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*January 1977*

**DECISION**



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

**FILE: B-188089**

**DATE: October 31, 1977**

**MATTER OF: Donald E. Bordenkircher and Chester C.  
Jew - Overtime Compensation**

**DIGEST:** Two former employees of Agency for International Development performed "voluntary overtime" work in accordance with duty rosters issued by official with competent authority to order or approve overtime, and were responsible for obtaining replacements if unable to work as scheduled. In view of these circumstances and since overtime was required by very nature and volume of work assigned and since nonperformance of such work could affect their performance ratings, overtime was, in effect, ordered and employees are entitled to payment of overtime compensation under 5 U.S.C. § 5542 (Supp. II, 1972).

This decision is in response to a letter dated December 21, 1976, with enclosures, from Mr. I. R. Ludacer, Assistant General Counsel for Enforcement, Agency for International Development (AID), Department of State, in which he seeks guidance with respect to the claims for overtime compensation by Messrs. Donald E. Bordenkircher and Chester C. Jew, former AID employees of the Office of Public Safety (OPS).

The record discloses that Messrs. Bordenkircher and Jew and about 76 other employees were employed as duty officers by the Training Division (TD), International Police Academy, AID, in Washington, D.C. Mr. Bordenkircher's claim for 664 hours of overtime pay for services performed by him outside of normal working hours allegedly occurred on various dates within the period February 7, 1971, to July 21, 1973. The period during which Mr. Jew's claim arose was from July 11, 1971, to September 20, 1974, and the claimed overtime worked totals 629 hours.

B-188089

The claimants contend that the overtime duty in question was performed by them under specific instructions from their official supervisors and in accordance with established administrative procedures, and in no sense was such overtime duty performed on a voluntary basis. In support of their contentions they have submitted copies of duty rosters dated September 13 and November 24, 1972, and February 14 and July 9, 1973, issued in memorandum form to the affected duty officers by Mr. John A. Lindquist, then Chief, TD, OPS. The subject of the memoranda was "Security Duty Schedule OPS/TD Professional Staff." The initial paragraph in each memorandum states the following:

"It is the responsibility of each officer named below to perform Security Duty as scheduled or to make suitable arrangements for his substitute and so notify Administrative Services Branch. This schedule is to be issued quarterly, with revisions as necessary."

The name of Mr. Borderkircher appears on two of the aforementioned memoranda, and Mr. Jew's name appears on three of them.

A copy of an additional official AID document dated April 18, 1973, entitled "Staff Notice No. 54," SUBJECT: "Training Division Duty Personnel," signed by Mr. Lindquist, states in pertinent part that its purpose is to define and discuss the duties of three different assignments which provide coverage outside normal duty hours within the TD, namely, the Division Duty Officer, the Security Duty Officer, and the Duty Secretary. The claimants performed the duties of the Division Duty Officer and the Security Duty Officer. With respect to the Division Duty Officer and the Security Duty Officer, the Staff Notice stated that roster assignments would be established by the Office of the Division Chief and the Chief, Administrative Services Section, respectively. It was stated in regard to Security Duty Officers that:

"Any officer unable to perform his assigned duty is responsible for obtaining a replacement and notifying the Chief, Administrative

B-188089

Services, 48 hours in advance in writing of the change on a router slip."

The claimants also point out that Staff Notice No. 54 shows (1) that the duty officer assignments were not on an irregular or occasional basis but were firmly scheduled in advance by date and working duty time, and (2) that each duty officer had specific regular duties for each assignment.

In its request for a determination by this Office in the matter, the agency states as follows:

"Mr. John Lindquist, who was the Chief of the training division of the Public Safety Office during the relevant period of time has indicated that when he assumed his job in 1968 the prevailing practice among his staff was to perform these overtime services on a voluntary basis and that he merely continued the existing practice. He denies that anyone was coerced into performing these services in any way and it was understood that the services were entirely voluntary."

Mr. Bordenkircher states that even though the overtime work in question has been stipulated by the agency as being voluntary, it was stated to him and his professional colleagues verbally that failure to work "voluntary" overtime would result in their receiving a poor performance report and subsequent dismissal. In this regard, the file does not contain his Performance Evaluation Report. However, the file contains such reports for Mr. Jew. In the narrative comments in the Performance Evaluation Report for Mr. Jew for the period July 11 through December 31, 1971, it is stated:

"The rated officer is hardworking and dedicated, as indicated by his contribution of 144 hours of voluntary overtime since July of rating period, much of this time being on Saturdays. He only took 16 hours of annual leave and 8 hours sick leave."

B-188089

In his Performance Evaluation Report for the period January 1 through December 31, 1972, it is stated as follows:

"Mr. Jew has given 260 hours of voluntary uncompensated overtime during this reporting period."

Also included in the evidence of record is a copy of a draft memorandum dated January 1, 1973, from Mr. Lindquist to Mr. Byron Engle, Director, CPS, entitled "Report of Overtime and Forfeited Annual Leave for Calendar Year 1972." The draft memorandum states in pertinent part as follows:

"1. Forwarded herewith is a report of overtime and annual leave forfeited by all personnel performing duties with the Training Division during Calendar Year 1972.

Total Number Personnel This Report	78
Total Hours Voluntary Overtime	13,858
Total Hours Paid Overtime	2,881
Total Hours Annual Leave Forfeited	1,449

"2. The Training Division's Professional Staff worked a total of 13,858 voluntary overtime hours and forfeited 1,091 hours of annual leave for a grand total of 14,949 hours. This equates to 1,868 man-days or 7.3 man-years and provided additional services valued at \$162,496.00 (based on the average hourly wage for IPA Professionals at \$10.87 per hour).

"3. A complete roster of personnel reflecting the individual breakdown of overtime, annual leave, and sick time is attached."

The claimants therefore contend that one of the apparent major administrative objectives was the achievement of budgetary savings by AID.

B-188089

The basic statutory provisions regarding the payment of overtime compensation are codified in 5 U.S.C. § 5542 (Supp. II, 1972). Under this statute, when an 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 a day, overtime shall be paid.

The determinative issue here, as was in the case of Matter of John W. Gardner, B-175275.05, April 7, 1976, is whether the overtime work performed by Messrs. Bordenkircher and Jew was "work officially ordered or approved," as that clause appears in section 5542. 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. With respect to the facts and circumstances herein involved, the specific question is whether Mr. Lindquist, the Director of TD, who had authority to order or approve overtime work for the claimants, knew of or should have known of any regulations, duty rosters, etc., which required the performance of overtime, and whether Mr. Lindquist had more than a "tacit expectation" that the overtime work would be performed. Thus, an assessment as to the knowledge and/or endorsement of Mr. Lindquist of the continued performance of overtime work by Messrs. Bordenkircher and Jew is required.

As to whether the duty rosters constitute orders to perform uncompensated overtime work, such 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, now codified as 5 U.S.C. § 5542. See Court of Claims decisions cited in Gardner, supra.

In Baylor v. United States, 198 Ct. Cl. 331 (1972), which involved claims 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

B-188089

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.

"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."

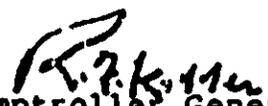
In our decision 53 Comp. Gen. 489 (1974), we indicated that we would follow the principles of law as set forth in the Baylor case.

The record does not show that the claimants were, by express written orders, directed to perform overtime work by the Director of TD. However, they were clearly actively induced to perform such overtime work by the Director who had the authority to order or approve overtime work. This was accomplished by the issuance of duty rosters signed

B-188089

by Mr. Lindquist scheduling the claimants to perform security duty work after regular duty hours on weekdays and Saturdays (see Staff Notice No. 54); by requiring the claimants to obtain substitutes when they were unable to work as scheduled and so notify the Administrative Services Branch; by the very nature and volume of the work assigned; and by the understanding by both management officials and the rank and file employees that each day, the work assigned the employees had to be completed in order to effectively complete their assignments. Further, it appears that the employees had a reasonable fear of reprisal since "voluntary overtime" was entered on Performance Evaluation Reports and there was, thus, the threat of lower performance ratings and even dismissal if the overtime work was not performed. While Mr. Lindquist has indicated that he did not coerce any employee to work overtime, he did permit the continuance of the prevailing practice of allowing the claimants, and other employees similarly situated, to perform overtime services, and directed them, in writing, to perform overtime work. Under the circumstances it is our opinion that the overtime work by Messrs. Bordenkircher and Jew was, in effect, ordered and the claimants are entitled to payment of overtime compensation under 5 U.S.C. § 5542.

In light of the foregoing, the claims of Messrs. Bordenkircher and Jew for overtime work performed by them during the periods in question are for allowance by your agency in the amounts found due if they are otherwise proper.

  
Acting Comptroller General  
of the United States