

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

Dallas Oversight Division
1100 Commerce Street, Room 4C22
Dallas, TX 75242-9968

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

Claimant: [claimant's name] et al.

Agency classification: Dental Assistant
GS-0681-04 and GS-0681-05

Organization: [claimants' activity and location]
U.S. Army Dental Activity

Claim: No compensation paid for on-call hours

OPM decision: Claim denied

OPM decision number: F-0681-04-01

/s/ Bonnie J. Brandon

Bonnie J. Brandon
FLSA Claims Officer

July 19, 2000

Date

As provided in section 551.708 of title 5, Code of Federal Regulations, this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the Office of Personnel Management administers the Fair Labor Standards Act. The agency should identify all similarly situated current and, to the extent possible, former employees, and ensure that they are treated in a manner consistent with this decision. There is no right of further administrative appeal. This decision is subject to discretionary review only under conditions and time limits specified in section 551.708 of title 5, Code of Federal Regulations (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

Decision sent to:

Claimants

[claimants' names]

[name and address of claimants' representative]

Agency

[servicing personnel activity]

Deputy Assistant Secretary Civilian Personnel
Policy/Civilian Personnel Director for Army
U.S. Department of the Army
Room 23681, Pentagon
Washington, DC 20310-0300

Director, U.S. Army Civilian Personnel
Evaluation Agency
U.S. Department of the Army
Crystal Mall 4, Suite 918
1941 Jefferson Davis Highway
Arlington, VA 22202-4508

Chief, Position Management and Classification Branch
Office of the Assistant Secretary
Manpower & Reserve Affairs
U.S. Department of the Army
ATTN: SAMR-CPP-MP
Hoffman Building II
200 Stovall Street, Suite 5N35
Alexandria, VA 22332-0340

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

Introduction

On March 22, 2000, the Dallas Oversight Division of the U.S. Office of Personnel Management (OPM) accepted a Fair Labor Standards Act (FLSA) claim from [the claimants' designated representative]. [The representative] filed this claim on behalf of [14 employees] assigned to positions of Dental Assistants, GS-681, at [two different] Dental Clinics, U.S. Army Dental Activity, [geographic location]. Some of the employees occupy GS-4 positions; others are in GS-5 positions. We have accepted and decided the claim under section 4(f) of the FLSA as amended.

The period covered by the employees' claim began on March 1, 1999, upon implementation of an after-hours dental support roster that required the civilian employees to be available for duty in emergency situations. The claimants believe their agency has violated the FLSA by requiring dental assistants to carry a pager on nights and weekends without compensation. The claimants are seeking back pay for previous "on-call" time with night differential, annual and sick leave accrual, and interest; future payments at time and a half, paid at the highest rate of any on-call dental assistant; and payment for all attorney fees incurred in relation to this claim.

General issues

The claimants believe they all should be compensated for overtime work at the overtime hourly rate for the highest grade dental assistant, regardless of the actual overtime rate for the employee who performed the overtime work. That is, the claimants believe that the GS-4 and GS-5 dental assistants should be paid at the same overtime rate as the highest level dental assistant. There is no provision for paying an employee based on the pay grade and rate of another employee. Therefore, the overtime hourly rate for the claimants would be one and a half times the individual employee's hourly rate of basic pay.

With regard to the claimants' request for payment of all attorney fees, OPM has no authority to direct such payment. Determination of the propriety and reasonableness of attorney fees is within the purview of the employees' agency. Section 5596(b)(A)(ii) of title 5, United States Code, provides entitlement to reimbursement of attorney fees for employees who, on the basis of an administrative decision, have been found to have been affected by an unjustified personnel action which has resulted in lost or reduced pay.

Evaluation

OPM has responsibility for administration of the FLSA for most Federal employees and has prescribed regulations contained in part 551 of title 5, Code of Federal Regulations (CFR), to carry out that responsibility. We have compared the facts in the claimants' case to the criteria in 5 CFR 551 in deciding their claim.

The agency has determined that the claimants' positions are nonexempt; that is, they are covered by the FLSA. We concur with that determination.

Time spent on standby duty or in an on-call status is addressed in 5 CFR 551.431. Prior to January 10, 2000, the criteria in this section stated:

(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:

(1) The employee is restricted to an agency's premises, or so close thereto that the employee cannot use the time effectively for his or her own purposes; or

(2) The employee, although not restricted to the agency's premises:

- (i) Is restricted to his or her living quarters or designated post of duty;
- (ii) Has his or her activities substantially limited; and
- (iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

Effective January 10, 2000, paragraph (a) was revised as follows.

(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

(2) An employee is not considered restricted for "work-related reasons" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. . . .

The revision to 5 CFR 551.431 did not affect paragraph (b). That is, the criteria in paragraph (b) remained unchanged.

We have carefully reviewed the record, including the agency's DENTAC Memorandum No. 210-2, dated March 1, 1999, that describes the duties and responsibilities of after duty hours dental care support personnel. The procedures in this memorandum stipulate that the period of

on-call work will be for a week, that is, from 4:30 p.m. Tuesday through 7:30 a.m. the following Tuesday. The memorandum also includes the following conditions:

- The dental assistant does not need to remain in the clinic but must be within the range of the pager or be able to be contacted by telephone.
- Transit time to the clinic should be between 30 and 45 minutes, with allowances for inclement weather.
- Personnel may exchange their duty periods with others.

We find that the procedures in the agency's memorandum do not impose the close restrictions or substantially limit the activities of the employees as required to meet the standby duty criteria. That is, the claimants' situation does not meet the criteria for standby duty as hours of work as defined in 5 CFR 551.431(a) either before or after January 10, 2000.

The information provided by the claimants, their representative, and their agency indicates that the claimants were in an on-call status for the period covered by their claim. During the period of on-call duty, the claimants were free to leave the clinics, responding to telephone or pager recall to the clinic to provide service in emergency situations. The time spent by the claimants is within the definition of on-call status and is not considered hours of work, as defined in 5 CFR 551.431(b). Employees are eligible for pay only when they are actually called back to the clinic for duty.

Decision

The time the claimants spent in an on-call status is not hours of work under the FLSA. Their claim for back pay is denied.