

**U.S. Office of Personnel Management**  
**Office of Merit Systems Oversight and Effectiveness**  
**Classification Appeals and U.S. 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:** Materials Handler Supervisor  
WS-6907-5

**Organization:** Consolidated Installation Property  
Book Office  
Directorate of Logistics  
Headquarters, U.S. Army Garrison  
Fort [name]  
U.S. Department of the Army  
[location]

**Claim:** Received no overtime pay for suffered and permitted work

**OPM decision:** Overtime pay is not due  
**OPM decision number:** F-6907-05-01

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Robert D. Hendler  
FLSA Claims Officer

Date

/s/ 8/6/98

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]  
[address]

[name]  
Supervisory Personnel Management Specialist  
Headquarters, U.S. Army Garrison  
Fort [name]  
[location]

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## Introduction

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] as the result of a transfer of claims functions from the General Accounting Office (GAO) under Public Law 104-53. Our acceptance of this claim was based on the letter of October 19, 1995, from the claimant's former representative, [name], Esq., that states, in part:

I am not prepared to concede that the Fair Labor Standards Act does not apply to this claim, since merely labeling an employee as a 'supervisor' does not necessarily disqualify that employee from coverage by the FLSA. And at the very least, cases construing the FLSA are persuasive authority for this claim.

In his letter of January 5, 1998, to this office, the claimant again stated his belief that his job was nonexempt and that his "claim under the FLSA was filed in Oct 95." We accepted these statements as the basis for docketing and processing this action as an FLSA claim. The record, however, shows the initial claim was filed with the agency in a memorandum dated as received by the servicing Civilian Personnel Office on August 8, 1995. The claimant believes that for the calendar years 1988-1995 he should be entitled to payment for 998.34 hours of overtime, totaling \$24,579.70. During the claim period, he initially occupied the position of Warehouse Worker Foreman, WS-6907-6 (job number Z3034). As the result of a reduction-in-force action, he was placed in the position of Materials Handler Supervisor, WS-6907-5 (job number ZA002) effective October 11, 1991. The record shows this was from the "removal of full technical supervision over the warehousing operation . . . and assigning those duties to the chief of the division." The title was changed due to the application of a new job grading standard. Record information from 1994 shows it is in the Consolidated Property Book Office, Directorate of Logistics, Headquarters, U.S. Army Garrison, Fort [name], [location]. The job description (JD) (job number ZA002), classified in 1991, shows the location as Reserve Components/ROTC Supply Division, Directorate of Logistics. JD ZA002 shows that it initially was identified as nonexempt, and later changed to 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 telephone conversations with the claimant on April 20 and 24, 1998; [name], former Director of Logistics, the claimant's second level supervisor on April 20, 1998; [name], former Chief, Consolidated Installation Property Book Office, the claimant's first level supervisor, on May 7, 1998; and, [name], former subordinate, on April 24, 1998. In reaching our FLSA decision, we reviewed information gained from these conversations and all material of record furnished by the claimant and his agency, including statements from co-workers supplied by both the claimant and the agency, and his official JD.

## 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, he claimed his JD of record had been “altered from nonexempt to exempt.” Our decision must independently determine whether the work the claimant performed was exempt or nonexempt from the overtime provisions of the FLSA. Therefore, we have considered the claimant’s statements only as far as they are relevant to making that determination.

In his letter of October 19, 1995, the claimant’s former representative, [name], Esq., cited section 5542(a) of title 5, United States Code (U.S.C.) as the basis for the claim based on the statutory language requiring “that hours of work be ordered *or* approved.” Based on the agency’s “awareness of the hours worked by [claimant’s name] in excess of 8 hours per day, without prohibiting him from doing so, amounts to tacit approval of the claimed overtime.” The representative also stated section 5542(a) pertains to overtime pay claims under the Federal Employee’s Pay Act, and not the FLSA and, therefore has no force in our application of the FLSA to this claim.

## Evaluation

The claimant believes that he performed nonexempt overtime work for the calendar years 1988-1995 and he should be entitled to payment for 998.34 hours of overtime, totaling \$24,579.70. In support of claim, he cites his membership in a team nominated for Outstanding Team (TQM) of the Year. The award was submitted on March 18, 1994 by [supervisor’s name] for the “4 Materials Handlers and 2 Materials Handlers Supervisors of Consolidated Installation Property Book Warehouse,” that:

is operated by 6 permanent employees and is complemented by 8 temporary employees during peak summer annual training periods. Supervisors open warehouse 45 minutes to 1 hour early, seven days a week, to assist customers without any extra compensation - unheard of during today’s changing workforce attitudes.

This nomination, however, also states that as a result of consolidation and downsizing:

the warehouse operation had two fewer employees than the previous year and the same service was provided by increased production, staggered lunch periods, changing work schedules at peak periods to accommodate all activities and units that train at this facility.

In his letter of October 19, 1995, the claimant’s former representative, [name], Esq., claimed that the copies of the key control register and inventory sheets showing the time the claimant had signed for and statements from three individuals ([names]) evidenced the claimant worked the overtime hours claimed. The claimant’s letter of January 5, 1998, contained his response to the clarifying information provided by his agency requested in our letter of December 28, 1997. He stated:

My supervisors were fully aware I worked extra time by coming in early to get the job done. See nomination for Outstanding Team TQM of the year. . . .My supervisors were definitely aware that I was coming in early and was working (suffered) and did not require me to stop - Refer to the key control sign in register relevant to the case and the three witness statements. . . . My supervisor never allowed our CIPBO warehouse to work flextime.

The record shows that the claimant occupied Federal Wage System (FWS) supervisory jobs during the claim period that the agency determined met executive exemption from the FLSA. The claimant has disputed that finding, citing that his last position was initially identified as nonexempt by the agency. The basis of his claim is that his position was nonexempt, and that he was suffered and permitted to perform overtime work for which he was not compensated properly.

The regulations applicable in determining if work is exempt or nonexempt are contained in title 5, Code of Federal Regulations (CFR), part 551 - Pay Administration Under the FLSA, Subpart B - Exemptions in effect during the claim period.

Under the executive exemption criteria, contained in 5 CFR section 551.204, 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."

The first criterion is that the 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 those 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.

Generally, 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 work can be credited as the primary duty for exemption purposes provided that duty: (1) constitutes a substantial, regular part of a position; (2) governs the classification and qualification requirements of the position; and, 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.

In applying the executive criterion, we find the claimant's last JD of record describes the work performed as consisting of traditional supervisory work planning, direction, and administration functions. Our application of the primary duty criterion follows:

1. Manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function).

The claimant served as first line supervisor over the CIBPO warehousing, which satisfies this criterion.

2. Regularly and customarily directs the work of at least three subordinate employees (excluding support employees) to the organization serviced.

All employees supervised performed line materials handling mission functions, in conjunction with the number of permanent and seasonal employees discussed above, satisfies this criterion.

3. 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 those suggestions and recommendations.

The claimant's position was delegated sufficient authority in interviewing, selecting, hiring, and making or recommending other status changes to warrant the crediting of this criterion.

4. 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.

The claimant's position was responsible for planning, scheduling and assigning work; establishing deadlines; reviewing work in progress and upon completion; and coordinating work of the unit with other units. These duties, and the personnel management functions discussed under #3, result in the crediting of this criterion.

In addition to the primary duty criterion for executive exemption which applies to all employees, foreman level supervisors in the FWS must spend 80 percent or more of the work time in a representative work week on supervisory functions and work that is an essential part of those functions. Because the claimant occupied a foreman level position, the 80 percent test must be applied.

During our interviews, the claimant stressed that he was a working supervisor and routinely performed the same nonsupervisory functions performed by his subordinates. These duties included

pulling mops, brooms, paper towels and other supplies together; operating a fork lift; removing Freon so that equipment could then be turned in for salvage; assembling chairs and tables; and, removing garbage. One former co-worker stated the claimant routinely did “a lot of the lifting” because he was strong, and that he “was not a desk supervisor.” During our interviews, both former supervisors stated the purpose of the claimant’s position was to supervise work operations. The claimant’s performance appraisals in the record show only his supervisory functions were addressed.

The small size of the permanent staff (six), and the presence of a subordinate supervisor to insure supervisory coverage on the two days the claimant was off each week, cause us to conclude that the claimant’s position was not limited to supervisory and closely related functions from November to March each year. We considered fully the presence of one or two temporary employees during winter months in some years. Given the description of work operations in the record we find the claimant occupied a nonexempt position during that time frame.

The staff of approximately 14 people during the peak training season from March through October, however, reflects materially different work conditions. The heavy use of the facility by 6,000 to 12,000 troops using from 200 to 220 buildings at the post show a much larger work planning, oversight, and review workload than from November to March. This requires us to closely examine the claimant’s duties to separate supervisory and closely related duties from nonsupervisory duties.

The basic test for identifying closely related work is whether the work contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. Examples of closely related work include: (1) maintaining various records concerning workload or employee performance; (2) performing setup work that requires special skills, typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform; and, (3) performing infrequently recurring or one-time tasks that are impractical to delegate because they would disrupt normal operations or take longer to explain than to perform.

We find the claimant’s Freon recovery work meets the intent of example #2 in that it was not typical of materials handling occupational functions, and was not of the volume to justify hiring a specially trained employee to perform. Another duty he performed to facilitate the smooth functioning of the unit was plugging fork lifts in to recharge, and driving unit members to their respective work sites.

Performance appraisals in the record also show a substantial amount of project planning tasked to the claimant, e.g., moving Bay C to A, cleaning out buildings in areas to be demolished, and running inventories. Given the large number of buildings supported during peak training period, unit crews operating at multiple work sites, and the buildings walk-through requirements inherent in the claimant’s supervisory position, the record supports the conclusion that the claimant’s position was categorized properly as exempt during the peak training season.

We must now explore whether the claimant performed work for which he should be paid under the FLSA for the periods that he occupied a nonexempt position as determined in this decision.

Specifically, we must decide whether he performed work before his shift that which he should be paid under the FLSA.

The claimant's time cards do not show whether he performed such work. The key control register and inventory sheets are limited to showing when keys for the warehouse were picked up and returned. While the claimant has implied signing for the warehouse keys shows work began shortly after that, we find the log does not show whether or when the claimant began actually to work. Several Comptroller General decisions, including one concerning Christine Taliaferro (B-199783), March 9, 1981) show that in this situation, the claimant is due FLSA overtime pay if two criteria are met:

1. he shows that she performed overtime work under the FLSA for which he was not paid; and
2. he produces enough evidence to show the amount and extent of that work as a matter of reasonable inference.

Our discussion of each criterion follows.

***1. Did the claimant show that he performed unpaid FLSA overtime work?***

To decide if the claimant performed unpaid overtime work under the FLSA, we must first determine whether he performed any work during prior to his regularly scheduled work shift that was "suffered or permitted" under the Act. Section 551.102 of 5 CFR shows that he performed such work if:

- a. he performed work, whether requested or not, prior to the shift;
- b. his supervisors knew or had reason to believe the work was being performed; and
- c. they had opportunity to prevent it from being performed.

We discuss these three conditions below.

***a. Did the claimant perform work prior to the work shift?***

The first statement provided by the claimant ([name]) shows that the claimant's car was parked outside the warehouse "most times when I left work at 1630 hours." The second statement ([name]) attests to the claimant's vehicle being parked at Building T-11-91 "at approximately 7:00 A.M." and that the claimant "at approximately 4:15 P.M. [claimant's name]'s vehicle is at the building . . . [and] much of the time I see him around the dock area." The third statement ([name]) attested to the claimant "most always stayed until 1630 hours. Every time I came to work, he was already started with some kind of project." The record, however, does not show when [name] typically arrived.



[name] stopped working in the warehouse in June 1994. Therefore, only one of the three statements cited by the claimant establishes that he performed substantive work tasks.

[name] (claimant's subordinate supervisor) confirmed that when he arrived "15 to 20 minutes early" that "there were occasions" when the claimant was already working. However, "the majority of the time when I arrived for work [claimant's name] either was at his desk reading the paper, or talking to the men who had arrived before me or watching TV." [name] also stated: "At no time were we told or asked to come in early unless we were told we'd be compensated either by being paid over-time or told we could leave early. We were told by [supervisor's name] prior to our coming in which one it would be." The second statement, from [name] (claimant's former subordinate work leader), was: "I . . . have observed [claimant's name] working early on occasions and remaining until quitting time. There were also times that [claimant's name] started working early and went home early."

[name], (claimant's former subordinate) stated that he occasionally arrived at the warehouse "between 715 and 730 hours. On most of these occasions [claimant's name] was already there. I do not recall what he was doing." He also stated that he returned to the warehouse "nightly between 1605 and 1620 hours. There were a few times when I wanted to talk to him and he had already left for the day. I do not know if he was on annual leave." [name] (claimant's former term subordinate) stated:

I have always arrived at my work place early. I came in early to put coffee on for the guys I work with. I have seen [claimant's name] on several occasions at work when I arrived. He was either taking weapons in from units or issuing them out. I have also seen him doing other chores when I arrived early. But the majority of the time he was reading the newspaper when I came in. I usually arrived at work about 7:20 or 7:25.

[name] (claimant's former temporary subordinate) stated that when he began work as a temporary employee on April 5, 1990, he was briefed by the claimant on hours of work. He was told that on the:

infrequent times I would be asked to work over lunch, through break times, started earlier than normal, and quit later than normal. . . . [we] would be compensated at a later time when it was convenient for both the warehouse and individual. At the end of the briefing, given by [claimant's name], I was given a counseling statement, which I signed and was written by [claimant's name]. . . . [claimant's name], on numerous occasions, opened the warehouse early, between 0700 and 0730 hours. The object of opening the warehouse was never mentioned since no one was scheduled to work early. After opening the building, [claimant's name] made little effort to work. I have observed [claimant's name] reading newspapers at his desk or talking to someone on the dock.

I have observed [claimant's name] leaving work on or around noon on Fridays quite frequently. [claimant's name] also has a habit of disappearing on Fridays. These departures were usually two or three times a month.

I have been told by different permanent personnel these Friday departures were legal because [claimant's name] had compensation time coming due to opening the building early. These departures have been normal procedure for [claimant's name] since I have been employed at the CIBPO warehouse.

[name] (claimant's former temporary subordinate) stated: "I have always arrived at work at 7:35 A.M. Most of the time, [claimant's name] was sitting in his office, reading the paper. Sometimes when I came in he was working, such as issuing weapons. I have seen [claimant's name] leave early from work." [name] (claimant's former temporary subordinate) stated:

I have never seen [claimant's name] work over time in the morning unless a unit was clearing early and he would open early. I would come in around 7:50 AM. I usually see him sitting at his desk reading his paper. I have seen him leave work at around 3:30 PM 5 or 6 times.

[name] (claimant's former subordinate) stated that the claimant usually opened the warehouse and usually was there when he ([name]) arrived between 7:30 and 8:00 AM. He claimed [claimant's name] used that time to do "writing," e.g., performance appraisals, remove Freon from equipment, or pull expendables and fill up carts.

Based on this, we find the claimant intermittently performed work prior to the beginning of the shift.

The second part of this question is whether the claimant was compensated for work performed prior to the shift.

In a statement dated August 30, 1995, [supervisor's name] claimed:

On a number of occasions, [claimant's name] volunteered to personally handle a unit's special request for an early start of the work day and on every occasion I instructed him to adjust his shift to adequately compensate him. (i.e., start 0700 hrs, end 1530 hrs.) These occasions, I assumed were always discussed in advance (unless an emergency, then it would be discussed as soon as I arrived at work that day). I also assumed he did always adjust his shift hours as instructed by myself and in keeping with established policies.

I was not aware there was any problem with this arrangement since he never spoke up that he was treated unfairly. Knowing [claimant's name], he would have verbalized if he felt something wasn't right.

I was aware of occasions when [claimant's name] did arrive at the work place prior to 0800, not to support units, but simply because he was an early riser and he'd relax, read the newspaper and often cook food for the other employees in the warehouse. I would not consider this being on the job nor feel this is justification for additional compensation by paying overtime.

In his statement of November 3, 1995, [supervisor's name] claimed:

All supervisors in the DOL, to include [claimant's name], are authorized to adjust employees' work schedules to meet customer needs. Overtime is approved if necessary but, in most cases, it is not necessary. This means that if a customer requests an operation be open early, the supervisor can come in early themselves or ask an employee to come in early. The supervisors and employees know that if they start work before 8:00 AM they are to take the appropriate amount of time off, either during lunch or at the end of the day. No one is permitted to work more than an 8 hour day unless overtime is approved and paid. We always try to get approval in advance but, if this is not possible, overtime is approved as soon as possible. No one was disapproved for overtime when the supervisor said it was necessary.

[claimant's name] stated the warehouse staff was not under flexitime. [name] concurred, stating flexitime was an option available in other organizations on post. When overtime was offered, such as during Desert Storm, employees were paid for it. Copies in the record of DA Form 5172-R, May 84, Request, Authorization, and Report of Overtime, confirm that the claimant and other members of his staff were paid for pre-approved overtime.

Statements were supplied by the agency from employees who signed for the warehouse keys from August 5, 1993 to August 4, 1995. [name] (shown as signing for approximately 161 days), stated "I was properly compensated for this time by adjusted work schedule, and that I have no intention of claiming that any additional compensation is due me." [name]'s (shown as signing for approximately 13 days) and [name]'s (shown as signing for approximately 38 days) statements were the same as [name].

[name] (shown as signing for approximately 66 days) stated:

Weekends I would pick up keys on Saturdays, prior to 0700, and [name] would pick them up prior to 0700 on Sunday.

Any time I put in, that time was strictly to accommodate troops. If they came in early or left late our job was to serve them.

If compensation time was ever requested by me or any of my fellow employees, it was granted. We all fully understood this was not, nor ever be considered paid overtime, only comp time. And since I did not work at that time I don't expect to be paid for it.

Based on this, we conclude that a form of adjusted work schedules was in effect at the warehouse. For example, while [name] stated during our telephone conversation that the warehouse was not under flexitime, his statement concerning warehouse key sign in/sign out controls supports the description of adjusted work hours made by other supervisory and nonsupervisory employees in the record.

The award justification cited by the claimant also supports the conclusion that work schedules were adjusted to meet mission needs, without benefit of a formal flexitime system. That is, the opening of the warehouse 45 minutes to one hour early each day was accomplished by “increased production, staggered lunch periods, changes in work schedules at peak periods to accommodate all activities and units that train at the facility.”

The time key control log usually shows one person picking up the keys at the beginning of the day and a different person returning it. Our review of copies of the claimant's Time and Attendance Reports and Application for Leave forms did not reveal a pattern of signing for small amounts of leave on some afternoons when the claimant was observed leaving early. Therefore, we find it reasonable to conclude that the claimant did adjust his work hours under the informal adjusted work schedule practices in place at the CIPBO warehouse. The record also shows overtime was authorized and approved during the period of the claim, and that the claimant was one of the employees who received pay for authorized and approved overtime. Therefore, we do not find that the claimant has met his burden of proof that he performed overtime work prior to the shift for which he was not compensated.

*b. Did the claimant's supervisors know or have reason to believe the work was being performed?*

Although the claimant has failed to meet the initial condition and, thus, the threshold for establishing his claim, we find the other conditions warrant addressing. Previous OPM decisions indicate that a supervisor has reason to believe work is being performed if a responsible person in the supervisor's position would find reason to believe that this was the case. Our phone conversations show that the claimant and his supervisors were not usually visible to each in that their work sites were distant from each other. Given these considerations and the points in the preceding section, we judge that the claimant's supervisors did not know or had no reason to believe that he was performing tasks for which he was not adjusting his work hours.

*c. Did the claimant's supervisors have opportunity to prevent the work from being performed?*

Previous OPM decisions indicate that the claimant's supervisors had opportunity to prevent the work from being performed unless:

- (1) they did not know or have reason to believe that the work was being performed;
- (2) the work occurred so seldom that it was impossible to prevent; or
- (3) they tried by every reasonable means to prevent the work from being performed, such as directing the employee not to perform the work, counseling the employee about adverse consequences that might result from performing such work, controlling work hours more strictly, or taking other appropriate management actions.

The claimant's supervisors did not know or had no reason to believe that the work was being performed. As indicated earlier, his work prior to the shift was intermittent. Based on the informal adjusted work schedule practices in place, we find the conditions surrounding the claimant's pre-shift work meets the intent of the concept of such work not following a pattern or occur so seldom that it was impossible to prevent. Given our findings for criteria (1) and (2), criterion (3) is not pertinent to this claim.

Based on the discussion in the preceding pages, conditions a through c that we listed earlier are not met. Therefore, he did not perform work prior to the shift that was "suffered or permitted" under the FLSA.

***2. Is there enough evidence to show the amount and extent of overtime work as a matter of reasonable inference?***

In addition to the claimant having failed to meet his burden of proof that he performed "suffered or permitted work" for which he was not compensated, we also find that he failed to produce adequate evidence to show the amount and extent of his claimed overtime work as a matter of reasonable inference. The claimant has cited the key control register and inventory sheets as proof of the amount and extent of uncompensated overtime for the claim period. As discussed previously, the sheets and the statements provided by both the claimant and the activity do not show when he routinely performed work prior to 8:00 AM. Thus, we conclude that there is insufficient evidence to show the amount and extent of work performed prior to the shift as a matter of reasonable inference.

For the record, we note that the period of the claim put forward by the claimant is "six years from the last date for which unpaid overtime is claimed." The claim period was preserved by the claimant effective August 8, 1995. Section 640 of Treasury Appropriations Act, 1994, Public Law No. 103-329, September 30, 1994, as amended by Public Law No. 104-52, November 19, 1995, provides that FLSA claims filed prior to June 30, 1994, are covered by a 6-year statute of limitations. Claims filed after that date are subject to a 2-year statute of limitations, and a 3-year statute of limitations if it can be shown that the agency willfully violated the Act. Based on these statutory limitations and our analysis, we find the period of the claim limited to two years prior to August 8, 1995.

## **Decision**

The claimant is not due FLSA overtime pay.