

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



San Francisco Oversight Division  
120 Howard Street, Room 760  
San Francisco, CA 94105

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

**Claimant:** [claimant's name]

**Position:** Consumer Affairs Specialist  
OC-301-10

**Organization:** [claimant's activity]  
Office of the Comptroller of the Currency  
U.S. Department of the Treasury  
[city, state]

**Claim:** Status should be nonexempt; FLSA overtime pay was not properly computed; and the violation was willful.

**OPM decision:** Position is nonexempt; recompute FLSA overtime pay; and the violation was not willful

**OPM decision number:** F-0301-10-01

Signed by Denis J. Whitebook

Denis J. Whitebook

January 12, 1998

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. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

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

### **Decision sent to:**

[claimant's name and address]

[address of claimant's servicing personnel office]

Director, Human Resources  
Comptroller of the Currency  
Administrator of National Banks  
U.S. Department of the Treasury  
Washington, DC 20219

Director of Personnel Policy  
U.S. Department of Treasury  
Room 4164-ANX  
Washington, DC 20220

## **Introduction**

On March 12, 1997, the San Francisco Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes his agency willfully violated the FLSA in making his position exempt under the Act. The claim period is from January 12, 1992 to October 3, 1996. During the claim period, he has worked in [his activity], Office of the Comptroller of the Currency (OCC), U.S. Department of the Treasury, [city, state]. His position has been classified as Consumer Affairs Specialist, OC-301-10. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

## **General issues**

The claimant makes many statements relating to his agency and its reports on his FLSA case. In adjudicating this claim, our only concern is to make our own independent decision about his exemption status and, if his position is nonexempt (i.e., covered by the provisions of the FLSA), whether the violation was willful, and how much FLSA overtime pay he is owed, if any. We must make that decision by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimant's statements only insofar as they are relevant to making that comparison.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency, including his official position description (PD) 89110.

## **Background**

The following is a very brief summary of the circumstances surrounding this claim.

The claimant was appointed to a nonexempt Consumer Affairs Specialist OC-301-10 position on January 12, 1992. The claimant indicates that his first supervisor informed him that he should not record overtime worked on his work report. The agency indicates that the claimant's exemption status was changed to FLSA exempt on January 24, 1993 due to a clerical error. The agency states that on May 22, 1996, the Western District Human Resources Department (WEHR) staff discovered that the claimant's PD reflected that the position was nonexempt while the position was coded as exempt in the database during a personnel data integrity review project. On May 23 the WEHR sought guidance from its headquarters by electronic mail (e-mail) and was informed by e-mail on May 24 that the position was nonexempt. On May 28, 1996, the WEHR approved a personnel action that retroactively corrected the claimant's exemption status to nonexempt for all previous personnel actions from January 24, 1993, when the position was erroneously changed to exempt, to January 21, 1996, the last personnel action issued for the claimant. The claimant indicates that he never received a copy of the personnel action and only learned of the change on October 3, 1996 when his co-worker asked him if he had received his notice. They visited the WEHR where he obtained a copy of the personnel action.

The claimant worked unpaid overtime after May 1996 and the claimant's supervisor told the claimant that the WEHR had not informed him of the change to the claimant's FLSA exemption status. The

claimant indicates that [a human resource manager] convinced him to hold off filing his claim with OPM, implying that the claimant would be better off trying to resolve the matter amicably. After several months of negotiations in which the parties agreed on the number of hours worked, but not the period of the complaint or the kinds of pay to be included in the FLSA overtime pay computations, the claimant filed a claim with OPM for three years of overtime pay, interest, and liquidated damages. We received the claim on March 12, 1997. In its response to OPM's request for an administrative report, the agency states that the claimant's position is exempt from the FLSA under the professional or administrative exemption criteria. Alternatively, if the claimant's position is nonexempt, then the claim is subject to the two year statute of limitations and geographic pay should be excluded from the FLSA overtime pay calculation.

## **Evaluation**

OPM published new FLSA regulations that were effective on December 23, 1997; however, the regulations in effect during the complaint period have been used.

### ***FLSA exemption status***

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

The claimant does not perform supervisory or managerial duties as described in section 551.204 of title 5, Code of Federal Regulations and neither the claimant nor the agency disagrees. The agency believes that the claimant's position meets the professional and administrative exemption criteria and the claimant disagrees. A comparison of the claimant's duties and responsibilities to the professional and administrative exemption criteria follows.

### ***Position information***

1. The claimant spends 50 percent of his time analyzing complaints against national banks to determine if violations of consumer protection laws (e.g., Equal Credit Opportunity Act, Fair Credit Billing Act, Fair Credit Reporting Act) have occurred. After identifying and analyzing laws, regulations, legal decisions, rulings, precedents, etc., he prepares responses summarizing points of law and advising the complainants of their rights. If necessary, he requests additional information from banks regarding the specific complaint in order to respond to the complainant about the legality of actions and methods of resolution. If bank violations are noted, he prepares notification letter to bank for signature of District Counsel or Director for Bank Supervision.

2. The claimant spends 10 percent of his time maintaining a tracking system to monitor open complaints and contacts banks as necessary to ensure prompt response to complaints. He also spends 10 percent of his time coordinating and reviewing the work performed by two support personnel.
3. He spends 5 percent of his time on each of the following duties: analyzing incoming complaints for jurisdiction and referring complaints outside his district's jurisdiction to other districts or agencies; monitoring consumer complaint information for adverse trends and keeping his supervisor informed; providing technical assistance to field and review examiners and responding to requests from bankers, general public, field examiners, and District and Field Office personnel concerning consumer compliance and related laws; preparing various consumer complaint reports; training and coordinating temporary personnel assigned during high volume periods; and work flow evaluation, development of process, including requested input into the agency's changing policies, systems, and procedures for the consumer affairs unit.

#### *General principles governing exemptions*

Section 551.202 of title 5, Code of Federal Regulations (5 CFR 551.202) provides:

- In all exemption determinations, the agency shall observe the principles that—
- (a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
  - (b) The burden of proof rests with the agency that asserts the exemption.
  - (c) All employees who clearly meet the criteria for exemption must be exempted.

#### *Primary duty*

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

The claimant's primary duty is to receive, review, and respond to complaints against national banks. This work occupies well over 50 percent of the claimant's time. In addition to the duties described in his official PD, the supervisor indicates that the claimant performs work flow evaluation, development of process, including requested input into the agency's changing policies, systems, and procedures for the consumer affairs unit. He has performed this work primarily through his participation on a task force and has been asked for further input on a continuing basis. Some periods of his time were allocated fully to the task force. However, the task force work was essentially a one time assignment rather than a substantial, regular part of his position and it did not govern the

classification of his position as Consumer Affairs Specialist OC-301-10. Providing input occupies only 5 percent of his time and it does not govern the classification of his position. We have determined that the task force work and providing input does not meet the primary duty criteria.

### *Professional exemption*

Section 551.206 of title 5, Code of Federal Regulations (5 CFR 551.206) contains the criteria governing whether the claimant's position is exempt from the FLSA under the professional exemption criteria. The position is exempt if it meets professional exemption criteria (a)(1) or (2), and (b) through (d), in section 551.206.

The claimant's PD, the percentages of time spent on the duties, and other information provided by his current supervisor and the agency do not indicate that the claimant's primary duty consists of 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 [5 CFR 551.206(a)(1)].

The agency believes that the claimant's bachelor's degree, paralegal certificate, and experience working in banks as a manager meets the professional exemption criteria. The claimant's bachelor's degree is in literature. The bachelor's degree must be in a field pertinent to banking and consumer issues to meet the intent of the exemption criterion and a literature degree does not meet the criterion. In addition, one of the claimant's co-workers performs the same job as the claimant based on extensive service within OCC dealing with consumer issues. The agency did not provide any information that the co-worker required education or training that provides theoretical as well as practical knowledge of the specialty in order to perform the work. As mentioned above, the exemption criteria are to be narrowly construed and the burden of proof is on the agency. The agency has provided no information, such as a qualification standard, training development plan, or vacancy announcement for the Consumer Affairs Specialist OC-301-10 position which describes the specialized field of learning (e.g., accounting, law), lists the education or training which is required to perform the work, and shows how such education or training meets the requirements for a *bachelor's degree* related to the specialized field or how it provides both *theoretical* and practical knowledge of the specialty. Criterion (a)(1) is not met.

The claimant's PD and other information indicate that the claimant's work is not in a recognized field of artistic endeavor as described in 5 CFR 551.206(a)(2).

The claimant's work does not meet criterion (a)(1) or (2); therefore, the claimant is nonexempt since his position does not meet all the criteria in 5 CFR 551.206. There is no need to compare the

claimant's work to criteria (b) through (d). The claimant's duties and responsibilities do not meet the professional exemption criteria.

#### *Administrative exemption*

Five CFR 551.205 contains the criteria governing whether the claimant's position is exempt from the FLSA under the administrative exemption criteria. The position is exempt if it meets administrative exemption criteria (a)(1), (2), or (3) and (b) through (d), in section 551.205. Interpretative guidance is found in paragraphs B.1.g., h., and I. in the Attachment to FPM Letter 551-7.

The claimant's PD and other information of record indicate that the claimant's primary duty involves responding to consumer complaints as discussed under the primary duty section above.

The claimant's primary duty does not consist of work that significantly affects the formulation or execution of management policies or programs [5 CFR 551.205(a)(1)]. For instance, the claimant does not perform one or more phases of program management, i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the OCC or of other organizations subject to OCC regulation or other controls. The claimant's position does not meet criterion (a)(1).

The claimant's primary duty does not consist of work that involves general management or business functions or supporting services of substantial importance to the organization serviced [5 CFR 551.205(a)(2)]. This criterion covers a wide variety of specialists who provide general management, business, or other supporting services to management as distinguished from production functions. The claimant provides expertise and guidance on consumer matters. However, he does not provide expert advice in a specialized management field such as that provided by management consultants or systems analysts. His primary duty does not involve assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management. His position does not require him to represent management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payment. His work also does not involve providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies. The claimant's primary duty does not meet criterion (a)(2).

The claimant's primary duty does not involve substantial participation in the executive or administrative functions of a management official [5 CFR 551.205(a)(3)]. This criterion includes those employees (variously identified as secretaries, administrative or executive assistants, aids, etc.) who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. Based on a knowledge of the administrative procedures, organizational relationships, and the supervisor's policies, the employee has substantial discretion to schedule or reject invitations or requests for appointments, redirecting calls or visitors, representing or arranging for another staff member to represent the supervisor in meetings or conferences, etc. The claimant does not serve as his supervisor's secretary. The claimant's primary duty does not meet criterion (a)(3).

The claimant's work does not meet criterion (a)(1), (2), or (3); therefore, the claimant is nonexempt since his position does not meet all the criteria in 5 CFR 551.205. There is no need to compare the claimant's work to criteria (b) through (d). The claimant's duties and responsibilities do not meet the administrative exemption criteria.

The claimant's position is nonexempt, i.e., covered by the provisions of the FLSA.

### ***Willful violation***

The statute of limitations is 2 years or 3 years if the violation is willful. The claimant believes that the agency willfully violated the FLSA and the agency disagrees. The claim is retroactive from the date that it was received by OPM on March 12, 1997 (unless he filed his claim with the agency at an earlier date). A written claim must be filed with either the agency or OPM in order to preserve the claim period and entitlement to back pay.

OPM has not defined the term willful violation in its regulations; however, the Department of Labor (DOL) which administers the FLSA for the private sector has defined it. It is Congress's intent that OPM's administration of the FLSA parallel DOL's administration of the FLSA to the extent possible. DOL regulations (29 CFR 578.3) state:

(c)(1) An employer's violation of section 6 or section 7 of the Act shall be deemed to be *willful* for the purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful.

(3) For purposes of this section, an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry.

In 1981, OCC converted from the GG pay plan to the CP pay plan. Nonexaminers converted to the CP plan were made exempt. In 1991, OCC converted CP and GG employees to the OC pay plan. The assistant bank examiners were converted to nonexempt OC-8. On conversion to the 1991 pay plan, new position descriptions were established and classified under the OC pay plan. The Consumer Affairs Specialist OC-301-10, PD 89110, was designated nonexempt. The claimant was appointed to the nonexempt Consumer Affairs Specialist OC-301-10 position on January 12, 1992. The agency indicates that the claimant's exemption status was mistakenly changed to FLSA exempt on January 24, 1993. The personnel assistant recalls that she and the personnel management specialist (who no longer works at OCC) and other staff members thought that the position should be exempt based on their belief that the FLSA status for employees in nonexaminer job series was determined by grade



cutoff. On May 22, 1996, during a personnel data integrity review project, the WEHR staff discovered a discrepancy between the claimant's PD which showed that the position was nonexempt and the SF-50 which showed he was exempt. On May 23 the WEHR sought guidance from its headquarters by electronic mail (e-mail) and was informed by e-mail on May 24 that the position was nonexempt. On May 28, 1996, the WEHR approved a personnel action that retroactively corrected the claimant's exemption status to nonexempt for all previous personnel actions from January 24, 1993, when the position was erroneously changed to exempt, to January 21, 1996, the last personnel action issued for the claimant. The claimant indicates that he never received a copy of the personnel action and only learned of the change on October 3, 1996 when his co-worker asked him if he had received his notice. They visited the WEHR where he obtained a copy of the personnel action. The claimant worked unpaid overtime after May 1996 and the claimant's supervisor told the claimant that the WEHR had not informed him of the change to the claimant's FLSA exemption status.

The agency states that despite the change in how FLSA status was designated for OC positions in 1991, the Western District Human Resources Department (WEHR) continued to use grade cutoffs in determining FLSA status without verifying the FLSA designation on PD's. The agency's Policies and Procedures Manual (PPM), dated March 29, 1986, reflects the use of grade cutoffs for CP and GG positions. The agency's PPM dated June 13, 1991, does not contain grade cutoffs. It states that the personnel officers are responsible for administering the compensation program within designated guidelines to ensure that jobs are properly identified as exempt or nonexempt based on FLSA guidelines. In addition, the agency provided to the field personnel offices a standard PD which identified the claimant's position as nonexempt.

For purposes of interpreting 29 CFR 578.3 for the Federal sector, OPM has determined that the term *employer* refers to an agency, and in particular, the agency's headquarters management since an agency's compensation policies and procedures are typically determined at the headquarters level. In this case, the OCC headquarters determined that the claimant's position was nonexempt based on the application of FLSA guidelines and informed the field personnel office of its determination through the nonexempt determination on the standard PD. The agency investigation found, "Despite the change in how FLSA status was designated for OC positions in 1991, staff in the WEHR continued to use grade cutoffs in determining FLSA status. They did this without verifying the FLSA designation on position descriptions."

The OCC's actions do not meet the criteria in 29 CFR 578.3(c) for determining that a willful violation occurred. With respect to 578.3(c)(2), OCC headquarters did not *know* that its conduct was prohibited by the FLSA since OCC's conduct was lawful, i.e., OCC headquarters properly determined that the claimant's position was nonexempt. The same reasoning applies to 578.3(c)(3). OCC's conduct cannot be deemed to be in *reckless disregard* of the FLSA since OCC headquarters made adequate inquiry in properly determining that the claimant's position was nonexempt. We find that the OCC (i.e., the employer) did not willfully violate the FLSA.

The agency did not willfully violate the FLSA; therefore, the statute of limitation is two years.

### *Geographic differential*

The agency's OC pay plan is comprised of three parts: base salary, base salary adjustment, and geographic differential. The agency states on page 6 of its August 4, 1997 letter to OPM that the base salary and base salary adjustment are included in the FLSA overtime pay calculation; however, it believes that the geographic differential should be excluded and the claimant disagrees.

Five CFR 551.512 provides that an employee's overtime entitlement under the FLSA includes:

1. The *straight time rate* of pay times all overtime hours worked; plus
2. One-half times the employee's *hourly regular rate* of pay times all overtime hours worked.

#### *Straight time rate*

Under 5 CFR 551.512(b), an employee's *straight time rate* is equal to the employee's rate of pay for his or her position (**exclusive of any premiums or differentials**). Since the regulation specifically excludes **differentials** from the straight time rate computation, the geographic differential must be excluded from the claimant's straight time rate computation. However, the base salary and the base salary adjustment are included in the straight time rate computation.

#### *Hourly regular rate*

An employee's hourly regular rate of pay is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid. The *total remuneration* includes all remuneration paid to an employee except for the payments, reimbursements, contributions, and extra compensation listed in 5 CFR 551.511(b)(1-7).

The agency believes that the geographic differential portion of its unique OC pay scale is not subject to inclusion in the *hourly regular rate of pay* for the purpose of overtime calculation. However, no evidence in the form of a law, regulation, court decision, or similar document has been provided which allows any of the three parts of the OC pay plan to be excluded from the total remuneration computation described in 5 CFR 551.511. Since the base salary, base salary adjustment, and the geographic differential are not in the list of payments to be excluded [5 CFR 551.511(b)], all three parts must be included in the computation of the employee's hourly regular rate of pay.

In computing the FLSA overtime pay, the geographic differential is *excluded* from the straight time rate computation. However, the base salary, the base salary adjustment, and the geographic differential are *included* in the hourly regular rate computation.

### ***Liquidated damages***

Liquidated damages may be awarded when the act or omission giving rise to the violation was not made in good faith. Since we find that the agency did not willfully violate the FLSA, the agency acted in good faith and no liquidated damages will be awarded.

### **Decision**

The claimant's position, Consumer Affairs Specialist OC-301-10, is nonexempt from the provisions of the Fair Labor Standards Act (FLSA). The statute of limitation is 2 years. The FLSA overtime pay computation includes the base salary, the base salary adjustment, and the geographic differential in the hourly regular rate of pay computation; however, the geographic differential is excluded from the straight time rate computation.

### **Compliance instructions**

The claimant is entitled to FLSA compensation for all overtime hours worked at the FLSA overtime rate as discussed in the body of the decision. The statute of limitations is two years prior to March 12, 1997, the date the claimant filed his claim with OPM (unless he filed his claim with the agency at an earlier date). Five CFR 550.806 shows that the claimant is also owed interest on the back pay. Therefore, the agency is instructed to compute the interest as described in the regulation. To help with this we have enclosed a floppy disk containing an OPM program for computing such interest and instructions for using the program. We have also attached a copy of abolished FPM Letter 550-78. Although the FPM is abolished, the guidance in this letter is current.

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

If agency personnel have any questions, they may call our desk officer at (415) 281-7050.