

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



Philadelphia Oversight Division
600 Arch Street, Room 3400
Philadelphia, PA 19106-1596

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

Claimant: [claimant's name]

Position: Civil Engineer
GS-810-12

Organization: Emergency Management Branch
Construction-Operations Division
[name] District
U.S. Army Corps of Engineers
U.S. Department of the Army
[location]

Claim: Received no overtime pay for emergency work

OPM decision: Overtime pay is not due
OPM decision number: F-0810-12-01

Robert D. Hendler
FLSA Claims Officer

2/4/98
Date

There is no right of further appeal from this decision. The Director of the U.S. Office of Personnel Management may at her discretion reopen and consider the case. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision.

Decision sent to:

[claimant's name]
[claimant's address]

Personnel Officer
U.S. Army Corps of Engineers
[name] District
[activity address]

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Introduction

On March 18, 1996, the Philadelphia Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. He believes that from September 20, 1995, to October 27, 1996, he worked overtime while performing emergency work in the Hurricane [name] relief efforts in the [location] and [location]. During the claim period, he worked as head of the Emergency Operations Center (EOC), in the Tactical Operations Center (TOC), [name] Emergency Recovery Office (MERO). His permanent position is classified as Civil Engineer, GS-810-12. It is located in the Emergency Management Branch, Construction-Operations Division, [name] District, U.S. Army Corps of Engineers, [location]. The position is exempt from the FLSA. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

To help decide the claim, we held a telephone conversation on August 13, 1996, with [name], Acting Branch Chief, Emergency Management Branch, on August 26, 1996, with Lt. Colonel [name], Commanding Officer, MERO, and on November 20, 1996, with [name], Deputy, TOC, who functioned in supervisory capacities over the claimant at various times during the claim period. In reaching our FLSA decision, we have reviewed information gained from these conversations and all material of record furnished by the claimant and his agency, including his official position description (PD) 89-68 revised.

General issues

The claimant makes many statements relating to his agency and its response to his FLSA case. In adjudicating this claim, our only concern is to make our own independent decision about how much FLSA overtime pay he is owed if any. In support of his claim, the claimant submitted a copy of a portion of U.S. Comptroller General decision B-250889, dated April 28, 1993, pertaining to overtime claims under section 5542(b)(2)(B)(iii) or 5544(a), title 5, United States Code (U.S.C.). This decision states "we have limited our decision to those provisions and have not addressed the issue of Fair Labor Standards Act Overtime." We must make that decision by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines concerning the FLSA. Therefore, we have considered the claimant's statements only as far as they are relevant to making that comparison.

Evaluation

The claimant believes that he performed nonexempt emergency work from September 20, 1995 to October 27, 1995, in support of Hurricane [name] relief efforts in the [location] and [location]. Based on the information provided by the claimant in his letter of February 29, 1996, his claim covers his arrival on a charter flight to [location] on September 20, 1995. Copies of his time cards show that he was paid title 5 overtime for the hours claimed. He claims that his performing nonexempt work should result in "paying full overtime for those above GS-10, step 1."

The claimant provided a list of functions that he performed during the claim period. The list of duties ranged from "General housecleaning duties" 1 percent of the time, to "Receive and distribute inbound

mail” 5 percent of the time, to “Answering all satellite phones (4-6) 24 hours a day” 15 percent of the time.

The record shows that the claimant occupies a Civil Engineer, GS-810-12 position the agency has determined is both professionally and administratively exempt from the FLSA. The claimant has not disputed that finding. The basis of his claim is that he performed nonexempt duties that exceeded the 20 percent threshold stipulated in title 5, Code of Federal Regulations (CFR), section 551.208(f). This section states that when an agency has determined an emergency situation exists, and there is no recourse other than to assign qualified employees to perform emergency duties, the exemption status of an employee will be determined on a workweek basis and the employee will be nonexempt for any workweek in which the employee performs more than 20 percent nonexempt work.

The regulations applicable in determining if work is exempt or nonexempt are contained in 5 CFR part 551 - Pay Administration Under the FLSA, Subpart B - Exemptions.

Under the administrative exemption criteria, contained in 5 CFR 551.205, an administrative employee is one who is "an advisor, assistant, or representative of management, or a specialist in a management or general business function whose work meets the following criteria:

The first criterion is that the primary duty consists of work that:

- (1) Significantly affects the formulation or execution of management policies or programs;
or
- (2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or
- (3) Involves substantial participation in the executive or administrative functions of a management official.”

These alternatives apply to the work performed by the claimant as follows:

1. Significantly affects the formulation or execution of management policies or programs.

Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that others act on. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or organizations, both within or outside the Federal government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work

typically perform one or more phases of program management; i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs.

As the Natural Disaster Manager of the [name] District, the claimant is “responsible for planning, coordinating, and managing the District’s program involving preparations prior to, operations during, and recovery operations following a natural disaster or emergency. . . .” The claimant’s position serves as:

point-of-contact during duty and non-duty hours for all administrative [sic] of natural disasters and hazardous material emergencies. . . .Coordinates emergency actions with higher headquarters, with other Districts, military commands, and field offices. Represents the Branch at conferences with higher headquarters, other governmental authorities, and the general public on matters concerning the natural disaster program. . . .Establishes and maintains a District-wide organization and capability to respond to natural disasters, including conduct of exercises, coordination of emergency operations, and reporting. Operates the District Emergency Operations Center or Emergency Area Office during natural disasters and exercises. Organizes and, when directed, leads field teams engaged in damage survey, preventive or recovery operations.

The list of 28 duties submitted by the claimant includes a large number of seemingly nonexempt work functions, e.g., receiving and sending faxes, providing up-to-date phone and fax lists to staff elements, distributing faxes either via hand delivery or mailboxes, physically finding all parties for inbound phone calls in offices throughout the hotel complex, and filing and copying “as needed.” In evaluating administrative functions, there is a requirement that related work is an essential part of the administrative functions to be included in the exempt work. Such work typically is identified by examining the processes involved in performing the exempt function. For example, the processes involved in the evaluation of a body of information; the analysis, evaluation, and development of conclusions; and frequently, the preparation of a record of findings and conclusions. Often the collection or compilation of information and the preparation of reports or other records, if divorced from the evaluative function, are nonexempt tasks. When the employee who performs the evaluative functions also performs some or all these related steps, all such work is included in the employee’s exempt duties.

The record shows the claimant was sent to the [location] to institute the disaster response by establishing and running the EOC for Lt. Colonel [name]. The claimant’s primary function was to provide communications and administrative support to mission managers directing the operation of the actual disaster field work, e.g., damage inspection.

The claimant stated that he flew on a charter to set up the EOC. He stated the problems:

encountered were numerous, long-lasting, real, and required abandonment of all traditional jobs to get the job done. Everyone had to pitch in and forget their job

titles on a 24 hour basis, 7 days a week. Supplies were arriving on a 24 hour basis and had to be offloaded on a 24 hour basis by whomever was available. The work of the Corps of Engineers in this event was exceptional and it is unconscionable that human resources was able to rate us on the exempt/ nonexempt issue without being there.

With this description of events, however, the claimant described the loading and unloading of supplies as occupying 2 percent of his time during the claim period. Similar seemingly nonexempt manual labor and related functions, described previously, occupied similar small percentages of his work time. The context of these functions, however, is crucial in determining their FLSA classification. Our fact finding revealed the claimant rarely, if ever, was engaged in field work. Running the EOC, he remained in the hotel, with occasional visits to their airfield to help transfer equipment necessary for EOC operations, e.g., radios, telephones, and other communications equipment. That equipment was installed within 24 to 36 hours after the initial team arrived in the [location].

While working out of a damaged hotel evidences undesirable working conditions, they are not emergency conditions within the meaning of FLSA regulations. Emergency functions were performed by other staff members, e.g., staff engaged in field housing inspections. The claimant managed the EOC operations and was usually helped by two people; i.e., military communications operator(s) and/or Individual Mobilization Augmentee. His primary and paramount function was as the focal point of communication and information, e.g., with local government and the Federal Emergency Management Agency (FEMA). He was responsible for pulling together weather information from various sources, coordinating guidance needed by the field staff to function, and counsel the Operations Officer and Commander on operational procedures. This work entailed executing a major component of the MERO management program, including program planning and development functions when recommending operational procedures, despite the subsequent review and control process. The claimant performed these functions within the overall policies, objectives, and requirements prescribed by emergency regulations, guidelines, and procedures. The claimant formulated and developed plans, procedures, and timetables to accomplish the desired work outcomes, e.g., a technically accurate, complete and thorough EOC operation necessary to support the actual emergency field operations. Accordingly, we find that the claimant's work meets this criterion.

2. Involves general management or business functions or supporting services of substantial importance to the organization serviced.

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, work which meets this criterion includes support services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into production functions. To warrant exemption from the FLSA, such

work must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

The claimant's position is vested with the authority to establish and maintain a District-wide organization and capability to respond to natural disasters, including conduct of exercises, coordination of emergency operations, and reporting, and operating the District EOC or Emergency Area Office during natural disasters and exercises. The PD of record states that he independently plans, organizes, and manages his assigned work, referring to his superior those matters that impinge on other programs or projects, or impact policy; discusses with the supervisor matters likely to generate a significant controversy or interest; and, is responsible for the technical adequacy of his work.

The claimant's position, and the work performed, are central to the purpose and reason for the existence of the Emergency Management Branch; i.e., planning, coordinating, and managing the District's emergency operations program. The operations performed as an EOC manager are part of the mission core of the emergency management program and, thus, the decisions and recommendations made by the claimant are of fundamental importance to the "business" of the District. As manager of the EOC room, the claimant made sure the EOC ran properly, e.g., assuring equipment was running, the AT&T representative on standby dealt with communications problems, and assuring situation reports to the District for action. He attended the MERO commander's daily briefings, and briefed the staff on EOC operations. These functions are performed within the overall policies, objectives, and requirements prescribed by emergency management regulations, guidelines, and procedures. The District relies upon the claimant to independently formulate and develop plans, procedures, and timetables to accomplish the desired outcomes and to affect necessary coordination and integration with other organizations in accomplishing the emergency operations program execution functions of his position. The very nature and purpose of the position are to represent the District as management's on-site agent and voice in EOC matters, and vests significant representational authority and responsibility in the work. These functions reflect support services of substantial importance to the organization, and affect the ability of the District, and its MERO operating component, to accomplish their mandated emergency management program mission. The manual functions stressed by the claimant were integral to those functions. Accordingly, we find that the claimant's work meets this criterion.

The second portion of the primary duty criterion is that the employee performs office or other predominantly nonmanual work that is:

- (1) Intellectual and varied in nature; or
- (2) Of a specialized or technical nature that requires considerable specialized training, experience, and knowledge.

These criteria apply to the work performed by the claimant as follows:

1. Intellectual and varied in nature.

Work of an intellectual nature is work involving general intellectual capability, such as perceptiveness, analytical reasoning, perspective and judgment applied to a variety of subject matter fields, or work involving mental processes that require substantial judgment based on considering, selecting, adapting and applying principles to numerous variables. The employee cannot rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the "best" alternative from among a broad range of possible actions.

Although not addressed in detail in the PD of record, we find that EOC operations work requires intellectual capability, including perceptiveness, analytical reasoning, perspective and judgment to conceptualize the likely paths of fact-finding necessary to plan and carry out EOC operations. These functions entail applying knowledge of a variety of subject matter fields covered by emergency operations management. The work involves substantial judgment based on considering, selecting, adapting and applying this wide variety of subject matter principles and concepts to the numerous variables present in each emergency or disaster to establish appropriate procedures that will support recovery operations.

The intellectual demands of the work are reflected in the responsibility to organize and plan EOC work; to decide the most appropriate means of completing assigned position functions; and, to apply the breadth and depth of program and technical knowledge discussed above in the most effective way to accomplish EOC program functions effectively and efficiently.

The claimant's rationale stressed the physical demands of the work, e.g., off loading of supplies, as FLSA emergency nonexempt manual work. The rationale regarding the physical demands of the work; i.e., work entailed nonexempt manual labor in an emergency situation in which "everyone had to pitch in and forget their job titles on a 24 hour basis, 7 days a week," does not address this FLSA criterion in context. Many inherently exempt positions entail substantial physical demands and manual skills, e.g., wildlife biologist, foresters, musicians, artists and physicians. These physical effort requirements, however, are ancillary to and do not change the intellectual and/or creative nature of the work at the heart of those occupations. Establishing an EOC to deal with an emergency or disaster would, at least at the outset, require physical effort. The limited amount of physical effort identified in the claim, e.g., 2 percent of the time "loading and unloading supplies," supports the conclusion that manual labor occupied a small portion of the claimant's time and was ancillary to EOC management. Thus, based on the above analysis, these functions reflect the scope of work and application of intellectual acumen that satisfy this criterion.

2. Of a specialized or technical nature that requires considerable specialized training, experience and knowledge.

Work that meets this criterion requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject matter field. These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject matter field, as distinguished from professional knowledges characteristically acquired through specialized academic training.

The duties described previously in this decision require substantial intellectual effort to analyze and apply subject matter of considerable difficulty entailed in the technical program work assigned to the position. These duties reflect work requiring substantial knowledge of complex subject matter that form the basis for classifying the position to the GS-12 grade level as stated in section 5104, title 5, U.S.C. definition of GS-12 grade level work, i.e., "to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of a very high order of difficulty and responsibility along special technical, supervisory, or administrative lines requiring extended specialized, supervisory, or administrative training and experience." EOC operation is recognized as a major duty of the position and entails application of the emergency management program knowledge, skill, and abilities at the core of the claimant's regular and recurring work. Accordingly, we find the position meets this criterion.

The third portion of the primary duty criterion is that the employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. The exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Decisions made as the result of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion and independent judgment of the level required for exemption. There are three elements involved in the evaluation of this criterion:

1. The work must involve sufficient variables as to regularly require discretion and judgment in determining the approaches and techniques to be used, and in evaluating results.

Employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines that specifically govern their actions would not meet this element.

The claimant's position is vested with substantial independence of action since it operates independently in a field work situation, e.g., as a member of the MERO management team, and is relied upon to independently formulate, develop and implement the specific processes and procedures necessary to accomplish EOC operations. The position is delegated the authority to effect necessary

coordination and integration with other organizations to accomplish its work, e.g., local government and other Federal agencies. Discretion and judgment are reflected in such duties as planning, developing, coordinating, and controlling EOC operations, applying the complex emergency management knowledge and skills required to perform that work. The day-to-day freedom of action with which the position operates in performing the above analytically demanding work, reflects sufficient variables as to regularly require the scope of discretion and judgment warranting the crediting of this element to the position.

2. The employee must have authority to make such determinations during the courses of assignments.

The intent of this element is to preclude exempting trainees who are in a line of work that requires discretion, but who have not been given authority to decide discretionary matters independently. The position is not that of a trainee. The scope of authority exercised in accomplishing the work assigned, as discussed above, results in the crediting of this element to the position.

3. The decisions made independently must be significant.

This term is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, this term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

As discussed above, the program decisions vested in the position in managing the EOC extend beyond the procedural details of the position's work in that they significantly affect the ability of the District to meet its mission responsibilities. The EOC decisions made by the claimant in the day-to-day management of the EOC operation are significant decisions that affect fundamental District mission responsibilities. They reflect the independent decisions of the degree of significance which result in the crediting of this element to the position.

Summary

Based on the above information and analysis, we find the claimant's position, and his EOC functions in the MERO, meet the primary duty and associated criteria.

In addition to the primary duty criterion for administrative exemption that applies to all employees, General Schedule employees in positions classified at the GS-5 or GS-6 grade level must spend 80% or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. Because the position is classified above these grade levels, this criterion does not apply to the position.

Based on the preceding analysis, we find the claimant's position, and his functions as EOC manager in the MERO, are categorized properly as exempt from the overtime provisions of the FLSA under the administrative exemption category.

In applying the professional exemption criteria contained in 5 CFR 511.206, the claimant's agency opined that:

the Chief of Readiness Branch, states that [claimant's name] was deployed to the disaster site to perform Emergency Operations duties including reporting requirements, and that these duties required professional engineering knowledge. Therefore, these duties meet the criteria for professional exemption.

The functions described by those knowledgeable of the claimant's on-site MERO activities do not support the conclusion that professional engineering functions occupied a substantial portion of the claimant's work time. The functions discussed previously in this decision were preponderantly administrative in nature. The structure of MERO shows that professional engineering functions were vested in and performed by other MERO components and not the EOC. Therefore, while the claimant's permanent position includes professional engineering work, we find the claimant's specific MERO functions did not. Therefore, while the MERO work is not categorized properly as exempt from the overtime provisions of the FLSA under the professional exemption category, it is exempt under the administrative exemption category.

Decision

The claimant did not perform nonexempt emergency work within the meaning of the FLSA and is not due FLSA overtime pay.