by a part-time WAE employee shall be the regular rate of pay for such employee." Furthermore, the Customs Service investigated the matter and found that these employees were aware of restrictions on overtime pay and were familiar with the Customs Service Circular and Comptroller General decision B-167804 in early July 1970. We believe that the language used in decision B-167804, Customs Service Circular FIS-4-FASxPER-6-FAS, and the notification letter of August 19, 1970, was quite explicit and clear enough to have put these employees on notice that they were not entitled to the overtime pay they received after August 19, 1970. Notwithstanding the confusion which the district director experienced and the attempts made by these employees to get clarification of the new overtime policy, we cannot allow Messrs. Gulliford, Jenkins, and Benjamin to retain the overpayments because they were aware that they were being overpaid at the time the payments were made. As we stated in our prior decision B-183558, April 23, 1975:

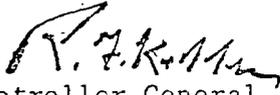
"We have consistently held that where the employee was aware of the overpayment, when it occurred a request for waiver will be denied. See B-175052, March 10, 1972. As a reasonable and prudent person who knows that he is being overpaid * * * /the employee/ should have set aside the amount of overpayment for eventual refunding. Instead, he used the funds for his own purposes, even though he knew they belonged to the United States. Although he deserves credit for his repeated efforts to have the error corrected,

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this fact alone does not entitle him to enjoy an unearned windfall at his country's expense. This failure to set aside the funds which he knew were not his represents a lack of good faith and precludes the Comptroller General from exercising his authority to waive."

With respect to the overpayments made after notification on August 19, 1970, it is evident that the employees were aware before the fact that payments to be made might include additional sums to which they would not be entitled. Therefore, it is the view of this Office that as to the overtime payments received after August 19, 1970, the employees are not free from fault nor can it be said that they accepted such payments in good faith as required by law. Furthermore, we do not find that a collection action under the claim would be against equity and not in the best interests of the United States.

Accordingly, the indebtedness involved here which arose subsequent to August 19, 1970, as a result of erroneous overtime payments cannot be waived. The decision reached by our Transportation and Claims Division on August 14, 1974, is sustained, and the appeal of the request for waiver is, therefore, denied.


Deputy Comptroller General
of the United States