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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548



OFFICE OF GENERAL COUNSEL

IN REPLY
REFER TO: B-197109

March 24, 1980

Mr. John A. Hurley
Assistant Commissioner
Commissioner of Customs
Washington, D.C. 20229

ACC00156

Dear Mr. Hurley:

This is in response to your letter (your reference FIS-5-02-A:A:0 JW), forwarding Mr. William M. VanLandingham's [request for waiver of a claim] asserted against him in the amount of \$2,063.76. This amount consists of \$1,139.60 paid to him in overtime compensation, and \$924.16 paid to other customs inspectors for overtime. Mr. VanLandingham was advised by the Regional Commissioner of Customs, Houston, that he was indebted to the Customs Service because these overtime payments were "overpayments," and that he could request waiver of this claim, apparently under the provisions of 5 U.S.C. § 5584 and its implementing regulations, allowing waivers of claims for erroneous payments of pay to employees under certain conditions.

The amount due was determined as a result of an audit conducted by the Customs Service Office of Internal Affairs. In the Audit Report No. 77-VI-4, dated February 10, 1977, the Office of Internal Affairs charged that:

"customs personnel have been overpaid \$2,063.76 since July 1, 1975, for reimbursable overtime services because inspectors were not held available for an eight hour period after start of the first assignment on Sundays and holidays,"

as required by Customs regulations. Mr. VanLandingham, in his capacity as Port Director, was responsible for scheduling overtime assignments in accordance with the regulations and limitations applicable. After a formal investigation, action was taken to reassign Mr. VanLandingham from Port Director, Freeport, Texas, to Customs Inspector, El Paso, Texas, in addition to a suspension not to exceed thirty days.

On review of the record, we find no basis for a claim against Mr. VanLandingham. The Customs Service should terminate collection action in this matter.

First, the overtime in question was performed on a reimbursable basis (19 U.S.C. §§ 261, 267); the United States has evidently been paid by the importers or others who benefited from the overtime assignments. There is thus no loss or out-of-pocket expense on which to base a claim.

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More fundamentally, even if the Government has not been reimbursed, we see no basis for recovery of the payments from Mr. VanLandingham. Although this matter has been presented in the posture of a request for waiver of overpayments, there is in fact no evidence in the record of overpayments. The audit finding was that the total overtime cost would have been less if a customs inspector, once having been summoned to work on an overtime basis, was kept available for a full eight hours as regulations require. Instead, Mr. VanLandingham would release the first inspector before the end of eight hours, and then call on another to perform duties which could have been done by the first inspector within a single eight-hour overtime shift. Evidently, this was more expensive because inspectors called upon to perform overtime duties are paid a minimum amount regardless of how long they actually work. As a result, it might cost more, for example, to pay two inspectors for four hours each of consecutive overtime than to pay one inspector for eight hours.

However, while the total paid for services performed during overtime was thus more than it would have been had the eight-hour rule been followed, no employee individually received more than he was entitled to for the work he performed. That is, the employees were evidently paid the correct rate for the time they actually worked, and there is no suggestion that they did not perform their duties during the periods for which they were compensated. This is true of Mr. VanLandingham himself, who was paid for some of the overtime, and of the other employees. Consequently, even though Mr. VanLandingham violated agency regulations in assigning overtime, no employee was overpaid, so that no claim for overpayment can be asserted.

Nor can Mr. VanLandingham be held liable for erroneous payments as an accountable officer. Although the submission refers to his "certifications" of overtime assignments, we have been advised informally by the Customs Service that he was not an authorized certifying officer. Presumably the certification by him which is referred to is merely that of a timekeeper verifying that the employees worked the hours of overtime claimed.

In sum, Mr. VanLandingham violated agency regulations. He may be subject to disciplinary action for having done so, but there is no basis in the record for any further attempt to collect the \$2,063.76 now sought by the Customs Service.

Sincerely yours,

Harry R. Van Cleave

for Milton J. Socolar
General Counsel