



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

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B-167602

September 21, 1973

Mr. Lorenzo G. Baca
P. O. Box 113
Tijeras, New Mexico 87059

Dear Mr. Baca:

We refer to your letter of August 11, 1972, ^{for} requesting overtime compensation for the period from January of 1959 to July 1, 1966, for preliminary and postliminary duties performed while employed by the General Services Administration (GSA) as a security policeman at the Albuquerque Operations Office, Atomic Energy Commission.

Your claim, initially filed with this Office on January 27, 1969, was disallowed by Settlement Certificate dated March 19, 1969. That disallowance was predicated on the fact that performance of the duties involved had never been authorized or approved by an official having authority to authorize and approve overtime. Claims of other guard members which were submitted with your claim were similarly disallowed. Those settlements were later reviewed pursuant to a congressional request, however, no basis was found to alter the actions taken.

These preliminary and postliminary duties for which overtime compensation is claimed are: changing into and out of uniform, picking up and replacing belt, ammunition and revolver, standing inspection for physical fitness, receiving special instructions and assignments, and walking to your assigned guard post.

During the period of the claim guards were under the jurisdiction of the GSA which furnished security guard service for the Albuquerque Operations Office. Guards employed at that station were assigned to 8-hour tours of duty without a nonpaid lunch break. In order to provide continued coverage at each guard post, guards were required to be at their assigned posts ready for duty at the time designated for the beginning of their shifts. Although the guards were allowed to wear their basic uniforms between work and home they were required to keep their caps, badges and belts, as well as their revolvers and ammunition at a central location in the Albuquerque Operations Office installation. The GSA has reported to us that the guards would normally sign in at the front gate before the beginning of their shifts so that they could walk to the central location, obtain uniform items and weapons and receive special instructions at that place and then walk to their assigned posts,

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if necessary, before the time their shifts were to begin. After guards were relieved they would return the indicated uniform items and weapons to the central location before they were free to go home.

In discussing the disallowances, we indicated that we did not regard time involved in changing into and out of uniform as compensable working time even when required by an agency, and that, in view of the small size of the guard force and the informality with which inspection was accomplished and assignments given, the time involved in performing those and the few other functions involved was so nominal as to be de minimis. We pointed out, moreover, that payment of overtime compensation under 5 U.S.C. 5542 must be predicated on the performance of overtime work authorized and approved by an official having delegated authority, and that whereas such authorization and approval could be established where supervisors having such authority actively induced employees to perform work, it could not be established where they merely had knowledge of and tacitly approved early reporting procedures.

In requesting our further consideration of your claim, you rely on the holdings of the Court of Claims in Bates v. United States, 196 C. Cls. 362 (1971), and in Baylor v. United States, 198 C. Cls. 331 (1972). Both decisions were rendered subsequent to our previous consideration of your claim.

The Court of Claims in Bates and Baylor held that time spent changing into and out of uniform was compensable as overtime hours of work although in those cases the employees involved were not permitted to wear their uniforms to and from their homes. The court in those cases considered uniform changing time together with the performance of other preliminary and postliminary duties as compensable time. In view of those and other recent decisions of the Court of Claims, it appears that time spent by you in putting on your badge, cap and belt and in picking up your ammunition and revolver would properly be considered as work. Whether such time is compensable as overtime, however, is contingent upon authorization and approval by an official to whom such authority has been delegated and upon the amount of time involved being of substantial length so that it would not be considered de minimis.

The Bates case was decided on the basis of a Government stipulation admitting that certain officials had been delegated authority to authorize or approve the overtime work there in question. However, in the Baylor case whether or not the necessary authorization had been given by an appropriate official was, as in your case, very much in issue. The court

there explained that under the applicable case law, whether work had been officially authorized or approved was a matter of "legal line drawing." Whereas work that is required by an official regulation is clearly authorized or approved, a tacit expectation that work be performed is insufficient, where there is more than a tacit expectation, and where employees have been induced by appropriate superiors to perform additional duties, overtime has been held to have been authorized and approved. An "appropriate official" in this context is one having authority to order or approve overtime. In this regard, the Court of Claims in Kenneth D. Anderson et al. v. United States, C. Cls. No. 151-68, decided May 11, 1973, recognized that in order to establish that overtime work had been ordered or approved, a proper written delegation of authority to the person alleged to have authorized or approved the work must be shown.

In attempting to determine where on the above spectrum the circumstances in your case lie we requested a report from GSA with respect to the specific information necessary to that determination. In response, GSA has advised:

"By letter dated June 7, 1973, the Denver regional office advised that all written records and files that would have a direct bearing on the claim of Mr. Baca were destroyed or transferred to Region 7 at the time of the regional realignment in 1972. Officials in Region 7 were also requested to supply any pertinent information but unfortunately, relevant records were not available there. The Denver report does state, however, that Guards have never been required to perform preliminary and postliminary duties in Region 8. This implies that authorized GSA officials in Region 8 (which included Albuquerque during the period under consideration), did not encourage or induce the performance of the activities in question.

"The unavailability of the relevant records precludes conclusive answers to the questions raised in your letter, particularly the question pertaining to official approval, directly or indirectly, of preliminary and postliminary duties which Mr. Baca claims to have performed. * * *"

Your letter indicates that the preliminary and postliminary duties performed were ordered by Mr. Decater Brown who you state was the "approving official." Due to the absence of records, we are unable to

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verify whether Mr. Brown had been delegated authority to order and approve overtime or whether he did in fact order or approve the preliminary and postliminary duties involved.

With regard to the length of time used by guards at the Albuquerque Operations Office for performance of preliminary and postliminary duties, the reports furnished this Office in connection with the original settlements indicate that there was no consistent pattern of early reporting which would support a finding that the guards concerned regularly reported to work at any given time prior to the beginning of their shifts or that they remained after the end of their shifts to perform postliminary duties. The record also does not support a conclusion that the amount of time required for preliminary and postliminary activities which may be considered work was in excess of a few minutes each day. Therefore, any preliminary and postliminary work performed would be considered de minimus and would not provide a basis for allowing you any additional compensation.

Where, as here, a claim is based on statements by a claimant that cannot be verified or corroborated by Government records which have been destroyed in accordance with law, the burden does not rest upon this Office to refute claims presented, but is on claimants to furnish evidence satisfactorily proving the validity of the claim. 31 Comp. Gen. 340 (1952).

On the record before us, we are thus constrained to uphold the denial of your claim.

Sincerely yours,

Paul G. DeBolt

For the Comptroller General
of the United States

cc: General Services Administration ✓
Public Buildings Service
Washington, D. C. 20405