

UNRESTRICTED - CP

DECISION



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

FILE: B-216952

DATE: October 18, 1985

MATTER OF: Carl L. Haggins - Overtime Compensation -
Retroactive Quality Step Increase

DIGEST:

1. Former employee of Department of the Interior alleges that he performed overtime work as an Equal Employment Opportunity (EEO) Investigator because of heavy workload and remoteness of worksites, and that the discretionary performance of overtime work was recognized by the agency. Interior had a written policy which stated that overtime work must be approved in advance by the Chief of the EEO Complaints Investigations Branch and that overtime could not be claimed unless approved in advance. Claimant has been paid for overtime work that was approved in advance. Since other overtime work allegedly performed by claimant was not ordered or approved by the Branch Chief, overtime compensation for that work may not be paid. See 5 U.S.C. § 5542 (1982); Baylor v. United States, 198 Ct. Cl. 331 (1972).
2. Former employee of Department of the Interior claims entitlement to a quality step increase (QSI). His supervisor recommended that he be granted a QSI but, upon review, the award was not approved since performance standards had not been established for the employee's unit at that time. Claimant is not entitled to a QSI inasmuch as agency has discretionary authority, under 5 U.S.C. § 5336 (1982), to approve or disapprove a QSI. Claimant does

B-216952

not have a vested right to be granted a QSI unless and until the appropriate agency official approves the recommendation.

Mr. Carl L. Haggins, a former Equal Employment Opportunity (EEO) Investigator for the Department of the Interior, has appealed Settlement Certificate Z-2844941, June 4, 1984, issued by our Claims Group. The settlement disallowed his claim for compensation for overtime work performed prior to March 10, 1980, a quality step increase (QSI) award for work performed from July 1 to December 31, 1979, and interest on both claims. For the reasons set forth below, we sustain the disallowance of Mr. Haggins' claim by our Claims Group.

FACTS

Mr. Haggins, a grade GS-12 employee, was employed as an EEO Specialist in the EEO Complaints Investigations Branch, Office for Equal Opportunity, United States Department of the Interior (Interior). The Branch was established with responsibility for investigating all discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, against Interior or any of its bureaus or offices. The agency reports that whenever a supervisor anticipated the need for an employee to work overtime, a request to authorize the payment of overtime or grant compensatory time off was submitted to the Administrative Officer for approval prior to the time the work was performed. The form was prepared in triplicate. The original was sent to the Payroll Office with the time and attendance cards, one copy was retained on file in the Administrative Office, and the third copy was returned to the requester to show that the overtime for the period requested had been approved. If the third copy was not returned to the requester, that indicated that the overtime had not been approved.

Interior states that while Mr. Haggins was in a travel status, he worked overtime without prior authorization or approval. The agency says that point 3 of Operating Memorandum No. 2, Overtime Procedures, for the EEO Complaints Investigations Branch, stated that "Overtime may not be claimed if not approved in advance," and therefore Mr. Haggins' claim for overtime compensation should be disallowed. Points 1 and 2 of this Memorandum stated that all overtime must be approved in advance by the Branch Chief

and that overtime must be approved on a case-by-case basis. The agency, speaking through the Director, Office for Equal Opportunity, recommends that the claim by Mr. Haggins for overtime compensation be disallowed. The record also shows that by written memorandum, effective March 10, 1980, paid overtime for the EEO Complaints Investigations Branch was discontinued by the Department of the Interior.

Mr. Haggins states that he was one of the three original investigators hired when the EEO Investigations Branch was established in the Office of the Secretary of the Department of the Interior. He says that the payment of overtime was departmental policy. Mr. Haggins reports that the operational memorandum concerning overtime procedures was issued at a time when the Branch was not yet 6 months old with no track record upon which to formulate a stringent policy on compensation for overtime work. The claimant states that "[t]he exigency of reducing the horrendous EEO complaints backlog was all consuming" in that the investigators investigated the EEO complaints for all of the organizations within Interior. He says they worked in different time zones and often in remote locations for weeks at a time. Mr. Haggins states that initially, the investigators had to use overtime at their discretion to be effective in their work. Further, after additional investigators were hired, they still relied heavily on the discretionary use of overtime. He says that the pattern and practice of discretionary use of paid overtime was a proven fact as attested to by the approved time and attendance sheets sent in from the field.

The time and attendance sheets which are part of the record show that overtime work that was authorized in advance by agency officials with competent authority were certified correct by the Chief of the EEO Complaints Investigations Branch and paid by the Department of the Interior.

DECISION

We initially note that Mr. Haggins, as a GS-12 employee under the General Schedule, is an "exempt" employee under the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq. (1982), and therefore is not entitled to overtime compensation under that Act. His entitlement to overtime compensation is governed by the provisions of Title 5, United States Code (1982), and specifically the provisions of section 5542. Under these provisions, when an

B-216952

official with competent authority orders or approves hours of work in excess of 40 hours in an administrative workweek or in excess of 8 hours in a day, overtime shall be paid.

In Baylor v. United States,[✓] 198 Ct. Cl. 331 (1972), which involved claims by uniformed guards of the General Services Administration for overtime compensation under 5 U.S.C. § 5542,[✓] the Court of Claims stated the standards for determining whether overtime was properly "ordered or approved." The court explained its holding as follows:

"* * * [I]f there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes 'officially ordered or approved' but, at the other extreme, if there is only a 'tacit expectation' that overtime is to be performed, this does not constitute official order or approval.

"In between 'tacit expectation' and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as 'more than a tacit expectation.' 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." 198 Ct. Cl. at 359."

Commencing with our decision 53 Comp. Gen. 489[✓] (1974), and in subsequent decisions, we have followed the principles of law set forth in the Baylor case.

B-216952

With respect to the facts and circumstances here, the specific questions are whether the Chief of the EEO Complaints Investigations Branch, who was the official with the authority to order or approve overtime work for the claimant, knew or should have known of the heavy workload of the investigators and that such workload required the performance of overtime, and whether the Branch Chief had more than a "tacit expectation" that the overtime work would be performed. Thus, an assessment of the knowledge and endorsement by the Branch Chief of the performance of overtime work by Mr. Haggins is required. See Jim L. Hudson, B-182180, January 6, 1982; Donald E. Bordenkircher and Chester C. Jew, B-188089, October 31, 1977.

We have carefully reviewed the material submitted by Mr. Haggins and by officials of the Department of the Interior in light of the standard enunciated in Baylor, supra, and our cases. We note that Mr. Haggins has requested that we hold a hearing. However, our review is restricted to the written record before us and we do not hold adversary hearings with the examination and cross-examination of witnesses. The burden is on the claimant to establish the elements of his claim and the liability of the United States in the written record before us. 4 C.F.R. § 31.7 (1985).

In applying the Baylor standard to the facts before us, it appears that the Branch Chief was or should have been aware that Mr. Haggins was performing overtime work and that a "tacit expectation" existed on his part that such work would be accomplished. Was there more than a "tacit expectation" by the Branch Chief that the overtime work be performed? Was Mr. Haggins "induced" or encouraged to perform overtime work due to the nature and volume of his caseload and in order to complete his investigative assignments effectively? We believe these questions must be answered in the negative. This Office has long held that mere knowledge that overtime work is being performed by an employee, without official inducement, is not sufficient to support payment of overtime compensation in the absence of an order authorizing or approving overtime work by an official with competent authority to do so. W. S. Brandenburg, et al., B-156407, April 25, 1977; Donald W. Plaskett, B-183916, March 8, 1976; B-179908, December 20, 1973, affirmed upon reconsideration, January 16, 1975.

Operating Memorandum No. 2, cited earlier, clearly states the policy of the Department of the Interior and the EEO Complaints Investigations Branch, i.e., overtime must be approved in advance by the Branch Chief; overtime may not be claimed if not approved in advance; and overtime will be approved on a case-by-case basis. Compensation for overtime work that was authorized in advance was, in fact, paid to Mr. Haggins and other EEO investigators in the Branch prior to the March 10, 1980, cutoff date. Conversely, overtime work that was not authorized in advance did not appear on the time and attendance sheets and was not paid. While it appears that overtime work, in addition to the amount paid for, was performed by Mr. Haggins and that the Branch Chief, who had competent authority to authorize or approve overtime, was aware and tacitly expected that overtime work would be performed by Mr. Haggins, the evidence does not show that the Branch Chief ordered or approved or actively induced Mr. Haggins to work overtime. Therefore, the requirement of 5 U.S.C. § 5542 that overtime be ordered or approved is not met. See Emma H. Welsh, B-214880, September 25, 1984.

The record shows that Mr. Haggins was aware of the stated agency policy that overtime work must have been approved in advance by the Chief of the EEO Complaints Investigations Branch. Since there was no prior authorization or approval by specific written orders or active inducement by the Branch Chief, the official with the authority to order or approve overtime work, compensation for overtime work performed by Mr. Haggins may not be paid. In light of our determination that Mr. Haggins is not entitled to compensation for overtime work allegedly performed, the issue of his entitlement to interest on such compensation is moot.

With respect to the issue of Mr. Haggins' entitlement to a monetary incentive award, the record shows that he was recommended for a quality step increase (QSI) for work performed during the period July 1 through December 31, 1979. Inasmuch as performance standards had not been established for the EEO Complaints Investigations Branch at that time, upon review by higher agency authority, the award was not approved.

An agency has the discretionary authority to approve or disapprove a QSI as an incentive award. 5 U.S.C. § 5336 (1982); 5 C.F.R. §§ 531.501 et seq. (1984). Therefore, an employee does not have a vested right, by statute or regulation, to be granted a QSI unless and until the appropriate agency official approves the recommendation.

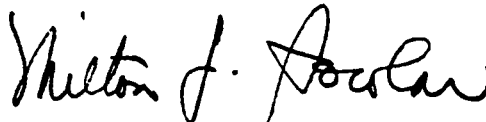
B-216952

The recommendation of a supervisor does not necessarily mean that an award will be granted since approval at a higher level is required. Carolyn Whitlock, 58 Comp. Gen. 290 (1979).

Here, the QSI was not approved upon review because the performance standards had not been established for the EEO Complaints Investigations Branch. Therefore, it cannot be said that Mr. Haggins would have been granted a QSI had the performance standards been in place or that he underwent an unjustified or unwarranted personnel action under the provisions of the Back Pay Act of 1966, 5 U.S.C. § 5596 (1982). Accordingly, the QSI may not be granted retroactively.

CONCLUSION

The settlement issued by our Claims Group which denied Mr. Haggins' claims for compensation for overtime work performed prior to March 10, 1980, and a quality step increase award, and interest on both claims, is sustained.

for 
Comptroller General
of the United States