

Matter of: [claimant]

Date: February 25, 2002

File Number: 00338

OPM Contact: Jo-Ann Chabot

A retired federal employee submitted a claim through his former employing agency for overtime worked.

The original claim covered the period of May 10, 1988 through and April 2, 1993. In addition to the claim, the claimant submitted evidence that he had been induced to work overtime. The evidence included a June 5, 1988 E-mail message from his immediate supervisor stating that: "You'll *just have* to work the hours it takes to get the job done." [Emphasis added.] It also included a January 18, 1995 memorandum from the agency Inspector General acknowledging that the claimant had made repeated claims for overtime and that his superiors were aware of these claims. In addition, the claimant submitted copies of his personal calendar cataloging dates, times, and amounts of overtime hours and a general list of the assignments and projects that he worked on during the period for which he claimed overtime.

In an initial decision on this claim, OPM stated that the claimant had shown that he was induced to work uncompensated overtime. OPM noted, moreover, that the claimant had shifted the burden to the agency to come forward with evidence of the precise amount of overtime work performed, or with evidence rebutting the inference to be drawn from the claimant's evidence. OPM said that, unless the agency submitted such evidence, it must pay the claim.

A claim for overtime worked is a continuing claim that accrues when the overtime is performed, and the Barring Act begins to run on a daily basis from that time. *Jackie A. Murphy*, B-251301, April 23, 1993; *David A. Turner*, B-251043, February 8, 1993. The agency approved the claim in part for overtime performed from August 1, 1988 to April 2, 1993, but denied it in part for overtime worked from May 10, 1988 to August 1, 1988. The agency based its decision on the Barring Act, 31 U.S.C. 3701(b)(1), which requires that a claim must be received within six years after the claim accrues. The agency also based its decision on agency regulations requiring compensation claims to state a sum certain. In this regard, the agency stated that requests for payment that the claimant had submitted during the six-year period following May 10, 1988 through August 1, 1988, were not valid claims because they did not state a sum certain. Therefore, the agency stated that the claim for

overtime worked during this period was barred by the Barring Act. The only issues remaining in this case are whether two requests for payment that the claimant submitted before August 1, 1994 are valid claims, and whether the claim for overtime worked from May 10, 1988 to August 1, 1988 is barred under the Barring Act.

In maintaining that the Barring Act does not apply to this portion of his claim, the claimant states that the file includes documents showing that he filed a valid claim within the six-year limitation period. In the first document, a June 4, 1988 E-mail from the claimant to his immediate supervisor, the claimant states that he was working 10 to 16 hours beyond his regular 40-hour work week and requested overtime pay or compensatory time for the additional hours he worked. The statute governing submission of claims, 31 U.S.C. § 3702(b)(1), requires that a claim must include the signature and address of the claimant or his authorized representative. Regulations of the claimant's employing agency require that pay claims must state a sum certain. The E-mail does not include the claimant's signature. Moreover, it does not state a sum certain or provide any means of ascertaining a sum certain. Therefore, the E-mail of June 4, 1988 is not a valid claim and fails to meet the requirements for filing a claim under the agency regulations.<sup>1</sup>

The second memorandum, signed and dated May 9, 1990, from the claimant to his second level supervisor, was written in reference to a meeting that occurred on the same date between those two individuals.<sup>2</sup> It appears from this memorandum that the meeting concerned overtime pay that the claimant's immediate supervisor had granted to another employee. It also appears from the memorandum that the claimant took the opportunity afforded by this meeting to discuss his overtime work and to request payment for it. The concluding paragraph of the memorandum reads:

Requested that [my immediate supervisor's] illegal orders that I work overtime without compensation be rescinded, and that I be fully compensated for all overtime worked to date. My preference is for compensatory time, but payment of back pay for the overtime worked will be satisfactory.

In addition to the memorandum, the file also includes working notes that the claimant wrote in connection with that meeting. The notes include a list of six issues for discussion in the

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<sup>1</sup> The file also includes two more documents, dated prior to August 1, 1994, where the claimant stated that he was working overtime without compensation. First, in an E-mail of August 2, 1989, the claimant stated that, on the average, he was working approximately one hour 15 minutes each weekday and four hours each weekend. Second, in a signed memorandum of November 21, 1990, the claimant stated that he had requested compensation for overtime hours worked and, in a July 13, 1989 meeting in his supervisor's office, it was decided that employees who worked unpaid overtime would submit the information by E-mail. Thus, the record reflects that the claimant filed numerous requests for payment.

<sup>2</sup> The claimant's personal calendar for that date shows that the meeting was scheduled for 9:15 AM.

meeting with the claimant's second level supervisor, with tick marks placed alongside five issues and a cross placed alongside the remaining issue, which also had lines drawn through it. The notes also include a list of documents to be brought to the meeting and the list includes "[Immediate supervisor's] e-mails, etc., req. me to work OT without pay" and "Xeroxes of appt. calendar with daily hrs of OT worked." Such lists are consistent with memory joggers that individuals use as reminders of items to bring to, and of issues to discuss during, a meeting. Finally, there is a line drawn two-thirds of the way down the page followed by additional notes, which the claimant maintains were written during the meeting. They state in part:

Send this to [second level supervisor] in memo -- Do not copy to [other specified agency offices]. (He will contact) .  
 . . . Ends: Do not make more copies of docs for encls.  
 [Second line supervisor] will keep those brought today. But save e-mail files on [organization] also downloaded to PC.  
 Also save any future emails, memo, etc. Get memo to [second line supervisor] asap.

The tick marks alongside the issues for discussion and notes at the bottom of the page are consistent with notations made during a meeting to show which matters were discussed and any further action to be taken. The meeting occurred on May 9, 1990, the day that the claimant wrote his memorandum and notes in connection with the meeting. According to the notes, the claimant also submitted his work diaries to his second level supervisor on the same day.

The agency's regulations require compensation claims to state a sum certain. Comptroller General decisions have not discussed exactly what qualifies as a sum certain within the context of a compensation claim. Judicial decisions, however, have addressed the question of what constitutes a sum certain within the context of the Federal Tort Claims Act's prerequisite that administrative claims must state a sum certain. According to these decisions, the prerequisite of stating a sum certain is satisfied when a claim provides enough facts to enable the agency to conduct an investigation and estimate the value of the claim. *Romulus v. United States*, 160 F. 3d 131, 132 (2d Cir. 1998); *Wardsworth v. United States*, 721 F. 2d 503, 505-506 ( 5<sup>th</sup> Cir. 1983), *cert. denied*, 469 U.S. 818 (1984); *Molinar v. United States*, 515 F. 2d 246 (5<sup>th</sup> Cir. 1975); *Magdalenski v. United States*, 977 F. Supp. 66, 70 (D. Mass. 1997); *Thompson v. United States*, 749 F. Supp. 299, 300 (D. D.C. 1990 ). Thus, claims that did not state a sum certain within the body of the claim, but were accompanied by bills for property repair and medical treatment, or included an itemization of such bills within the claim, met the prerequisite of stating a sum certain. *Molinar v. United States, id.*; *Thompson v. United States, id.*

The documents in the file reflect that the claimant in this case met with his second level supervisor, wrote his memorandum, and submitted his work diaries to that supervisor on May 9, 1990. Examination of these work diaries shows that they included enough information to investigate the claim and estimate its value. Therefore, the memorandum of May 9, 1990 plus the work diaries that were submitted on the same day constitute a valid

claim that states a sum certain. Submission of a claim in 1990 for overtime work done in 1988 is well within the time period specified in the Barring Act. Finally, according to OPM's initial decision in this case, the burden has shifted to the agency to come forward with evidence of the precise amount of overtime work performed, or with evidence rebutting the inference to be drawn from the claimant's evidence. Unless the agency submits such evidence, it must pay the claim for overtime worked between May 10, 1988 and August 1, 1988. Accordingly, the claim for overtime worked between May 1, 1988 and August 1, 1988 is remanded to the agency for further action consistent with OPM's decisions.