

120 Howard Street, Room 760
San Francisco, CA 94105



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

| | |
|-------------------------|--|
| Claimants: | [Name of claimant] et al. |
| Position: | Law Enforcement Ranger GS-1801-9 |
| Organization: | U.S. Department of the Interior Bureau of Land Management |
| Locations: | [Location of claimants] |
| Claim: | Exemption status |
| Decision: | Nonexempt |
| OPM Decision No. | F-1801-09-03 |

Signed by Denis J. Whitebook _____
DENIS J. WHITEBOOK
CLASSIFICATION APPEALS OFFICER

February 20, 1997 _____
DATE

There is no right of further appeal from this decision. The Director of the U.S. Office of Personnel Management may at his 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. The servicing personnel office must submit a compliance report consisting of a corrected position description and Standard Form 50 showing that the claimant's exemption status has been changed to comply with this decision. The corrected position description and SF 50 should be sent to this office for review within 15 workdays of receiving the decision.

The agency is to submit a plan for applying this decision to all identical or similar positions in accordance with instructions in this decision within 30 workdays of receiving the decision.

Decision sent to:

[Names and addresses of claimants]

Director
National Human Resources Management Center
U.S. Department of the Interior
Denver Federal Center, Building 50
P.O. Box 25047
Denver, CO 80225-0047

Manager, Interagency Human Resources Center
U.S. Department of the Interior
2800 Cottage Way, Room W-1102
Sacramento, CA 95825

Director of Personnel
U.S. Department of the Interior
Washington, D.C. 20240

Introduction

In March, April, May, and June 1996, the San Francisco Oversight Division of the U.S. Office of Personnel Management (OPM) received Fair Labor Standards Act (FLSA) claims from [name of claimant] et al. They believe that their FLSA exemption status should be nonexempt. Their positions are classified as Law Enforcement Rangers GS-1801-9. The claimants work for the Bureau of Land Management, Department of the Interior, at the following locations:

| <u>Location</u> | <u>Name</u> | <u>Complaint period</u> |
|------------------|----------------------|-------------------------|
| [Work locations] | [Names of claimants] | December 1995 - present |
| | | November 1995 - present |
| | | December 1995 - present |
| | | December 1994 - present |
| | | November 1995 - present |
| | | November 1995 - present |

We have accepted and decided their claims under section 4(f) of the FLSA as amended.

Position information

The claimants are assigned to Position Description (PD) [number] which states:

The primary purpose is to enforce Federal laws and regulations relating to public lands and resources managed by the Bureau of Land Management (BLM). The incumbent is a uniformed law enforcement officer with full delegated law enforcement authority. The incumbent is assigned a large geographical area of public land and is responsible for identifying and investigating criminal activity occurring on the public lands, apprehending suspects and violators, and carrying out the Federal Land Policy and Management Act of 1976 (FLPMA) law enforcement objectives.

Incidental to performing law enforcement work, the incumbent also performs assigned tasks in support of resource management activities.

In summary, the PD also provides:

MAJOR DUTIES (60 percent)

A. Investigations, Apprehensions, and Enforcement

1. Investigates areas where acts of criminal activity, theft, vandalism or offenses of the criminal laws and regulations of the United States that relate to the public lands and resources have occurred. Develops information through fact finding by collecting on-site

evidence, interviewing witnesses or suspects, following up on leads, searching records, conducting surveillance, observing suspicious activity, and through information provided by informants, concerned citizens, and local, Federal, and State officials.

2. Prepares investigation reports by documenting findings and facts, obtaining witness statements and copies of official records, and including pertinent correspondence, maps, historical information, exhibits, and photographs.

3. Determines the Federal criminal laws or regulations and/or State laws being violated. Makes record checks with State agencies to determine if violator has any prior violations. Issues citations or makes arrests and files criminal complaints with the court. Books suspects when appropriate and feasible.

4. Prepares law enforcement work plans incorporating resource management objectives and concerns. Identifies and recommends specific actions to ensure and enhance the protection of natural resources.

5. Enforces a variety of Federal laws and regulations related to public land and resources by performing investigations, apprehending suspects and violators, performing surveillance activities, and making enforcement contacts.

6. As case agent, represents the U.S. Government as the prosecutor in court. Obtains investigation reports and criminal history of the defendant and prepares testimony. Meets with prosecuting attorneys, presents testimony, delivers evidence to the court, and responds to testimony presented by defense attorneys/defendants. Recommends sentences, e.g., fines, probation, time in custody, administrative action, monetary restitution to the Government or reclamation of damage to the court.

7. Requests and presents justification for arrest warrants for defendants who fail to appear in court.

8. Develops and maintains liaison with other Federal, State, and local law enforcement agencies to share in the resources in order to provide additional protection of people and property on public lands. Cooperates in the investigation and disposition of cases. Provides assistance, e.g., back-up, to other law enforcement officers, exchanges case information, and coordinates other law enforcement activities of mutual interest.

9. May be delegated as a State Peace Officer under a Memorandum of Understanding with the county sheriff or other State or local official so authorized. Pursuant to such memoranda, is authorized to enforce applicable State laws or county ordinances on Federal public land and private property adjacent to the public land.

OTHER (40 percent)

B. Special Assignments

Is assigned to multi-agency task forces to perform special law enforcement activities, e.g., eradicate marijuana plantations, drug investigations.

C. Education

Communicates to public land users the Federal laws and regulations pertaining to use of public land and its resources. Prepares and make presentations to school groups, various organizations, and visitors.

D. Search and Rescue

Assists in searching for, and rescuing, visitors to public lands.

E. Automation

Uses automated equipment, data, systems, and applications to accomplish assigned duties.

F. Resource Management

Participates as a member of a multi-disciplinary team in performing work in support of resource management activities. Performs one or more of the following assignments, not to exceed 25 percent of total duties:

1. Resource Management: Performs specific resource management duties commensurate with incumbent's professional background and expertise. Develops and implements work plans, e.g., recreation, wildlife habitat, vegetative management, wilderness.

2. Trespass and Unauthorized Use Coordination: Coordinates and works with program leaders in lands, minerals, range, recreation, fire, and forestry.

3. Hazardous Materials Coordination: Coordinates investigation of suspected hazardous waste dumpers.

4. Safety Management: Plans and programs the safety program and established the safety goals through field office narratives, monthly accident incident reports, and accident analysis.

The claimants and their supervisors have certified the PD as complete and accurate. The PD and other information of record furnish additional details about the duties and responsibilities actually performed by the claimants.

Exemption determination

Three types of employees are exempted from the FLSA's overtime benefits: executive, professional, and administrative. The exemption criteria are found in sections 551.204, 551.205, and 551.206 of Title 5, Code of Federal Regulations (CFR). We have used accepted OPM

interpretations of the terms used in the exemption criteria. The claimants do not meet the executive or professional exemption criteria. Neither the agency nor the claimants disagree.

The agency found that the claimants met the administrative exemption criteria. The claimants disagree.

Administrative Exemption Criteria

The administrative exemption criteria are found in 5 CFR 551.205:

An administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

- (a) The employee's primary duty consists of work that--
 - (1) Significantly affects the formulation or execution of management policies or programs; or
 - (2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or
 - (3) Involves substantial participation in the executive or administrative functions of a management official.

- (b) The employee performs office or other predominantly nonmanual work which is --
 - (1) Intellectual and varied in nature; or
 - (2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

- (c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

The general principles governing exemptions found in 5 CFR 551.202 provide that the exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption, that the burden of proof rests with the agency that asserts the exemption, and that all employees who clearly meet the criteria for exemption must be exempted.

Based on the Adam v. United States (26 Cl.Ct.782), Roney v. United States (790 F.Supp. 23), and Amshey v. United States (26 Cl.Ct. 582) court rulings, the claimants believe that they should be nonexempt. The Adam case covered Border Patrol Agents GS-1896-11, the Roney case covered a Deputy U.S. Marshal GS-11, and the Amshey case covered sergeants and lieutenants in the Uniformed Division of the U.S. Secret Service. The work discussed in the three court cases is not identical to the claimants' work. It is less clear if the work covered by the court cases is similar enough to the claimants' work that the court decisions would apply to the claimants' work. However, we find that we can make an independent and objective decision on the exemption status of the claimants through application of the appropriate regulations and guidance.

Evaluation

Criterion (a)

To meet criterion (a) the claimants' primary duty must meet one of the three subpoints under (a). Accepted OPM guidance provides the following interpretation of the term *primary duty*.

As a general rule, the primary duty is that which constitutes a 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) Represents the most important duty;
- (2) Controls the classification of the position (i.e., if that duty were removed, the position would be classified at a lower grade); 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.

Under duty F., PD [number] states that no more than 25 percent of the claimants' time will be spent performing work in support of resource management activities. The PD states in the second paragraph of the introductory section that such work is incidental to performing law enforcement work. Thus, duty F. does not represent the most important duty. Further, a review of the agency's classification evaluation statement reflects that duty F. was not considered in the classification. The resource management work described in duty F. does not represent the primary duty. For the same reasons, duties B. through E. cannot be considered the primary duty.

PD [number] states that the primary purpose is to enforce Federal laws and regulations relating to public lands and resources managed by the BLM. Duties A.1-3 and A.5-9 describe routine law enforcement work: investigating, apprehending, and enforcing Federal or State criminal laws and Federal laws and regulations related to public land and resources. The claimants also carry out duty A.4 which involves the preparation of law enforcement work plans incorporating resource management objectives and concerns. Duty A.4 is a small portion of the overall law enforcement work and, while helpful in carrying out their law enforcement duties, duty A.4 alone does not

represent the claimants' most important duty. In addition, the agency's classification evaluation statement of PD [number] reflects that duty A.4. does not control the classification of the claimants' positions. The classification of the claimants' work is governed, for instance, by the requirement for an intensive practical knowledge of the laws, concepts, operational practices and law enforcement methods and techniques to perform the full range of duties typically encountered in the enforcement of FLPMA and other Federal laws and regulations governing situations which may occur on public lands. The law enforcement work occupies more than 50 percent of the claimants' time. The primary duty is the law enforcement work.

(a)(1) The agency finds that the claimants meet criterion (a)(1) where the employee's primary duty consists of work that significantly affects the formulation or execution of management policies or programs. Following is the accepted OPM interpretation of the term *formulation or execution of management policies or programs*:

Management policies and programs range from broad national goals that are expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that are acted on by others. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations in furtherance of the operation of programs and accomplishment of program objectives.

Administrative employees engaged in formulation or execution of management policies or programs typically perform one or more phases of program management (i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing or of other organizations subject to regulation or other controls). Some of these employees are classified in occupations that reflect these functions (e.g., program analyst) but many are classified in subject matter occupations.

BLM believes that the claimants meet this interpretation because the claimants develop proposals for District and Resource Area resource management plans and for law enforcement plans and they obtain compliance with policies reflected in those plans, and make significant determinations for the law enforcement program in the field office. We find, for reasons discussed on the preceding page, that the development of law enforcement and resource management plans does not constitute the claimants' primary duty and will not consider them further. The claimants' primary duty involves investigations, apprehensions, and enforcement of Federal laws and regulations. Under Factor 5 of PD [number] it states:

The purpose of the work is the enforcement of laws, regulations and related statutes concerning public lands and resources. The law enforcement work involves apprehending persons suspected of committing criminal violations, investigating

criminal activity and violations, and developing case information sufficient to have suspects tried in court hearings or trials. The effect of the work results in the protection and enhancement of numerous and high resource values on BLM-managed lands, and the protection of visitors and users on those lands.

The claimants' primary duty does not involve obtaining compliance with BLM policies, but rather are routine law enforcement tasks involved in obtaining compliance with the law and regulations.

BLM also believes that law enforcement work is a management program and the claimants' work clearly affected the execution of that program. BLM finds that investigating, apprehending, and enforcing laws significantly affects the execution of the law enforcement program in a given District or Resource Area. The claimants *effect* the execution of policy by carrying out the work. However, we do not find that their primary duty (i.e., routine law enforcement work) *significantly affects*, i.e., influences or changes, the execution of policy.

The claimants do not meet criterion (a)(1).

(a)(2) We find that the claimants' work does not involve general management or business functions or supporting services of substantial importance to the organization serviced. The claimants do not provide expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts; they do not assume facets of the overall management function, such as safety management, personnel management, or budgeting and financial management; they do not represent management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; and they do not provide supporting services, such as automated data processing, communications, or procurement and distribution of supplies. Neither the agency nor the claimants disagree.

(a)(3) The claimants do not meet (a)(3) either. The claimants do not participate in the functions of a management official. This subpoint covers employees (variously identified as secretaries, administrative or executive assistants, aids, etc.) who participate in portions of the managerial or administrative functions of the supervisor whose scope of responsibility precludes personally attending to all aspects of the work. Such employees perform varied duties such as personally attending to or redirecting calls and visitors; scheduling or rejecting invitations and requests for appointments; representing or arranging for another staff member to represent the supervisor in conferences or meetings; and similar actions which significantly affect the supervisor's effectiveness. Neither the agency nor the claimants disagree.

The claimants do not meet criterion (a).

Criterion (b)

To evaluate criterion (b), we must first determine if the claimants perform office or other predominantly nonmanual work.

OPM has not provided an interpretation of the term *nonmanual work*. However, OPM is to interpret the FLSA consistent with the U.S. Department of Labor's (DOL) regulations. DOL administers the FLSA for State and local governments, the U.S. Post Office, and the private sector. DOL explains the term *nonmanual work* in 29 CFR 541.203:

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to *white-collar* employees who meet the tests. If the work is *office* work it is immaterial if it is manual or nonmanual in nature. This is consistent with the intent to include within the term *administrative* only employees who are basically white-collar employees since the accepted usage of the term *white-collar* includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of [the administrative exemption criteria] (although they would not qualify as administrative employees since they do not meet the other [administrative exemption criteria]).

(b) [The administrative exemption criteria do] not completely prohibit the performance of manual work by an *administrative* employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to *white-collar* employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a *white-collar* employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of [the administrative exemption criteria]. An office employee, on the other hand, is a *white-collar* worker, and would not lose the exemption on the grounds that he is not primarily engaged in *nonmanual* work, although he would lose the exemption if he failed to meet any of the other requirements.

Webster's Ninth New Collegiate Dictionary (1986) defines *manual* as "requiring or using physical skill or energy." We conclude, therefore, nonmanual work would not call for significant use of physical skill or energy.

The claimants' PD and the classification evaluation statement reflect that their law enforcement work requires considerable physical exertion, e.g., long periods of standing, crawling, walking and running over rough, uneven, rocky surfaces and through wooded or brush areas, performing these activities day or night, when the claimants may be required to respond immediately from a sedentary activity to an extremely arduous activity. The duties of the position are so rigorous that a physical examination was required to ensure that the claimants could perform the work before they were assigned to it. The work is performed both in a typical office setting and outside with exposure to hazardous and environmentally adverse conditions. Field work is normally performed alone in isolated areas and for extended periods of time. Many investigations occur in isolated areas of the public lands. The remote areas are in high mountains as well as desert areas, canyons, and other types of rough terrain. This type of work involves potentially high risks with personal exposure to dangerous situations, including possible physical attack or other uncontrollable conditions. They travel on foot, horseback, or in vehicles such as four-wheel drives, motorcycles, and all-terrain vehicles.

Given that the field work is performed on a regular and recurring basis and the level of effort required in the environment described, the claimants' work cannot be considered *office or other predominantly nonmanual work*. The claimants' work does require the use of physical skill and energy. The work involves considerable strenuous physical exertion, e.g., long periods of standing, crawling, walking, and running over rough, uneven, rocky surfaces and through wooded or brush areas. They perform the work in isolated areas such as in mountain and desert areas, canyons, and other types of rough terrain. The work involves potentially high risks with personal exposure to dangerous situations including possible physical attack. We must conclude that the claimants' work is manual work.

BLM believes that the claimants' work meets both subpoints under criterion (b). However, BLM has not addressed the nonmanual work issue. This issue must be decided first. Since we find that the claimants do not perform office or other predominantly nonmanual work, it is not necessary to determine if the claimants meet either of the two subpoints under criterion (b).

The claimants do not meet criterion (b).

Summary

To meet the administrative exemption criteria found in 5 CFR 551.205, the employee must meet *all* of the criteria. Since the claimants do not meet two of the criteria, there is no requirement that the remaining criteria be evaluated. The claimants do not meet the administrative exemption criteria.

Decision

The claimants' Law Enforcement Ranger GS-1801-9 positions (PD number) are nonexempt from the FLSA. This decision covers the entire complaint period, including the present. During the

complaint period, the claimants are generally due FLSA overtime pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act or are in excess of 40 hours in a workweek if the claimants do not receive compensation for those hours under 5 U.S. Code 5545(c)(1) or (c)(2).

Compliance instructions

Claimants

The servicing personnel office must submit a compliance report containing the corrected position description and Standard Form 50's showing that the claimants' exemption status has been changed to comply with this decision. The corrected position description and SF 50's should be sent to this office within 15 workdays of receiving the decision.

FPM Letter 551-5 or 551-24 will contain the appropriate guidance for computing pay when FLSA overtime is due. Although the FPM was abolished, the guidance in these FPM Letters is still applicable as is other FPM guidance cited in this decision. As indicated earlier, the claimants' overtime pay must be calculated on a work period or workweek basis. Therefore, for each work period or workweek in the claim period, the agency is to compute the claimants' pay entitlement using the guidance in the appropriate FPM letter. The claimants are due this amount, minus whatever they have already been paid for the work period or workweek.

Five CFR 550.806 and the attached FPM Letter 550-78 show that the claimants are also owed interest on the back pay discussed above. Therefore, the agency is instructed to compute that interest as described in the regulation and the FPM letter. To help with this, we have enclosed a floppy disk containing an OPM program for computing such interest and instructions on using the program.

If a claimant and the agency cannot agree on the amount due, the claimant can submit a claim to this office.

Identical and similar positions

This decision applies to all identical and similar positions. The agency must submit a plan with timeframes for reviewing the FLSA status of identical and similar positions and for making corrections and payments including interest to all affected employees, if necessary. The plan should be sent to us within 30 workdays from receiving this decision.

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

Attachments