

**DECISION**

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

FILE: B-175275.05

DATE:

APR 7 1976

MATTER OF: John W. Gardner - Overtime Compensation

## DIGEST:

1. Regulations of Agency for International Development allowed area coordinators, office and division chiefs, and their deputies to approve individual authorizations for overtime work. Chief, Requirements Office, in Laos established and approved duty rosters scheduling claimant to work overtime. Claimant performed such overtime with knowledge and approval of agency officials. This constituted administrative acquiescence and endorsement and was tantamount to express authorization so as to require payment of overtime compensation under 5 U. S. C. § 5542 (1970).
2. Agency contends that where overseas employee did not officially protest working overtime at time work was performed, he is now estopped from claiming overtime compensation after returning to United States. Facts and circumstances involved in claim show that claimant did not deliberately wait, with intent to mislead, until he left Laos to file a claim for overtime compensation. Claimant is not now estopped to claim overtime to which he is entitled under the law.

This decision emanates from a letter dated July 27, 1973, from Mr. John W. Gardner, a former employee of the Agency for International Development (AID), Department of State, in which he requested compensation for 345 hours of overtime work he alleges to have performed between November 13, 1971, and March 24, 1973, while employed as an Assistant Requirements Officer of AID, in Laos.

As a matter of policy, we do not render formal decisions to individual claimants except upon review of the disallowance of a claim by our Claims Division. However, since several cases involving similar facts and circumstances are now under consideration by the Claims Division, a formal decision is being issued in order to resolve the issues and questions involved in such cases.

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In his letter, Mr. Gardner states that he did not submit his claim during the period of his service in Laos because (1) it was a regular practice for personnel in the Requirements Office to work as directed by their supervisors regardless of the overtime involved; (2) Requirements Office personnel were told on many occasions that overtime payment for officer status personnel would not be allowed; and (3) he did not consider it wise from a job security viewpoint to register a grievance with or against supervisors who prepared and reviewed his proficiency evaluation reports.

The claimant states that during his tenure of service as an Assistant Requirements Officer for AID in Laos, it was a regular practice for AID United States direct-hire personnel assigned to the Requirements Office to work Saturday mornings from 0800 to 1200 or 1300 hours and on holidays without payment of overtime or compensatory time off, and that work was required Saturday afternoons, Sundays, and evenings when support requirements so dictated. He also states that his official pay records show that he did not receive pay or compensatory time off for overtime worked. This statement has not been denied by AID. The claimant has included with his submission, copies of four duty rosters, three issued by the Chief and one by the Administrative Officer of the Requirements Office. The rosters show, among other things, that 24-hour coverage of the Requirements Office and the radio room was necessary on occasion, and that if for any reason an assigned duty officer could not assume his scheduled duty, it was his responsibility to obtain a substitute and notify the Administrative Officer of the change.

The copies of the Duty Officer rosters show that Mr. Gardner was listed to work various weekdays and on a Sunday and a holiday. In a written statement dated May 16, 1973, Mr. John M. Hogg made the following comments:

"While I was Deputy Chief, Requirements Office, USAID/Laos, due to the pressures of the war and shortage of personnel, AID U. S. direct-hire personnel assigned to the Requirement Office regularly worked Saturdays and holidays from 0800 to 1200 or 1300 as well as on Sundays when support requirements dictated. Compensatory time off was not possible for the same foregoing reasons. Overtime was not paid to other than contract or stenographer personnel."

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A copy of Administrative Support Team Memorandum No. 72-032, dated May 19, 1972, entitled "Administration of Overtime," which was issued after complaints were received by the Administrative Office about excessive overtime caused by pressure from supervisors, was also submitted by the claimant in support of his claim. It stated, in pertinent part, that "Basic overtime policy authorized payment or compensatory time off for hours of work officially ordered or approved in excess of 40 hours in a workweek." The memorandum also stated that a supervisor "may not order an employee to work overtime without approval of the authorizing officer." Further, that approval of overtime "must be made in writing by the authorizing officer prior to its performance, unless unusual circumstances preclude advance approval." The final paragraph of the memorandum reads as follows:

"Any officer who believes he or she is spending unnecessary time on the job because of unreasonable demands by supervisors should immediately call the problem to the attention of Mr. Reed P. Robinson, Counselor of Embassy for Administrative Affairs. This can be done in writing or privately and, needless to say, without prejudice to the officer himself. By this means we should be able to identify any superior officers who are habitually guilty of abusing the time of their staffs. If evidence of supervisory abuse is noted the Ambassador will make it his personal business to call in those responsible so the situation can be corrected."

In administrative reports to this Office dated September 16 and October 1, 1975, AID has not denied that its employees in Laos were required to work overtime. The stated reason for disallowing Mr. Gardner's claim for overtime compensation is that the agency's regulations and local instructions issued in the field of overtime pay were clear and that any grievance with regard to overtime should have been raised at the time of the employee's service. Mr. Gardner's claim for overtime compensation was administratively denied June 20, 1973. The administrative reports also stated that the duty rosters were established and approved by the office chief or his deputy in the Requirements Office. However, it was explained that maintenance of these duty rosters was the means of equalizing the voluntary overtime performed by the office employees.

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AID Manual Order 432.7, Uniform State/AID/USIA Regulations, which implements 5 U.S.C. § 5541 et. seq., states with regard to overtime:

"232.3 Authorization of Overtime

"232.3-1 Ordering and Approving Overtime

"a. Authorizing officers may order or approve the performance of irregular or occasional overtime by their subordinates. Authorizing officers ensure that overtime (for which compensatory time off cannot be granted because of workload considerations) is ordered or approved only to the extent that funds are made available. Ordinarily, overtime should be ordered prior to its performance and as far in advance as possible, particularly for recurrent performance."

The determinative issue in this case is whether or not the overtime work performed by Mr. Gardner was "work officially ordered or approved," as that clause appears in 5 U.S.C. § 5542 (1970). The decisions of this Office and those of the United States Court of Claims clearly establish that appropriate action by an official having authority to order or approve overtime is a condition precedent to recovery of compensation for overtime work.

AID regulations were implemented in Laos by Mission Order Lao-432.7 dated November 27, 1970, which allowed Area Coordinators, office and division chiefs and their deputies to approve individual authorizations for overtime work. Further, it is stated by the agency that duty rosters were not specific orders to perform uncompensated overtime. We concur to the extent that such duty rosters, standing alone, do not constitute official written authorizations for overtime work. However, the Court of Claims has held in numerous decisions that the absence of official written authorization or approval of overtime work does not necessarily defeat a claim for overtime compensation under section 201 of the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542. See Baylor v. United States, 198 Ct. Cl. 331 (1972); Rapp and Hawkins v. United States,

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167 Ct. Cl. 852, 340 F.2d 635 (1964); Byrnes v. United States, 163 Ct. Cl. 167, 324 F.2d 966 (1963), as amended, 330 F.2d 986 (1964); Adams v. United States, 162 Ct. Cl. 766 (1963); and Anderson v. United States, 136 Ct. Cl. 365 (1956).

In Baylor v. United States, *supra*, a claim by uniformed guards of the General Services Administration for overtime compensation for various preliminary and postliminary duties, the Court of Claims stated the standards for determining whether overtime was properly "ordered or approved." The court explained its holding on page 359 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.

"\* \* \* 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."

Although Mr. Gardner was not, by express written orders, directed to perform overtime work by the Chief or Deputy Chief in the Requirements Office, he was in fact actively induced to perform such overtime work by such agency officials who had the authority to authorize or approve overtime work. This was accomplished by their scheduling the claimant to work in the Requirements Office and radio room on various days during the week including Saturdays, Sundays, and holidays by the issuance of duty rosters signed by or on behalf of the Chief of the Requirements Office; by requiring the claimant to obtain a substitute when he was unable to work as scheduled; and by the

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very nature of the work itself which, in many instances, required tours of duty to cover 24-hour work periods. Further, there was a reasonable fear of reprisal by the claimant if he registered a grievance with or against his supervisors who prepared and reviewed his proficiency evaluation reports.

The overtime services rendered by Mr. Gardner as Assistant Requirements Office were performed with the knowledge and approval of agency officials having authority to authorize or approve overtime work in writing and such administrative acquiescence and endorsement was tantamount to express authorization so as to require the payment of overtime compensation under 5 U. S. C. § 5542. In our decision, B-156739, June 22, 1965, we allowed the claim of a civilian employee of AID for overtime services performed as a duty officer based upon the doctrine enunciated in the Rapp and Hawkins case.

It is contended by officials of AID that Mr. Gardner knew or should have known at the time he was performing the claimed overtime work that he should be compensated for officially ordered overtime work. Since he objected to performing voluntary overtime work, he should have made his objections known at the time to enable the Mission Director to assure compliance with the applicable regulations of AID. The agency argues that since Mr. Gardner failed to claim overtime while he was in Laos, which action could thereby have minimized the claim, it should be concluded that he volunteered the overtime and performed services without expectation of receiving overtime compensation. AID further argues that the claimant deliberately waited until after he left Laos before he raised an objection to an accumulation of uncompensated overtime work and put in a claim. By failing to make the agency aware of the situation to which he objected, he acquiesced in the situation. His acquiescence gave the agency neither the opportunity to stop the overtime, to decide to compensate him, or if need be, to allow someone else to volunteer for the duty. The agency contends, therefore, that Mr. Gardner should be estopped from now claiming overtime when he failed to make clear, while in Laos, that he was not volunteering overtime and that he intended to be compensated.

Officials of AID cite and quote two court decisions in support of their contention that Mr. Gardner is estopped from claiming overtime compensation. In United States v. Hanna Nickel Smelting Company, 253 F. Supp. 784, 793 (1966), it was stated:

"When a party fails to speak, although he knows or should know facts which require him to

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speaking, estoppel by acquiescence may be claimed by any other party who relies to his detriment on the first party's silence. \* \* \*

In Brixey v. Union Oil Company of California, 283 F. Supp. 353, 364 (1968), the court remarked:

"Equitable estoppel requires, as to persons against whom the estoppel is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure. \* \* \*"

The Brixey case, at page 365, in further defining equitable estoppel by silence, quotes from 19 American Jurisprudence 661 where it is stated:

"An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there is a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent.'"

Under the circumstances of this case, we conclude that the claimant is not estopped from asserting his claim. Our reasoning follows.

In the first place, Mr. Gardner did not have any meaningful opportunity to speak in light of the circumstances of his working conditions in Laos. The claimant states that on many occasions Requirements Office personnel were informed that overtime pay would not be allowed for officer status personnel. From a job security viewpoint, he did not consider it appropriate at the time to register a grievance with or against supervisors who prepared and reviewed his proficiency evaluation reports. In this regard, we have considered the memorandum of May 19, 1972, from the Administrative Support Team in Vientiane, Laos, which offered a channel through

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which any officer, who believed he was spending unnecessary time on the job because of unreasonable demands by supervisors, could, either in writing or privately, bring the problem to the attention of the Counselor of Embassy for Administrative Affairs, without prejudice to the officer involved. It appears that a reasonable fear of reprisal on the part of Mr. Gardner was justified which warranted his not complaining about such overtime work requirements while in Laos. The existence of a reasonable fear of reprisal, in accordance with the Brixey case, supra, thus negates and precludes application of the doctrine of equitable estoppel.

In any event, we do not agree with AID that Mr. Gardner had a "duty to speak" while in Laos. In the landmark case in this area, Wiser v. Lawler, 189 U.S. 260, 270 (1903), the Supreme Court said:

"\* \* \* To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. \* \* \*"

The Court further stated at page 271:

"\* \* \* The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. Sumner v. Seaton, 47 N.J. Eq. 103, 19 Atl. 884; Hill v. Epley, 31 Pa. 331; Markham v. O'Connor, 52 Ga. 183, 21 Am. Rep. 249. \* \* \*"

See also Greay v. Dockendorff, 231 U.S. 513 (1913); Teasdale v. Prosperity Company, 290 F.2d 345 (1961); Codell v. American Surety Co., 149 F.2d 854 (1945); Lundblad v. United States, 98 Ct. Cl. 397 (1943); Mosley v. Magnolia Petroleum Co., 114 P.2d 740 (1941).

Contrary to the contentions of AID officials, there is no evidence in the record to support the conclusion that Mr. Gardner deliberately waited, with intent to mislead, until he left Laos before he raised any objection to performing uncompensated overtime work or filed a claim therefor. His stated reason, fear of reprisal by his supervisors who prepared and reviewed his proficiency evaluation reports, is acceptable under the circumstances then existing. His silence does not appear to have been deceptive in nature or intended to defraud the

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Government. He was under no obligation to seek out the responsible agency officials while employed by the agency nor to attempt to stop being required to work overtime since such requirement was not due to his own conduct.

Finally, it is clear to us that the agency did not rely to its detriment upon Mr. Gardner's failure to speak while in Laos. The requirements for overtime work there arose from the nature of the situation which required the personnel stationed there to work extra hours in order to carry out the agency's mission. This is demonstrated by the issuance of duty rosters covering such extra hours and by the requirement upon each employee to obtain a substitute if he was unable to work such scheduled extra hours. The existing circumstances in Laos caused AID to require overtime work by its employees. It was not caused by Mr. Gardner's failure to claim overtime pay.

The claim of Mr. Gardner for compensation for overtime work performed by him is for allowance in accordance with the foregoing.

We are authorizing our Claims Division to issue a settlement in Mr. Gardner's favor in the amount found due.

R.F.KELLER

Acting

Comptroller General  
of the United States