

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

Atlanta Oversight Division
75 Spring Street, SW., Suite 972
Atlanta, GA 30303-3109

Fair Labor Standards Act Decision
Under section 4(f) of title 29, United States Code

Claimant: [Claimant]

Agency classification: Electronics Technician
GS-856-11

Organization: Department of the Navy

Claim: Nonexempt. Owed payment for
travel time.

OPM decision: Nonexempt. Agency to determine
compensation due while in travel
status, if any, and pay claimant
overtime plus interest on back pay.

OPM decision number: F-0856-11-02

**This decision was reopened, reconsidered, and sustained by
OPM decision number F-0856-11-04, dated 10/5/01.**

/s/

Kathy W. Day
FLSA Claims Officer

11/9/00

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 receiving 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, if any, within four pay periods. The agency must also submit a Standard Form (SF) 50 showing that the claimant's exemption status has been changed to comply with this decision. If the claimant believes that the agency has incorrectly computed the amount owed, he may file a new FLSA claim with this office.

Decision sent to:

[Claimant]

[Human Resource Department]

Office of the Deputy Assistant Secretary
of the Navy (Civilian Personnel and
Equal Employment Opportunity)
Nebraska Avenue Complex
321 Somer Court, NW., Suite 40101
Washington, DC 20393-5451

Chief, Classification Branch
Field Advisory Services Division
Defense Civilian Personnel Management
Service
1400 Key Boulevard, Suite B-200
Arlington, VA 22209-5144

Introduction

On February 7, 2000, the Atlanta Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant]. On March 31, 2000, the claim was suspended because the claimant was on a temporary overseas duty assignment and could not be contacted. On August 9, 2000, the administrative report was received and the claim was reactivated. The claimant believes that his FLSA status should be nonexempt. He works in the [organizational location], Department of the Navy, [geographic location]. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

General Issues

The claimant occupies an Electronics Technician, GS-856-11, position. He requests that his FLSA status be changed to nonexempt. He believes that his position is identical to an Engineering Technician, GS-802-11, position and notes that position was found to be FLSA nonexempt. However, we must make exemption decisions by comparing the actual duties performed by the claimant to criteria and guidance in FLSA regulations, laws, and guidelines. We cannot compare the claimant's position to others as a basis for determining his exemption status.

The claimant believes that employees paid on an hourly basis meet the salary basis test and are automatically nonexempt from the FLSA. He considers himself paid on an hourly basis and, therefore, nonexempt. The salary basis test does not apply to Federal employees, and the claimant's exemption status must be determined by comparing the actual duties and responsibilities performed to the exemption criteria in title 5, Code of Federal Regulations (CFR), Part 551, Subpart B.

The claimant believes he is entitled to payment for uncompensated overtime travel on non-workdays for the period July 1985 to present. By law, the claim is retroactive for 2 years from the date the initial claim was received by the agency or OPM (or 3 years for willful violation). There is no evidence in this case of willful violation on the part of the agency so the claim is retroactive for 2 years from February 7, 2000.

In reaching our decision, we have carefully reviewed all written information furnished by the claimant and his agency and conducted telephone interviews with the claimant and his supervisor.

Job Information

The claimant provides technical advice, assistance, and instructions to an assigned squadron on the maintenance and repair of electronic warfare/communication equipment on the F-14 aircraft. His primary duty is to provide technical assistance on the operation, maintenance and/or installation of radar and radio communications systems equipment. He spends approximately 80 percent of his time providing technical support and training to the sailors onboard ship, including 10 percent classroom training. The remaining 20 percent of his time is spent on personal training to keep abreast of current developments. He refers to technical publications and planning

documents when training and providing onsite assistance. He is not authorized to deviate from the established guidance, and his work is reviewed for adequacy of results. The assigned supervisor or Officer-in-Charge has final authorization of the claimant's work.

Evaluation

To be exempt from the overtime provisions of FLSA, the employee must meet the executive, administrative, or professional exemption criteria in sections 551.205 through 551.207 of 5 CFR. The agency determined that the claimant's duties do not meet the executive or administrative exemption criteria, and the claimant does not contest that determination. We agree. The agency determined that the claimant's duties are exempt based on the professional exemption criteria, and the claimant disagrees.

Professional Exemption Criteria

Under the professional exemption criteria, contained in 5 CFR 551.206, a professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

- (a) The employee's primary duty consists of –
 - (1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or
 - (2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or
 - (3) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the items listed under 5 CFR 551.207(a)(3).
- (b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

- (c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the work time in a representative workweek in professional functions and work that is an essential part of those functions.

The claimant's position does not meet (a)(1).

To meet (a)(1), the claimant must perform work comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field. The agency states that the claimant performs work comparable to professional work requiring specialized education or training and experience. They believe his work requires theoretical and practical knowledge, as well as knowledge of new developments in the field.

We find no evidence that the claimant applies theoretical knowledge in his work. He applies basic principles and an in-depth practical knowledge attained from experience working on the assigned electronic systems. The claimant is not required to have the level of analytical and evaluative skills expected of a professional engineer nor is he involved with creating new developments in the electronics field. The claimant provides technical training and assistance to sailors to help them resolve problems that occur on the F-14 aircraft electronics systems. This involves communicating via e-mail for minor problems and providing classroom and/or onsite training for hands on repair. The claimant reviews technical data and the operation, maintenance and installation of equipment. While he may occasionally suggest minor adjustments in procedures, such changes are made only within established and acceptable guidelines. The claimant's knowledge and job responsibilities are those of a highly skilled and experienced technician.

The claimant's position does not meet (a)(2).

The claimant's work is not in a field of artistic endeavor.

The claimant's position does not meet (a)(3).

The claimant's work is not in the computer software field.

The claimant's position does not meet (b).

The agency states that the claimant's work is intellectual and varied requiring him to recommend solutions to correct problems and determine the need to plan and conduct technical investigations. They state he helps to resolve problems according to the available documentation and works independently during the process of instructing the sailors both in the classroom setting and during the performance of maintenance.

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject-matter fields, or work involving mental processes which require substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized 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.

In providing technical assistance, the claimant assists the sailors in diagnosing and isolating malfunctions by applying standardized procedures and guidelines. To advise and provide on-the-job training, the claimant must be able to read and understand the technical publications, manufacturers' specifications, blueprints, etc., and know accepted repair and maintenance procedures to determine if systems and equipment are functioning as required. He does not create innovative techniques and procedures.

The claimant's position does not meet (c).

The agency states that the claimant uses discretion and independent judgment under general supervision in his work.

Established OPM guidance is that 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. The work must involve sufficient variables as to regularly require discretion and judgment; the employee must have the authority to make determinations or take action; and the decisions must be significant. Employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents or other guidelines which specifically govern their actions would not meet this element. In addition, deciding whether a situation does or does not conform to clearly applicable criteria would not be considered making significant decisions.

The claimant works independently. However, he does not have the opportunity to exercise independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. He uses and teaches approved maintenance and operating procedures. He has very little discretion within those approved procedures. The work performed by the claimant involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment.

Criterion (d) is not applicable to the claimant's position.

Since the claimant's position does not meet the professional criteria, his position cannot be considered exempt using that criteria.

SUMMARY

The claimant's position does not meet the professional, administrative, or executive exemption criteria. Therefore, the position is nonexempt, i.e., covered by the provisions of the Act.

Travel Claim

The claimant believes he is entitled to payment for uncompensated overtime travel on his non-workdays.

Time spent in a travel status is considered compensable hours of work as described in both 5 CFR 551.422(a) and 5 CFR 550.112(g). Section 551.422(a) states that time spent traveling is considered hours of work if an employee is required to (1) travel during regular working hours; (2) drive a vehicle or perform other work while traveling; (3) travel as a passenger on a one-day assignment away from the official duty station; or (4) travel as a passenger on an overnight assignment away from the official duty station during hours on non-workdays that correspond to the employee's regular working hours. Section 550.112(g) provides that time in a travel status away from the official duty station is hours of work if the travel (1) is within an employee's regularly scheduled administrative workweek; (2) involves the performance of work while traveling; (3) is incident to travel that involves the performance of work while traveling; (4) is carried out under arduous and unusual conditions; or (5) results from an event that could not be scheduled or controlled administratively.

Travel may be within a nonexempt area, such as travel within the United States, or it might be travel between a nonexempt area and an exempt area, such as travel between the claimant's official duty station and Japan. The FLSA overtime provisions do not apply to any employee who spends all hours of work in a given work week in an exempt area. *Exempt area* and *nonexempt area* are defined in 5 CFR 551.104. All locations not included under the definition of *nonexempt area* are considered exempt. The regulations pertaining to foreign exemption can be found in 5 CFR 551.209.

The claimant often traveled on non-workdays, specifically to Japan. He states that he would travel on Saturdays and arrive on Sundays at the agency's request. He did not provide specific dates and times of departures and arrivals.

The time the claimant spent traveling should be reviewed by the agency to determine his entitlement to compensation, if any, under FLSA.

Decision

The claimant's position is properly nonexempt under FLSA. Time spent traveling which meets applicable FLSA provisions is compensable as hours of work under FLSA. The claimant is

entitled to compensation for any overtime due under FLSA. He is also entitled to interest on this back pay under title 5, United States Code, and 5 CFR 550, subpart H.

Compliance instructions

The agency should correct the claimant's exemption status to nonexempt and determine his entitlement to compensation for travel time based on the regulations cited in this decision. They should pay him the total amount owed, if any, plus interest. The claimant can receive pay for his claim for two years back from the date it was recorded with OPM, which was February 7, 2000. Therefore, he can receive pay for his claim back to February 7, 1998, if the agency determines that any compensation is due. If the claimant believes that the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.