



United States
**Office of
Personnel Management**

Philadelphia Oversight Division
William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106-1596

In Reply Refer To:

Your Reference:

PH:OD:FLSA-94-2fl

OPM decision number: F-7404-05-01

[claimant's name]

[address]

[location]

Dear [claimant's name]:

This is our decision on the claim that you filed with this office under the Fair Labor Standards Act (FLSA). In your letter of December 26, 1993, you claimed that while in the employ of the Army and Air Force Exchange Service (AAFES) at [name] Air Force Base, [state]: (1) you worked overtime without benefit of proper overtime compensation because you were not paid for any overtime that you performed; (2) you were not paid for the time that you worked during what was scheduled to be your lunch break period; (3) you were told that "it didn't matter how many hours I had to work, I wasn't going to be paid for more than seven and a half hours a day"; (4) time sheets were filled out in pencil so that the Food Activities Manager could change them to reflect the standard seven-and-one-half hour day; and, (5) you were "intimidated into working without pay." You estimated that you had worked "approximately 1,500 hours in last four and one half years" of your employment, ending November 30, 1993, without pay. Our decision regarding your claim follows.

Analysis and Decision

In our letter dated January 6, 1994, we accepted your FLSA claim and: (1) requested additional information to substantiate your claim, including specific information establishing the number of hours of unpaid work that you had performed; and, (2) advised you to toll the statute of limitations to preserve your right to back pay should we determine that you were entitled to additional pay under the FLSA.

In your letter of January 16, 1994, you said that for the four-and-one half year period of your claim: (1) you initially worked as a Cook/Supervisor, and for the last two years as a Cook; (2) you were "put in a position of having to work past our scheduled time given to

us, just so that the place was clean and ready for business the next morning"; and, (3) you would be scheduled to leave at "20:00 Hrs., but would have to work to 20:30-21:00-21:30 and on some occasions as late as 22:00 Hrs." During the last two years of your employment, you worked a one person operation at Base Operations where you "seldom if ever had time to take a lunch break, which they took one half hour off our time for every day." You stated that you were advised by [name], the Personnel Manager, that it was not proper for you to work past your scheduled time without pay, and that if you did so, to enter the lunch time worked and any time past your scheduled tour onto your time sheets. You stated that [name], the Food Activity Manager, and his successor, [name], would not allow you to enter the correct time on the time sheets. You claimed that "We were told [by (name)], with hostility, that if we did not like working there, to hit the road. . . . The fear of the unemployment line made me and [name] (Food Activity Foreman-FAF) endure the abuse."

In support of your claim, you said that:

The only way my complaint can be verified is by comparing our time sheets where we signed out at 20:00 Hrs, against the opening and closing report, which is when we called the Security Police to let them know we were going to the bank to make the daily deposit, and call the Fire Dept. to let them know there were no more people in the facility. They would give us the time, a code and their initials which we would enter on the closing report.

The actual time we got done working was the time entered on the closing report plus the 10 to 20 minutes it took for us to make the deposit at the bank (being made to use our own vehicles and gas).

You also stated that most of the people knowledgeable of the facts of your case were no longer in the area, and that others still employed by AAFES; i.e., [three names], were unlikely to do so "unless under oath."

General Issues

The U.S. Office of Personnel Management (OPM) is vested with the authority to administer the FLSA for employees covered under the provisions of Public Law 93-259 enacted April 8, 1974. In a complaint decision, our FLSA rationale is based on an independent application of FLSA regulations and implementing guidance to the facts of the case. Therefore, we may consider your statements only to the extent that they are relevant to your legal entitlement to compensation, if any, under the FLSA.

Case Issues

Your letter of January 16, 1994, shows that you were employed in a nonappropriated fund (NAF) position of Cook/Supervisor HPP-5. Information provided by your former employing agency revealed that you were employed in the NAF position of Cook, HHP5 from July 7, 1990, until November 30, 1993. Your position before that date was Mobile Sales Associate, HPP-5. Therefore, under the provisions of 5 Code of Federal Regulations (CFR) 551.102(d)(3), we find that you were a covered employee of a nonappropriated fund instrumentality of a military department and, as such, are under OPM jurisdiction regarding your right to file a claim under the FLSA. In addition, your former agency stated that your position was covered by the provisions of the FLSA, which we find is supported by the record.

Was Work Performed for Which FLSA Compensation is Due?

The crux of your complaint is that you regularly worked through your 30-minute official lunch break and that you also regularly worked after the end of your official tour of duty without receiving overtime pay. The first step in the process is to determine whether you have performed work, as defined by the FLSA, for which you have not been compensated.

In our letter of January 26, 1994, to your former agency, we requested information that would permit us to reconstruct your hours of work. We requested a representative sample, which we defined as a minimum of two months, of your time sheets, including the beginning and ending times; copies of the documentation and/or information concerning the methodology used to account for your lunch breaks; copies of the opening and closing reports for the facility for the same dates; and, copies of the Fire/Security Office logs corroborating the closing times. We also asked for a description of how bank deposit duties were assigned, and how time spent on these duties at the closing of the facility were tracked.

In their letter of February 14, 1994, your former agency stated that there were no controls over lunch periods, and that if an employee "did not get their lunch, they were instructed to write it on their time sheet, and they would be paid," and the bank deposit process accomplished by the "closing supervisor" would take "less than five minutes if done properly." Regarding the requested logs, your former agency stated:

fire logs corroborating closing times are attached. This fire log is not an official or accurate record of when employees were actually working. They can't call the fire/police office until actually leaving the building and locking the doors. There have been many occasions when [claimant's name] was waiting for a ride home, so his sign out time on the payroll sheet would be

correct, but the fire/police log would be incorrect. . . . [claimant's name] did not submit ANY requests for overtime. . . . We rely on our people to fill their time sheets out for what they work . . . the time keeper has no way of knowing that an employee worked different than his scheduled shows. The employee's signature on the time sheets is to verify what they have reported is true and correct. In researching and compiling the information and answers to your questions . . . we have noted that [claimant's name] was in the facility for more hours than what he reported on his payroll sheet.

[claimant's name] was normally scheduled for 7 hours a day. The extra hours in the facility, based on the fire logs, from 15-45 minutes would not be considered overtime. We also found that there were times that he worked less than what he reported on his time sheet and received pay for those hours. He was separated for cause, for theft, which may have a bearing on why he made these allegations.

In your letter of April 6, 1994, responding to your former agency's letter of February 14, 1994, you: (1) claimed that the two-month sample was a time frame "during a tapering down of work" before the closing of the base; (2) repeated your claims regarding the recording of "worked lunches" as overtime; and, (3) described the night bag deposit as "going from the AAFES building, driving to the bank on base (using our own car and gas), depositing the bag in the Night Drop and calling the police and notifying them that the deposit was made. Contrary to what you were told it was not on the way home."

You stated that the call to:

Fire/Police . . . was as soon as we got done work. I've always had my own transportation. I never waited for "rides" home! I even often gave rides to fellow employee's who's spouses were at work, and had no transportation home (and on those occasions, the people I gave rides to had to wait for me, as my responsibilities as Cook/Supervisor took longer to fulfill than those of the other positions).

You further stated that you did not submit any requests for overtime "as it was common knowledge, they would be denied. The FAM's [Food Activity Managers] still expected us to have the facility ready for the next day, regardless of the amount of time we had to put in 'off the clock.'" You acknowledged:

They paid us for the hours on the Time Sheets, true. The times entered on the Time Sheets were what we were instructed to put on them (filled out in pencil as ordered by [supervisor's name] and enforced by his replacement).

In the four and a half years that I worked for AAFES as an hourly employee the FAM's were fully aware of the time differences between the Time Sheets and the actual time worked on the Police/Fire reports. Not only did they know it, but they required it. They took advantage of the fact that we would rather work that extra time "off the clock" than lose our jobs.

At no time did I ever work less than the times reported on my Time Sheets. If I had done such a thing they would have fired me on the spot.

My having been separated for cause, for theft, has nothing to do with this complaint, and I have every confidence . . . that I will be exonerated.

Our letter of March 30, 1994, to your former agency requested clarifying information concerning: (1) what controls were in place over sign in/sign out sheets to assure that the hours claimed represented actual work time to assure that management does not suffer and permit work to be performed after an employee signed out for the day; (2) the functions of the "closing supervisor"; (3) the bank deposit process which led to the conclusion that it would take less than 5 minutes if done properly; and, (4) the conclusion that you were "waiting for ride home"; i.e.,

It is not clear as to whether this was your reasoning as to why the log and the employee time sheets show time frame discrepancies; i.e., the closing of the facility does not reflect the time [claimant's name] actually stopped work, but reflects the time his transportation arrived and, thus permitted him to close and leave the facility.

In a letter dated April 19, 1994, your former agency responded to our additional questions, stating that there were no set controls over sign in/sign out sheets, but the:

Manager of the Snack Bar reviews and approves time sheets prior to processing. Any unusual entries would be investigated . . . [claimant's name]'s time sheet generally matched his work schedule. If actual time worked was more than scheduled time, but not reported on time sheets, the manager would be unaware of the excess time worked.

The "Closing Supervisor" was described as acting in the absence of the "Food Activity Foreman/Manager," in running the facility, "in charge of at least 1 Food Service Worker." In addition:

As part of the closing supervisor's paperwork responsibilities, a bank deposit is prepared. After the paperwork is completed and the facility closed, the

employee leaves the facility (this begins the 5 minute process) drives to the bank (approximately 1/10th of a mile from the Snack Bar), drops the money bag in the night deposit box, calls the Security Police to let them know their deposit is complete, then goes home. . . .

There could be many reasons why [claimant's name]'s time sheet and log do not match. This is one example we know of. His car was not useable for approximately 3 months. [claimant's name] was overheard many times asking family members to be here to pick him up late that evening. There is no way of knowing what time he would be picked up.

In your letter of April 23, 1994, responding to the April 19, 1994, agency letter, you: (1) stated that management was aware of the fact that "we had to work over our scheduled times"; and, (2) acknowledged that the bank was not far from the "BX Cafeteria, but the Base Operations Cafeteria, where I worked for about half the time was not so close. The point being that it was a daily expenditure of the employee's time and resources (vehicle and fuel) that management expected to be done 'off the clock'." In addition, you observed:

The only reason that the time-sheets and police-log do not match is that we are expected to sign out according to the time schedule made, but not to leave before the place was ready to open for the following day. It is true that my pickup truck broke down. I was not sure whether I wanted to have it fixed or buy another vehicle. I have a son who works for the Border Patrol, he has three cars. So when my truck broke down he lent me his third vehicle for as long as I needed it. I never waited for a ride. Everyone that worked with me can testify to the fact that I used by son's 1988 Subaru for the three months that management claims I was without transportation. As a matter of fact when making the closing report the Security Police record the make and registration number of the vehicle which will make the bank deposit.

In a letter dated May 12, 1994, you sent us a copy of a settlement agreement with AAFES concerning the ending of your employment, and provided the list of work functions identified as "COOK/FOOD SERVICE WORKER NIGHTLY RESPONSIBILITIES" in support of your claim that the work tasked was so extensive as to require more than the officially allotted hour to complete.

Based on the information provided by both you and your former agency, we find that the primary factual issue of your claim is whether you were suffered and permitted to perform work for which you did not receive proper compensation.

Under the authority provided in Public Law 93-259 and implemented in 5 CFR 551.101 it is OPM's responsibility to ascertain the facts necessary to administer the FLSA. After several unsuccessful attempts, on March 7, 1995, we received a response to our written interrogatory from [name], your former supervisor (Food Activities Foreman), concerning the factual claims made by both you and your agency regarding the assignment and control of work hours at the center of this case. We received a response from former co-workers [name] (August 14, 1995), [name] (September 21, 1995), and [name] (December 4, 1995). Interrogatories sent to former co-workers [name] and [name] were returned as undeliverable. The interrogatories sent to [supervisor's name] and [supervisor's name] were never returned. In a telephone conversation with us on March 7, 1998, [supervisor's name] stated he was no longer an AAFES employee, and felt it was not appropriate for him to respond to the interrogatory. However, we did obtain verbal responses to some questions from [supervisor's name].

Neither time cards nor any other official agency records show whether you performed such work. Several Comptroller General decisions, e.g., Christine D. Taliaferro (B-199783, March 9, 1981) and Paul Spurr (60 Comp. Gen. 354) indicate that FLSA overtime compensation is to be paid if two criteria are met: (1) the complainant shows that they have performed work under the FLSA for which they were not paid; and, (2) the complainant produces enough evidence to show the amount and extent of that work as a matter of reasonable inference. Our application of these criteria to your complaint follows.

To decide whether the complainant performed work under the FLSA, we must determine whether work was suffered and permitted to be performed. Five CFR 551.102(e) defines "suffered or permitted" work as:

any work performed by an employee for the benefit of an agency, whether requested or not, provided that the employee's supervisor knows or has reason to believe that the work is being performed and has the opportunity to prevent the work from being performed.

Our discussion of these issues follows.

1. Did the claimant perform work during his lunch break?

It is established OPM policy that work is considered to have been performed during lunch periods if the tasks extend beyond answering rare and infrequent emergency calls. [supervisor's name] stated:

I know there were times when [claimant's name] and I worked Base Ops, and we each worked our own shifts by ourselves, and they docked us for our half our [sic] [lunch] breaks, even though we couldn't actually sit down and take our breaks without being interrupted. We couldn't leave the facility on our breaks, because there was no one there to cover for us. Also if we got busy at the other facility we worked we had to get up from our break to help.

[name] stated: "For the lunch period the employees took their 30 min lunch break usually in the dining room. I know that some employees would come off their lunch break early if they thought they were needed. They would normally resume the rest of the lunch period at a later time." [name] stated: "Lunch breaks were given if you worked over 6 hours. Sometimes if you were to get busy you had to interrupt your break and go back to work." [name] stated: "breaks at Base operations were taken during times that there were no customers." She added "As far as lunch breaks we were docked ½ hour a day. We had no reliefs, but there were also periods of hours when we had no customer."

Given the dispersion of potential witnesses in this case, careful attention must be paid to the credibility of the information provided by [supervisor's name]. We find the information compelling in that she was a former member of the management staff, and worked closely with the claimant. The conclusion is substantiated by [name] response. The use of the term "normally" by [name], and her description of no relief during lunch breaks, lend credence to the conclusion that some employees, e.g., the claimant, did not routinely receive a full "lunch hour." Thus, we conclude that the claimant did perform work during lunch hours.

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

It is established OPM policy that a supervisor has reason to believe that work is being performed if a responsible person in the supervisor's position would find reason to believe that this was the case. This is met if the supervisor has direct evidence, e.g., their own observation, or indirect evidence, e.g., through the employee's work products or information from other employees. [supervisor's name]'s statement as the complainant's immediate supervisor during "the last couple of years" of his employment shows that management had direct knowledge of the complainant's regularly working through his lunch hours. [supervisor's name]'s description of facility coverage also causes us to conclude that AAFES management, in placing a single person at the Base Operations food facility, without making any provision to close the operation for a staff lunch period, also would have had reason to believe that work was being performed by the complainant during his lunch period.

3. Did the claimant's supervisors have the opportunity to prevent the work from being

performed?

It is established OPM policy that supervisors are considered to have had the opportunity to prevent work from being performed unless: (1) they did not know or have reason to believe that 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 work from being performed, including directing the employee not to perform unintended work, by counseling the employee about adverse consequences that may result from performing such work, or by taking other management actions to control the employee's work, e.g., taking escalating disciplinary actions.

In response to our question concerning the employee time sheet process, [supervisor's name] stated:

We were told that under no circumstances were we to work over eight hours in a day unless we got authorization. But if we did work over eight hours in a day we couldn't put it down for that day. We had to put it on another day where we wouldn't go over eight hours. Time sheets were changed quite often. I did them sometimes and I was told by the manager to change them, because they weren't authorized to work over their scheduled time, or they weren't allowed to get more than eight hours in one day. This was done a lot by [name of two supervisors] and also the Operation's Clerk who was working for us at the time. We were told we had to write out our hours in pencil, so that if they needed to change them they could.

[name], who handled time cards stated:

Occasionally timesheets were changed whenever there was a problem, by me, as requested by management. . . .

This description of the time sheet control process corroborates the complainant's claim that the official time sheets were altered routinely and, when considered in combination with [supervisor's name]'s description of facility operations as discussed in #2, causes us to conclude that management (1) knew that work was being performed during lunch periods and, (2) had the opportunity to prevent work from being performed.

We must now address the issue as to whether you performed work after your official tour of duty. Our application of the suffer and permit criteria to this portion of your claim follows.

1. Did the complainant work after his officially scheduled tour of duty?

The agency's response to the complainant's claims regarding his claimed performance of work rests on calling into question: (1) the propriety of the timeframes and proof of work performed claimed by the complainant, e.g., the fire logs are neither official nor an accurate representation of "when employees were actually done working"; and, (2) the veracity of the claimant in claiming that any work was performed even if the fire logs showed that he exited the base substantially after the time on the official time card, adjusting for the "5 minutes" necessary to drop off the bank deposit.

In response to our question whether employees, such as the claimant performed work "off the clock" after signing out for the shift, [supervisor's name] replied, in part:

We all worked off the clock on numerous occasions [sic]. We just put down the time that was on our schedule, because we knew the only thing that showed we got out later was the sign out sheet, where we had to call the fire department, and the police and we didn't do that until right before we walked out the door. [claimant's name] worked off the clock quite a bit because it took him longer to get the work done.

Concerning whether the complainant worked overtime for which he was not paid, and the frequency of that work, [supervisor's name] replied:

Yes. [claimant's name] worked overtime just about on a daily basis. Anywhere from 30 minutes to an hour, sometimes longer. We were all told if the place was not cleaned and all the work done for the next day that we would be counseled and if we got counseled too many times for it we could lose our jobs. So we had no choice but to stay on our own time to finish it.

In an attempt to determine whether work was performed by the complainant, or whether he was waiting for a ride home, [supervisor's name] said:

There was only one time that [claimant's name] was without transportation. I can't remember the dates it happened, but his son came to pick him up at the time he was scheduled to get out, and his son always had to wait for him, to finish his work on his own time.

[name] stated: "The only time overtime was paid was when approved by a supervisor." She added that "if we worked overtime it was because there was a lot of people at once at the end of our shifts. If it was late & a plane came in our supervisor was called & he had the final say whether to stay open or not." [name] stated that overtime was not assigned, and

that: "You should be done in the allowed time. By supervisor. But you couldn't leave till all the work was done." In readying the facility for the next day she stated: "You didn't sign out. You worked your schedule and sometimes beyond. Yes, [claimant's name] work [sic] off the clock sometimes."

[name], who handled time cards stated:

Occasionally timesheets were changed whenever there was a problem, by me, as requested by management. . . .

No overtime was assigned that I am aware of. . . .

When I noticed that an employee had worked past their scheduled shift I would bring it to the Supervisor or Manager's attention. They would inform me as to whether it was authorized or not. For example, if they had asked them to stay past their shift due to unforeseen circumstances (some one called in sick or facility was extra busy). The supervisor or manager would usually initial the time sheet.

If an employee had worked over their shift after the manager had gone home for the day, the manager would sometimes disapprove the time worked over the shift saying it was not authorized.

During our conversation, [supervisor's name] stated people were ordered not to work overtime, but that it was possible that people could have worked off the clock to "get the job done." He added, however, that they "knew they wouldn't be paid" for that work. This was not a written policy, but was understood by the staff. They knew that if they were given an hour to clean and close up, that was all the time for which they would be paid.

Our review of 19 work days in the two-month sample of fire and police logs and time sheets in which the complainant functioned as closing supervisor revealed: (1) 7 days in which the employee time sheet showed a time later than the facility closing time; i.e., the complainant apparently left the facility before the end of the official work day, ranging from 1 to 10 minutes; and (2) 12 days showing a later departure time than claimed on the employee time sheet ranging from 1 to 54 minutes. The days for which we can perform complete calculations show that the average early departure period was 5.5 minutes and the average later departure time was 20.4 minutes.

In determining whether work was performed by the complainant after his official tour of duty, we must examine the credibility of the information provided. We cannot accept the proposition that the fire or police closing logs are not official documents. They reflect

management action to control the activities of employees in the facility, particularly with regard to providing an audit trail for building security and bank deposits. Assuming, arguendo, that the claimant's actions at work were suspect, we do not find it credible that the agency, only after receiving our request for the logs, would first discover: "We also found that there were times that he worked less than what he reported on his time sheet and received pay for those hours." Based on the work controls and time frames corroborated by [supervisor's name], we find it reasonable to conclude that [claimant's name], and other employees, regularly worked past their scheduled tour of work for the benefit of the agency.

2. Did the complainant's supervisors know or have reason to believe that work was being performed?

In response to our question regarding whether employees were paid for work beyond their shift and, if not, why not, [supervisor's name] stated:

No, they weren't paid for it. Lots of times it was not authorized by the manager. There [sic] reasoning for not paying for it was because we didn't make enough money on our shift to account for the extra time, and that they must be fooling around instead of doing the work. If we couldn't get in touch with the manager to tell them that we had to stay late, we would tell them first thing the next day. They would just say we weren't getting paid for it and if we didn't like it they made it a point to show us the door wear [sic] we could leave.

This agrees with the statements of [name] and [name] cited above. Applying the criteria discussed previously in this decision, we find that management knew work was being performed. This conclusion is based on information provided by the complainant and corroborated by [supervisor's name] and others including: (1) the procedures in place to transfer time worked over eight hours in a day to another day; (2) the requirement that time cards be filled out in pencil to help changing after-the-fact; and, (3) management reaction to the reporting of work performed past the scheduled tour of duty.

3. Did the complainant's supervisors have the opportunity to prevent the work from being performed?

Based on the description of work controls and procedures in the record, we find that management's action, in response to the reporting of work being performed in excess of the scheduled tour, consisted of: (1) refusing to compensate the complainant and other employees for the work performed; and, (2) conveying the expectation that all planned work was to be performed, with "counseling" as the outcome, not to force employees to desist from working unapproved additional time, but for performance problem discussions

potentially leading to dismissal for failure to complete all planned work. Based on the record, we conclude that management had the opportunity to prevent work from being performed.

The second criterion to be addressed is whether there is sufficient evidence to show the amount and extent of overtime as a matter of reasonable inference.

The complainant has not provided a list of dates and times for which he is seeking additional compensation. The information provided by [supervisor's name], the complainant's first level supervisor, reflects a range of uncompensated work time; i.e., "[claimant's name] worked overtime just about on a daily basis. Anywhere from 30 minutes to an hour, sometimes longer."

Based on the sample of time sheets and logs which we reviewed, one can make a reasonable inference that the complainant worked for an average of 30 minutes daily past his scheduled tour of duty for that time period. In addition, based on the information provided by [supervisor's name], one can make a reasonable inference that he regularly worked through all lunch periods in which he was assigned alone to and worked at Base Operations.

What Compensation is Due for the Work Performed?

The next step in the process is to determine the compensation which is due to the complainant. Five CFR 551.402(b) requires that agencies keep complete and accurate records of all hours worked by their employees. Based on the time sheets and logs provided by management, we find that records also should exist that will permit the reconstruction of: (1) the time difference between the complainant's time sheet and when he actually concluded work after the bank deposit; and (2) days in which other food service facilities were short-staffed during which the complainant would have worked through his lunch break.

In determining the pay due, we must first establish what kind of pay is due under the FLSA. We find two aspects of the FLSA apply to determining the pay due the complainant in this complaint. The record shows that the complainant's normal tour of duty was 7 hours with an additional one-half hour lunch break. Our review of the record revealed that the complainant also was scheduled to work some 8 hour tours of duty.

Public Law 101-509 (the Federal Employees Pay Comparability Act of 1990) made certain changes to the implementation of FLSA in the Federal sector. In the instant case, work performed by the complainant in excess of 8 hours in a day is subject to the overtime provisions of the FLSA. For example, the record shows that on November 1, 1993, the complainant worked from 11:30 A.M. until 8:00 P.M. (8 ½ hours). The Opening and Closing (police) log shows that he closed the facility at 8:07 P.M. Assuming that the

complainant worked through his lunch break, he would be entitled to FLSA overtime for time worked in excess of 8 hours in that day. Because the time worked was not scheduled in advance of the work week, it is not regular overtime work, but is irregular or occasional overtime work as defined in 5 CFR 551.501 (8)(c). Five CFR 551.521(b) stipulates that a quarter of an hour is the largest fraction of an hour that may be used for crediting irregular or occasional overtime, and odd minutes are to be rounded up or rounded down to the nearest full fraction of an hour.

For days during which the claimant's tour of duty did not exceed the 8 hour overtime threshold, compensation is due under the minimum wage provisions of the FLSA as described in 5 CFR 551.301.

On January 6, 1994, the claimant was advised by this office to toll the statute of limitations applicable under Section 3702 (b) of Title 31, United States Code (U.S.C.). The copy of the tolling letter submitted by the claimant to this office shows that the claimant's letter tolling the statute of limitations was received and date stamped on August 22, 1994 by the U.S. General Accounting Office. Public Law 103-329 of September 30, 1995 stipulates that a 6-year statute of limitations for any Federal employee under the FLSA applies to claims filed before June 30, 1994. Therefore, we find that the claimant, by missing that filing date, is subject to the recovery periods defined within the FLSA; i.e., two years from the date the claim accrued (August 22, 1994), or three years if willful violation is found.

Twenty-nine CFR 578.3 (c) defines willful violations of the FLSA as "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." The employer's conduct is deemed knowing if, "among other situations, if the employer received advice from a responsible official of the Wage and Hour Division [U.S. Department of Labor] to the effect that the conduct in question was unlawful." "Reckless" is defined as "among other situations, if the employer should have inquired into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry."

Based on our analysis of the record, we find that the former agency did not willfully violate the Act. The former agency had issued appropriate guidance on FLSA requirements. You indicated that you were advised by [name], the Personnel Manager, that it was not proper for you to work past your scheduled time without pay, and that if you did so, to enter the lunch time worked and any time past your scheduled tour onto your time sheets. We must reach this conclusion notwithstanding lower level management's: (1) changing employee time sheets and/or directing the erroneous recording of hours worked in order to avoid payment of FLSA overtime for work performed in excess of 8 hours in a day; (2) refusing to acknowledge and compensate work performed during scheduled lunch breaks; and, (3) refusing to pay for time worked, implying that claims for additional compensation would

result in termination.

Therefore, we find that the claimant is entitled to back pay from August 22, 1992, forward for the hours of uncompensated work performed as discussed in this decision. Nonappropriated fund employees are not Federal employees for purposes of the Back Pay Law contained in 5 U.S.C. 5596. Therefore, the complainant is not owed interest on the compensation to which he is entitled under the FLSA.

Compliance Instructions

By copy of this decision, we are directing your former agency to compute the compensation due you in accordance with the instructions contained in this decision and established OPM policy guidance. Your former agency is instructed to pay you the amount due for the time for which you were not compensated. Your former agency is instructed to send us all computations and supporting documentation for review within 30 days from the date of this decision. You should not be paid until after we have reviewed these computations. Your former agency must compensate you at your straight time rate for your uncompensated worktime covered under the minimum wage provisions of the FLSA.

This is the final administrative level to which you have a right of review concerning the application of the FLSA to the position concerning which you filed your claim. If you disagree with this decision, you have the right to bring the matter to the appropriate U.S. Court. However, you may do so only if you do not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

Sincerely,

/s/ 8-6-98

cc:

Robert D. Hendler
FLSA Claims Officer

Director
Human Resources Directorate
Headquarters, Army and Air Force
Exchange Service
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Dallas, TX 75266-0202