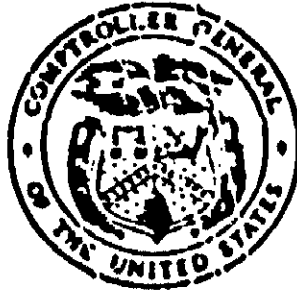


**DECISION**

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

*PLM-1  
Gibson  
120060*

**FILE:** B-206385

**DATE:** December 6, 1982

**MATTER OF:** Ronnie C. Sutton and John W. McKenzie -  
Waiver of Overpayments

**DIGEST:** As a result of administrative error, two Customs Service employees received premium pay for holiday work in addition to the overtime compensation to which they were entitled. Waiver of overpayments is proper even though agency's pay policies may be a matter of common knowledge because standards to be applied in making waiver determination require consideration of particular facts surrounding overpayment. There is no evidence that leave and earnings statements showed additional payments of holiday pay, and, therefore, it cannot be said that receipt of those documents constituted constructive notice of error. Additionally, a great deal of confusion existed in the payroll office servicing the employees involved, making it even more difficult to determine correctness of pay.

This decision is in response to an agency-filed appeal of our Claims Group settlement waiving overpayments of pay for holidays made to Mr. Ronnie C. Sutton and Mr. John W. McKenzie, two inspectors with the U.S. Customs Service, Port of Columbus, New Mexico. For the reasons stated below, we sustain our Claims Group settlement granting waiver.

From January 1, 1972, to February 16, 1976, for some holidays, the timekeeper for Mr. Sutton and Mr. McKenzie improperly recorded work the employees performed on holidays as both overtime and holiday hours. As a result, the employees received holiday premium pay in addition to the overtime compensation to which they were entitled under Customs' regulations and statutory provisions. The compensation overpayments to Mr. Sutton and Mr. McKenzie amounted to \$664.80 and \$891.20, respectively.

In Mr. Sutton's and Mr. McKenzie's requests for waiver, the employees claimed that they were unaware of the error since the leave and earnings statements furnished them during the pay periods in question did not reflect additional pay for holidays. The employees also alleged that the leave and earnings statements they received were inaccurate, and frequently contained adjustments from prior pay periods, so that it was virtually impossible to determine whether the pay in the statement was correct. No copies of the leave and earnings statements for the pay periods involved are in the record, so we will accept the employees' allegations about these statements. Interviews reported in the agency's investigation of the erroneous payments also contained the employees' uncontroverted statements that they were unable to keep track of overtime hours worked and pay received for such hours, since there was normally a 2 to 3 week delay between the time an employee performed work for which overtime compensation was payable and the time he received payment. Based on the lack of evidence rebutting the employees' allegations, and the confused pay situation that apparently existed at Customs' Port of Columbus station, our Claims Group found that the employees accepted the erroneous payments in good faith. On this basis, Mr. Sutton and Mr. McKenzie were granted waiver under the provisions of 5 U.S.C. § 5584 (1976).

The Regional Commissioner of the Customs Service has appealed our Claims Group settlement, arguing that the employees knew or should have known that they had been overpaid, since it is common knowledge among Customs inspectors that such employees are compensated for holiday work under Customs' overtime laws and generally are not entitled to holiday premium pay. Customs further contends that leave and earnings statements and overtime earnings reports were furnished to the employees for each pay period in question, and that these documents clearly indicated hours worked on holidays and the bases for payment. However, as we have already noted, no copies of the leave and earnings statements for the employees involved and the pay periods in question are in the record. Therefore, we cannot determine whether they are accurate, and if they were sufficient to put the employees on notice of the erroneous payments.

The waiver provisions of 5 U.S.C. § 5584 (1976), as implemented by 4 C.F.R. Parts 91 through 93 (1982), are

essentially equitable in nature, and waiver may not be granted unless the claimant demonstrates that collection would be against equity and good conscience, and not in the best interests of the United States. With respect to the standards to be applied in making that determination, 4 C.F.R. § 91.5(c) provides:

\* \* \* \* Generally these criteria will be met by a finding that the erroneous 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. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case. \* \* \* (Emphasis added).

In view of the requirement in 4 C.F.R. 91.5(c) that a waiver determination depends on the particular facts surrounding the overpayment, we cannot find that Mr. McKenzie and Mr. Sutton knew or should have known of the overpayment simply because Customs' policies with regard to holiday pay are allegedly a matter of common knowledge. Although Customs has furnished us with sample copies of an overtime earning report and two leave and earnings statements in support of its contention that the documents provided the employees notified them that an error had occurred, neither the report nor the statements provided by the agency identify the employees to whom they pertain, and the overtime earning report does not relate to the pay periods in question. Moreover, the holiday pay blocks of the leave and earnings statements submitted are blank, and there is nothing in the overtime earning report which indicates payment for hours worked on holidays. Since there is no evidence that the leave and earnings statements

B-206385

and overtime earning reports received by Mr. Sutton and Mr. McKenzie during the pay periods in question reflected erroneous payments of holiday pay, it cannot be said that the mere receipt of the documents constituted constructive notice to the employees that they had been overpaid. See Julius C. Steel, B-182188, January 22, 1975; B-177180, December 22, 1972.

Accordingly, we sustain our Claims Group settlement waiving collection of the overpayments in question.

*Winston J. Auer*  
for Comptroller General  
of the United States