

U.S. Office of Personnel Management  
Office of Merit Systems Oversight and Effectiveness  
Classification Appeals and FLSA Programs



Atlanta Oversight Division  
75 Spring Street, SW., Room 972  
Atlanta, Georgia 30303

**Fair Labor Standards Act Decision  
Under Section 4(f) of the Act as Amended**

**Claimant:** [Claimant]

**Position:** Supervisory Police Officer  
GS-083-7

**Organization:** Department of Veterans Affairs

**Claim:** Exemption status and not fully paid  
for overtime worked

**OPM decision:** Nonexempt and overtime payment due.  
**OPM decision number:** F-0083-07-01

\_\_\_\_\_  
Kathy W. Day  
FLSA Claims Officer

\_\_\_\_\_  
June 22, 1998  
Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which OPM administers the Act. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with this decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708 (address provided in 5 CFR 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed him. A copy of the computations and the date payment was made to the claimant should be furnished to this office within four pay periods following the date of the decision. The agency must also submit a Standard Form 50 showing that the claimant's exemption status has been changed to comply with this decision. The SF 50 should be sent to this office within 15 workdays of receiving the decision. If the claimant believes that the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

**Decision sent to:**

[Claimant]

[Human Resources Management  
Service]

Mr. Ronald E. Cowles  
Deputy Assistant Secretary for  
Personnel and Labor Relations  
Department of Veterans Affairs  
Washington, DC 20420

## **Introduction**

On January 2, 1998, the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant]. He believes his position should have been designated nonexempt under the Act since May 12, 1996, and that he is owed payment for overtime worked. During the claim period, he has worked in the [organizational location] Department of Veterans Affairs, [geographical location]. His position is classified as Supervisory Police Officer, GS-083-7. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

## **General issues**

The claimant states that, although he is assigned to a Supervisory Police Officer position, he has not been allowed to exercise supervisory responsibilities. He states that he does not spend 80 percent or more of his time performing supervisory and closely related duties. He believes his position should be nonexempt under the FLSA. He also states that he is a Canine Enforcement Officer and believes he should be receiving 2 hours of overtime a day for care, maintenance, and training of the canine.

In reaching our decision, we have carefully reviewed all information furnished by the claimant, his supervisor, and his agency, including his official position description number [#]. We have also interviewed a Lead Police Officer (LPO) and a Police Officer (PO) who have worked closely with the claimant and are familiar with the duties he performs.

## **Evaluation**

### ***FLSA Exemption Status***

An employee's exemption from the overtime provisions of the FLSA is determined by comparing the actual duties and responsibilities performed by an employee to the FLSA exemption criteria for executive, administrative, and professional employees found in Subpart B, Part 551 of title 5, Code of Federal Regulations (CFR). Guidance for interpreting the terms used in the exemption criteria is found in FPM Letter 551-7. Although the FPM has been abolished, the terms have well-established interpretations that are still current.

The claimant does not perform administrative or professional duties as described in sections 551.206 and 551.207 of 5 CFR and neither the claimant nor the agency contest this. The agency determined that the claimant's position is exempt based on the executive exemption criteria because he is assigned to a supervisory position. However, no audit of the claimant's position was conducted by the agency to determine if he was, in fact, actually performing the duties described in his position description. Section 551.205 of 5 CFR contains the criteria governing whether the claimant's supervisory position should have been exempt from the FLSA during the claim period under the executive exemption criteria. The position should have been exempt if it met executive exemption criteria (a)(1), (a)(2), and (b) in section 551.205.

*General principles governing exemptions*

Section 551.202 of 5 CFR provides:

In all exemption determinations, the agency shall observe the principles that—

- (a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM.
- (b) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (c) The burden of proof rests with the agency that asserts the exemption.
- (d) All employees who clearly meet the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

The claimant's position description states that he is a Supervisory Police/Canine Enforcement Officer responsible for enforcing Federal and State criminal codes, local ordinances and laws, and Department of Veterans Affairs rules and regulations in the physical protection of patients, visitors, employees, and property. It further states that he plans work schedules, coordinates and approves/disapproves leave, assigns case priorities, evaluates personnel for promotion or reassignment and handles minor disciplinary action. He directs shift personnel during emergencies, outbreaks of violence and criminal activity and is responsible for conducting inservice training, providing input for standard operating procedures and developing performance standards where the use of a canine is imperative to officer performance. He is responsible for using the canine in search and seizure efforts, for training the canine, and for proper care and maintenance of the canine.

The claimant states that although he is assigned to a supervisory position, he has never been allowed to function in a supervisory capacity. The organizational structure in place at the beginning of the claim period consisted of a Chief, an Assistant Chief, and a Supervisory Police Officer (the claimant) with 3 LPOs and 4 POs. A reorganization combined Safety and Police Services and made the Safety Officer the Chief of the Service. The Police Chief continues to perform in the capacity of Chief, and the Assistant Chief is out on long-term medical leave and has not been replaced. A criminal investigator and an administrator currently make work assignments, but these assignments ultimately come down from the Chief. The claimant states that he was and never has been in the chain of command. The Assistant Chief retained authority to approve leave until he left the position in June 1997. At that time, LPOs began approving minimum amounts of leave for their subordinates, but the Chief still approves leave for the LPOs and retains final authority for approving all leave. Leave requests are either sent to the Chief through the LPOs, who only occasionally forward them through the claimant, or they are sent directly to the Chief.

A PO and an LPO who have worked with the claimant since he was assigned to the supervisory position were interviewed. Both employees stated that the claimant has been a supervisor in title only

and has never functioned in a supervisory capacity. The LPO indicated, for example, that when he wishes to volunteer for another shift, such as the third shift when the claimant is acting as the Watch Supervisor, he does not go the claimant but rather must get approval from the Chief. The claimant has never provided performance ratings for the LPOs or POs nor has he participated in selection boards. The LPO and PO agreed with the claimant's assertion that he performs the same duties as the other LPOs, or in many cases, particularly on second and third shifts, he performs the same duties as the POs, i.e., traffic control, assisting patients and visitors, and patrolling the grounds, or he performs canine officer duties. The claimant does not recommend training, evaluate performance, recommend awards, or take personnel actions according to our fact finding.

The Chief confirmed that the Assistant Chief maintained authority for approving leave, that the claimant had not participated in selection boards, and that subordinates generally did not go through the claimant as an intermediate level of supervision but rather went directly to the Assistant Chief when he was there, and now to the Criminal Investigator or to the Chief himself. Although, the chief believes that the reason for the claimant's failure to perform supervisory duties is related to a performance problem, he provided no information to indicate any efforts to require the claimant to perform the supervisory duties as specified in his position description but rather allowed that the claimant did not function as a supervisor.

The [medical center] is a small center consisting of 600 beds. Several of the wings are closed and only the surgical ward, the psychiatric ward, and the extended care unit remain open. At any given time, there are no more than 80-150 patients and there is very little activity. Emergency situations seldom occur. Most evening and night shifts require no more than routine facility and ground patrol, assisting visitors, vehicle upkeep, etc.

As defined in section 551.205, an "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

- (a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee--
  - (1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and
  - (2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through 9 level subject to section 207(k) of title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the work time in a representative workweek on supervisory and closely related work.

### *Primary duty*

All exemption determinations are based on the employee's primary duty. Interpretive guidance in FPM Letter 551-7 provides that, as a general rule, the primary duty is that which constitutes the major part (over 50 percent) of the employee's work. However, a duty which constitutes less than 50 percent of the employee's work can be credited as the primary duty for exemption purposes provided that duty: (1) constitutes a substantial, regular part of a position, and (2) governs the classification and qualification requirements of the position, and (3) is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

### *Evaluation of criteria (a)(1) and (a)(2)*

The claimant states that prior to July 26, 1996, he acted as Watch Supervisor in the absence of the regular Watch Supervisor. The Assistant Chief retained authority for all supervisory functions. For select periods of time beginning July 26, 1996, the claimant became the Watch Supervisor on the second or third shift. During his periods as Watch Supervisor, he made post assignments to either 2 or 3 POs; periodically monitored their work during the shift, usually while he was performing routine work himself; and approved short term leave. He personally performed post assignments, assisted visitors, wrote reports, and participated in planned canine and police operations. He states that during that time he spent less than 5 hours per week as an LPO on supervisory and related duties and continues to spend no more than that amount of time in such a capacity. He has never had any authority to make selections or promotions nor to effect disciplinary action other than verbal discussions of minor problems on occasion. He does not participate in management decisions, establish priorities or interpret policy. Until January 6, 1998, the claimant prepared no performance appraisals and provided no input to performance appraisals. In January 1998, he states that he was told to "pass" all of his subordinates, and he was responsible for physically handing out some of the performance appraisals. During the periods of time in which the claimant was assigned to the day shift, the Chief, Assistant Chief or Criminal Investigator assumed all supervisory functions. The LPOs and POs have not viewed the claimant in a supervisory capacity, and his actual primary duty has not been that of a supervisor or manager. More than 50 percent of his time is spent performing the duties of a PO or LPO with very limited authority to make independent decisions concerning management of the work. Criteria (a)(1) and (a)(2) are not met.

### *Evaluation of criterion (b)*

The claimant states that he does not spend 80 percent of his work time on supervisory and closely related work. The claimant contends that during the claim period, he either had no supervisory duties, or, as Watch Supervisor, performed the limited duties of an LPO, both overseeing the work and performing PO duties related to crime prevention and canine enforcement work. Accepted OPM guidance provides that a basic test for identifying closely related work is whether or not the work contributes to effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. Although the claimant routinely made post assignments, checked on the POs at their posts, and occasionally approved minimum amounts of leave, these activities took less than 15 percent of the time. He did not perform other related duties typically associated with supervisory responsibility, such as determining training needs and providing training, interpreting policy guidance, recommending promotions and awards, evaluating performance, taking disciplinary actions, etc. The information obtained from the other employees and the Chief substantiates the claimant's contention that he performed only very limited supervisory and related duties for less than 15 percent of the time and continues to function in such a manner. Therefore, criterion (b) is not met.

Criteria (a)(1), (a)(2), and (b) of the executive exemption are not met; therefore, the claimant's position should have been nonexempt under FLSA for the claim period.

### *Overtime for Care of Canine*

The claimant is a Canine Enforcement Officer which means he has a trained police dog assigned to him. He is responsible for the care, maintenance and training of the canine. The claimant believes he is entitled to 2 hours of overtime each day for the canine's care and training.

The record shows that the agency paid the claimant 2 hours of overtime each day for the care and maintenance of the canine from April 16, 1995, to May 11, 1996. From May 12, 1996, until October 6, 1997, the agency informed the claimant that he was allowed time during his regular tour of duty to care for the canine plus 2 hours of overtime on Saturdays, Sundays, and holidays. Emergency veterinarian visits were handled on a case-by-case basis with the claimant filing for overtime when needed. Beginning October 6, 1997, the agency issued a directive to the claimant indicating the amount of time that he could use during his regular work day for each activity associated with the care and training of the canine (e.g., exercise - 45 minutes per day, training - up to 2 hours per day). Overtime requests for non-work days were to be submitted to the supervisor and would normally be granted based on a specific amount of time for each required activity as predetermined by the agency (e.g., feeding - up to 5 minutes twice a day, bathing - 2 times a month up to 15 minutes, exercise - up to 45 minutes, spraying yard - 15 minutes once a month). Overtime requests for more than 2 hours per day on non-duty days must be requested in advance.

The claimant states that the duties associated with the care and maintenance of the canine cannot be conducted during working hours for the following reasons:

- Enforcement dogs must be fed at least 3 hours prior to work to prevent gastrointestinal problems such as bloat which can be fatal.
- Some canine enforcement training must be conducted with the assistance of another person and in an environment free from interruptions.
- The government van cannot be washed and maintained during work hours because there are no facilities or supplies available for the claimant to use at the medical center.

He also believes he should be compensated for the extra time he must spend vacuuming and cleaning his carpets at home.

In order to determine an acceptable standard of care for dogs used in police enforcement, it was necessary to contact an expert in the field. Lt. William Faus, a certified canine trainer and officer in the North American Police Work Dog Association, has owned a kennel and trained enforcement dogs for 30 years. In addition, he has 23 years of experience as a police officer in charge of a canine unit. Lt. Faus advised that dogs should not be fed at work or immediately prior to work, however, there is not a strict requirement that the dog be fed 3 hours before work. The dog can be fed in approximately 5 minutes as any pet dog would be fed. There is no need to watch the dog eat or monitor him closely after eating. It is acceptable to turn the dog loose in the yard and let him rest or wander unattended for a length of time after being fed. Approximately 5 to 10 minutes of exercise and play should be conducted each day, at work or home. Some training can be conducted by the Canine Officer alone at work when the situation allows (e.g., during late shifts when there are few interruptions). However, more formalized, concentrated training should be conducted away from work for 8 hours a month to maintain the dog's proficiency, with some of that time including a person other than the handler hiding hides for the dog to find. The dog can be groomed at work. The enforcement canine is much like a family pet when not on duty and routine grooming, exercising, and minor training should be able to be carried out in approximately an hour a day.

During the claim period, the claimant has received 2 hours of overtime per non-duty day to care for the canine, been allowed time during his duty hours to care for the dog plus received 2 hours of overtime on non-duty days and holidays, or been allowed to care for the dog during duty hours and submit requests for overtime on non-duty days and holidays for time spent performing duties associated with caring for the dog and his surroundings. Overtime for veterinarian visits could be submitted on a case-by-case basis if not conducted during work hours. The claimant has maintained a daily log indicating that he has regularly been paid overtime during the claim period for time required to care for and maintain the dog during non-duty days and holidays. In addition, he is claiming additional time in excess of his regular duty hours each workday for care and maintenance duties that cannot be conducted during work hours.

Based on the guidelines furnished by the canine enforcement expert, we find that the agency has allowed duty time for the claimant to perform most of the tasks necessary to care for the dog. Since the guidance furnished by the expert indicates that routine care can be accomplished in approximately



an hour a day and the agency has allowed more than an hour a day on non-duty days and holidays, it follows that hours in excess of the one hour time were available for those household tasks associated with having the dog (e.g., spraying the yard, cleaning carpets) and those other less frequent dog care tasks necessary to maintain the health and appearance of the dog (e.g., baths). The agency has provided a policy for paying overtime, up to 2 hours, for the tasks performed on non-duty days and holidays, and there is no indication that requests for overtime submitted by the claimant for such activities within that time frame on those days have been denied.

However, VAMC #548, [medical center] Police Service Policy 07/48, dated April 1, 1995, and not rescinded until May 19, 1997, states:

It will be the responsibility of the handler to assure that proper training is conducted to keep the dog proficient in all areas of training. Therefore, the Canine Handler will devote a minimum of one hour per day, maximum of two hours per day, seven days per week, to the maintenance, exercising and training of his/her respective canine, before or after normal Watch Duty hours, away from the medical facility in a quiet area where the handler and/or canine can work without distraction (emphasis added).

On May 2, 1996, the Assistant Chief issued a memorandum to the claimant, effective May 12, 1996, discontinuing automatic accrual of 2 hours of overtime daily, Monday through Friday, and allowing time during duty hours for the care and maintenance of the canine. The policy requiring 1 to 2 hours of time on maintenance (i.e., maintaining the dog's proficiency), exercise, and training away from the medical center was, however, also still in effect until May 19, 1997. Therefore, these new procedures for caring for the canine are in conflict with written VAMC policy requirements from May 12, 1996, until May 19, 1997, and the claimant's overtime claims must be considered in light of this fact.

The claimant has kept detailed daily logs of the duties carried out in relation to the care, maintenance, training, etc., of his canine including the exact amount of time spent performing each duty. He is entitled to overtime pay for the time spent on maintenance, exercise, and training of the canine on days in on-duty status in which he was required by the above referenced policy to spend between 1 and 2 hours daily on maintenance, exercise, and training away from the medical facility. Therefore, for those duty days during the claim period that fall within the period covered by the above policy and for which he has not already received 2 hours of overtime (May 12, 1996 to May 19, 1997), the appellant is due overtime for the time he spent on maintaining proficiency, exercise, and training of his canine away from work. The claimant's records show 245 duty days during the period May 12, 1996, through May 18, 1997. From May 12, 1996, through February 24, 1997, the claimant's log indicates 185 duty days with records for only the total time spent each day after work on exercise, training, grooming, feeding, and other tasks associated with the canine. Since it is impossible to determine how much of the total time claimed beyond the 1 hour minimum required by policy for exercise and training was spent on what tasks, the minimum 1 hour required each day will be considered the time spent on exercise and training for a total of 185 hours of overtime on duty days from May 12, 1996, to February 24, 1997. On-duty time was available for other routine canine care activities. From February 25, 1997, through May 18, 1997, the claimant's log records 60 duty days

which include individually recorded amounts of time spent on training, exercise, and maintaining the proficiency of the canine. The agency should determine from the claimant's log the total number of hours spent each duty day during this time period performing the training and exercise tasks away from the medical center that meet the required VAMC written policy.

Based on the standards of proficiency recommended by the expert, 8 hours of structured training away from the work site per month is necessary. The claimant should, therefore, be compensated up to 8 hours per month for that time away from the work site spent in a more formalized, structured training situation after the VA policy requiring a minimum of 1 hour per day was rescinded on May 19, 1997. Beginning June 1997 to the present, the claimant should be compensated for up to 8 hours per month of the time he has spent training the canine away from the medical center.

As stated previously, beginning May 19, 1997, the claimant was allowed time at work to care for the dog and the agency allowed 2 hours of overtime per day for Saturdays, Sundays, and holidays to feed, exercise, care for, and perform associated household and yard upkeep created by the presence of the canine. Beginning October 6, 1997, the amount of time allowed for activities related to the care, maintenance, and training of the canine during work hours is specifically defined for each activity, and the claimant is authorized specific amounts of time for various tasks on non-duty days for which he can and has received overtime pay. Based on the information furnished by the expert, we have determined that basically the only duty in addition to the 8 hours of off-site training each month and household upkeep that cannot be performed at the work site is the daily feeding.

While the claimant's contention that he must feed the dog at home where the dog is not going to be working are supported by the expert's standard of care for canines in enforcement work, the amount of time required to feed the dog is less than the claimant believes is necessary. The expert indicated that it is acceptable to place the canine's food in a dish and leave. It is not necessary to watch the dog eat, and the dog may be turned out in a fenced yard to walk around or be left unmonitored in the house. Therefore, the specific process of feeding the dog should take no more than 5 to 10 minutes of actual time for each feeding.

What must be determined is whether or not the minimal amount of time it takes to feed the canine, which cannot be done at work, is noncompensable under the de minimis doctrine. To determine if the amount of time the claimant spends feeding the dog is significant enough to require compensation, the three pronged de minimis test enunciated in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), must be applied: 1) Is it administratively feasible to record the amount of time spent; 2) How regular are the occurrences; and 3) What is the aggregate amount of time expended? In this case, the claimant has maintained detailed daily records of the amount of time spent on feeding; therefore, it is administratively feasible to record the time. The canine must be fed each day; therefore, the occurrences are regular. If feeding takes from 5 to 10 minutes per feeding, the canine is fed twice a day, and there are 7 days per week on which the canine is fed, the aggregate amount of time the claimant has spent can range from 70 minutes to 2 hours and 20 minutes per week which is more than a minimal few minutes. Based on this analysis, de minimis is not met and the time spent feeding the canine is compensable. The agency should determine the number of days for which the claimant has

not been compensated for feeding the dog and compute the total number of hours spent on feeding based on 5 to 10 minutes of time per feeding as indicated by the claimant's log.

## Decision

Based on the above analysis, the claimant's position does not meet the criteria for executive, administrative, or professional exemption and is, therefore, properly covered by the overtime provisions of the FLSA. He is due overtime pay for the claim period beginning May 12, 1996, to the present for hours for which he has not been compensated and due compensation for the difference between the overtime payment he received under title 5 and the overtime payment due under FLSA.

## Compliance instructions

The claimant is entitled to FLSA compensation for all overtime hours worked at the FLSA overtime rate. The statute of limitations is two years prior to January 2, 1998, the date the claimant filed his claim with OPM; therefore, the period beginning May 12, 1996, which the claimant indicates as the start of his claim period, is covered. Five CFR 550.806 shows that the claimant is also owed interest on the back pay. Therefore, the agency is instructed to compute the interest as described in the regulation. To help with this, we have enclosed a disk containing an OPM program for computing such interest and instructions for using the program. We have also attached a copy of abolished FPM Letter 550-78. Although the FPM is abolished, the guidance in this letter is current.

Based on the agency's written policy and subsequent instructions allowing care and maintenance of the canine to be performed at work, as well as an analysis of what care and maintenance can actually be conducted during duty hours and an analysis of the claimant's canine activity log, the agency should work with the claimant to calculate the amount of overtime owed him as follows:

- |                   |   |
|-------------------|---|
| 5/12/96 - 2/24/97 | (Available log shows total time not broken down by individual activity; therefore, calculate number of duty days times the 1 hour minimum required by VA written policy for exercise and maintenance away from duty station. Time in excess of the 1 hour minimum required cannot reasonably be determined from the log.) |
| 2/25/97 - 5/18/97 | (Available log shows actual time for each activity; therefore, calculate amount of actual time spent on exercise and maintenance away from duty station, between minimum 1 hour and maximum 2 hours, as required by VA written policy.)   |
| 6/1/97 to present | (Time allowed according to agency instructions for canine care and maintenance during duty hours; however, professional standards require 8 hours of training time away from duty station to maintain canine proficiency each month. Therefore, using canine activity log,  |

calculate time spent on training away from duty station up to 8 hours per month.)

5/12/96 to present (Using the log, calculate feeding time based on 5-10 minutes allowable per feeding every day for which overtime compensation has not already been received for this activity.)

5/12/96 to present (Compute the difference between the overtime payment received under title 5 and the overtime payment due under FLSA.)

The agency should pay the claimant the total amount owed to him. If the claimant believes that the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.