

**FAIR LABOR STANDARDS ACT DECISION
U.S. OFFICE OF PERSONNEL MANAGEMENT
CHICAGO OVERSIGHT DIVISION**

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

POSITION : Cook, NA-7404-8

POSITION LOCATION: Department of the Army
 Non-appropriated Funds
 Clubs and Entertainment
 [installation]

CLAIM: Worked more than 40 hours per week without
 overtime compensation.

OFFICE OF PERSONNEL
MANAGEMENT DECISION: Overtime payment is due.
OPM DECISION NUMBER: F-7404-08-01

This is the final administrative decision on the claim and is not subject to further appeal. It is subject to review at the request of the claimant or agency involved at the discretion of the Office of Personnel Management Director. If dissatisfied with this decision, the claimant may pursue his claim in Federal court.

/s/

ANNA MARIE SCHUH
DIRECTOR, CHICAGO OVERSIGHT DIVISION

August 22, 1996

DATE

DECISION TRANSMITTED TO:

[claimant's name]
[address]
[city, state]

[name]
Civilian Personnel Officer
installation

Mr. David L. Snyder
Director, Civilian Personnel Management
U.S. Total Army Personnel Command
Attn: TAPC-CPF-P
200 Stovall Street
Alexandria, Virginia 22332-0360

Defense Civilian Personnel Management
Service
Field Advisory Services
1400 Key Boulevard
Arlington, Virginia 22209-5144

Mr. Harold Scholler
Director, U.S. Army Civilian
Personnel Evaluation Agency
1941 Jefferson Davis Highway
Arlington, Virginia 22202-3525

INTRODUCTION

On December 3, 1993, the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) complaint from [claimant]. He claims that from March 7, 1991, to September 22, 1993, he worked uncompensated overtime in excess of his 40 hour workweek. During the claim period, he worked for the Non-appropriated Funds (NAF), [installation], [location] primarily as a Cook at [activity]. He is not subject to a two year time limit on filing claims because his claim was filed December 3, 1993. (Section 640 of Public Law 103-329 established a six year time limit for any FLSA claims filed before June 30, 1994.) We have accepted and decided his claim under Section 4(f) of the FLSA as amended.

The FLSA requires that agencies compensate nonexempt employees for work exceeding 40 hours per week at a rate not less than 1½ times their regular rate. Hours under the FLSA are all hours that the employer suffers or permits the employee to work. Work is suffered or permitted if it is performed for the benefit of the agency, whether requested or not, provided that the employee's supervisor knows or has reason to believe that work is performed.

GENERAL ISSUES

The claimant states that he regularly performed work in excess of forty hours per week. He indicates that during most of his claim period, he had an arrangement with his supervisor to take compensatory leave in lieu of overtime pay for excess hours that he worked. He contends that the compensatory time off that he did take only amounted to a couple of days and did not reflect the overtime he actually worked and that even after the arrangement was terminated he continued to work overtime, but was not compensated.

The agency contends that the claimant should have been exempt from the overtime provisions of the FLSA because he was actually serving in a supervisory capacity. The agency also contends that the claimant agreed to accept compensatory time off in lieu of overtime pay and therefore is not due the compensation claimed.

INFORMATION CONSIDERED

Claimant's Proof

- Diary with daily entries showing hours worked covering the period from August 26, 1993, through September 13, 1993.
- Chronicle compiled from memory of the dates and hours and the amount of overtime hours he claims to have worked between March 1, 1991, and September 30, 1993.

- Statement that management requested and he agreed to accept a flat rate of pay based on 40 hours a week regardless of the hours worked with compensatory time off in lieu of overtime pay.
- List of co-workers he believes able to verify his claim.

Agency Response To Claim

- Supervisors' statements indicating that the claimant had agreed to accept a flat rate of pay based on 40 hours a week regardless of the hours worked with compensatory time off in lieu of overtime pay.
- Supervisors' statements that they neither assigned nor observed the claimant working the hours he claimed.
- Assertion that the claimant was in fact correct when he claimed that he should have been classified as a supervisory employee and that he should be retroactively considered exempt and not eligible for overtime pay under the FLSA.
- Contention that the claimant's chronicle is not creditable because it was compiled long after the events occurred, it contained what they felt were incredible claims of time worked, and it contained claims for overtime which occurred after he resigned on September 21, 1993.

Additional Information Examined

- Evaluation statement for the position, Cook, NA-7404-8.
- Official time and payroll records for the period November 14, 1991, through September 21, 1993.
- Claimant's NAFI-Employment Record (DA Form 3438).
- Claimant's Leave and Earnings Statements (DA Form 5352) from September 9, 1990, through September 29, 1993.
- Duty schedules prepared by the claimant's supervisors.

ANALYSIS AND FINDINGS

In an overtime claim under FLSA, the employee initially must prove that he has in fact performed overtime work for which he was not compensated. He must then produce sufficient evidence to show the amount and the extent of the work as a matter of just and reasonable inference. Once he meets

this burden, the burden of proof shifts to the employing agency either to show the precise amount of work performed or to rebut the employee's evidence.

Sufficiency of Proof

Neither the agency time cards nor payroll records show that the claimant performed overtime work or received compensatory time off during the claim period. However, weekly duty schedules prepared by his supervisor show the claimant had been scheduled to work overtime. These schedules are available for most, but not all, the weeks of the claim period. Coupled with statements provided by co-workers (discussed in the Supervisory and Witness Statements section), they indicate that the claimant regularly worked overtime during the period claimed, but the overtime was not recorded as required by law.

The FLSA requires that the employer keep accurate records. In the absence of such records, the employer is liable if the employee meets his burden of proof. Where an agency has failed to record overtime hours as required by the Act, the employee may prevail in a claim on the basis of evidence other than official agency records. In the absence of official records, the employee must show the amount and extent of work by reasonable inference.

Most of the claimant's documentation fails to meet the initial burden of proof. His chronicle of hours worked was compiled six months after his resignation on September 21, 1993, following our request for a list of hours worked for each day claimed. His chronicle has obvious errors, such as overtime claims for periods when he was no longer employed by the agency. He attributes the discrepancies in his chronicle to the length of time which had passed between the time he resigned and when he attempted to recreate his schedule. In creating his chronicle he tried to replicate hours he worked during a routine week plus those extra hours required during peak periods, for special events, and recurring events such as inventories. He also contends that his diary had been sent to the Department of Labor with his initial claim and was not available to him when he created the chronicle from memory.

The claimant's diary is his daily record of work related issues including the hours he worked between August 26 and September 14, 1993. Given its calendar nature and other supporting evidence (the duty schedules and corroborating statements of co-workers discussed below), it provides, in the absence of accurate agency records, an acceptable record from which the claimant's hours of work may be reasonably inferred. His chronicle, however, compiled months and years after the fact, is unsuited to the diary's task, i.e., accurately recording specific events, such as hours worked each day, before time clouds them. Consequently, without specific corroboration to support it, it is virtually no better than mere assertion. The burden is on the claimant to establish the liability of the government and his right to payment. Mere assertions of working overtime coupled with indefinite statements on the part of former supervisors or co-workers cannot establish an entitlement to compensation.

Claims against the Government must be predicated, if at all possible, upon official records. Where agency action has precluded official records from reflecting overtime, other forms of evidence or

documentation may be acceptable. The weekly duty schedule, coupled with general corroborating statements, provides acceptable documentation in the claimant's case for most of his claim period prior to his diary. (For those pay periods for which neither a duty schedule nor diary is available, the amount and extent of overtime hours can be reasonably inferred where a pattern of work is evident.)

The claimant has, therefore, shifted the burden to the employer to come forward with evidence of the precise amount of overtime work performed or with evidence negating the reasonableness of the inference to be drawn from the employee's evidence. Without such evidence, the agency is liable for payment.

Supervisory and Witness Statements

Agency supervisory statements suggest the claimant worked less overtime than claimed and that he was compensated, at least on some occasions, by taking an equivalent amount of time off. The statements from the managers and the claimant's witnesses do not provide a clear picture of the frequency or extent of the claimant's overtime. [Name], the club manager between January 1991 and June 1993 stated, "[Claimant] did work in excess of eight hours in one day and on an 'as needed basis' he occasionally worked over forty. He was always reimbursed compensatory time . . ." Of the duty schedule overtime (see appendix), all but a few hours occurred while [name] was the club manager. Agency records do not show compensatory time being granted during this period.

[Name], duty manager from April 1991 until June 1993, when she became acting club manager, indicated she was unaware that the claimant ever worked the extended periods he claimed, such as noon till midnight. She does acknowledge, though, that the claimant was often allowed time off without any charge to his annual leave and that he would often leave as much as two hours early.

The duty schedules provided by the agency do show scheduled tours for the claimant beginning at noon and ending at 10 p.m. during the period [name] was the duty manager.

The claimant's contention that he consistently worked overtime is supported to varying degrees by the witnesses he and the agency identified. However, their opinions vary greatly as to the frequency and duration of work. It is further complicated by the fact that the witnesses seldom worked exactly the same scheduled hours or even, in some cases, at the same location as the claimant. The witnesses whose statements most closely support the claimant were employed at the Officers' Club and not [name of restaurant]. Their perspectives are based on work related contacts, "grapevine" information, and occasionally temporary work assignments at [name of restaurant]'s. While everyone did not agree as to the extent of the claimant's overtime, they did agree that he worked extra hours "prepping" the kitchen, closing the restaurant, and completing paperwork and inventories. They also believed his supervisors were aware he was performing this work.

The individuals recommended as sources of information by both the claimant and a manager at [name of restaurant] included [name], manager of the Officer's Club; [name], cook at the Officer's Club; [name], cashier and part time duty manager of [activity]; and [name], server and duty manager of [activity]. They did not respond to our written interrogatories, but instead responded to our follow-up telephone calls. One other person declined our request for information.

Compensatory Time

The agency contends that the claimant agreed to accept compensatory time off in lieu of overtime pay. This is supported in written statements from the claimant and two of his former supervisors. The statements from club managers attached to the agency's December 1, 1994, response to the claim include the following:

. . . he (the claimant) would only be paid for forty hours a week regardless of the number of hours that he actually worked, but he would receive compensatory time for all hours over forty. When I took over the facility I followed the same guidance.

and,

I was present when they discussed comp time with Phil if he was ever to go over 40 hours. [Name] totally agreed with this and was not charged with annual leave when he took it.

This arrangement was instituted around the end of May 1991. Prior to May 30, 1991, the claimant was working full time hours (even though he was not officially converted to full time status until August 1991) and being paid overtime according to agency payroll records and his Leave and Earnings Statements. (He was paid overtime eight times or about half the pay periods between November 1, 1990, and May 29, 1991). From the end of May 1991 on, however, no overtime payments, except for a single three hour payment, appear.

It is clear the claimant agreed to take compensatory time off in lieu of overtime pay, that he continued to work beyond 40 hours per week, and that his supervisors were generally aware of it. Under 5 U.S.C. 5543, an agency may grant compensatory time off instead of overtime payment to employees meeting the definition given in 5 U.S.C. 5541. Wage Grade employees, like the claimant, are excluded by definition. They are paid instead under 5 U.S.C. 5544, which has no provision for compensatory time in lieu of overtime, i.e., employees must be given overtime pay for hours in excess of eight hours a day or forty hours a week. (An exception to this rule, is now provided under 5 U.S.C. 6123 for Wage Grade employees who are on flexible or compressed work weeks, e.g., who work longer days in order to shorten their work week. The claimant did not have a flexible tour of duty). Therefore, the mutual arrangement for compensatory time off was not legitimate and the agency is liable for payment at the overtime rate in effect when earned, less the value of any compensatory time that it can precisely establish was taken by the claimant.

Agency Records

The acknowledged agreement between [activity's] managers and the claimant support the contention that the claimant continued to work overtime, though it was no longer recorded as required by the FLSA, after May 30, 1991, when overtime payments virtually stopped. Consequently, the weekly duty schedules prepared by the claimant's supervisors are a more credible source of the actual time the claimant worked than the agency's time cards.

Weekly duty schedules show he was officially scheduled to work overtime (but received no monetary compensation according to payroll records) between November 14, 1991, when the schedules first become available, and September 21, 1993, when the claimant resigns. These documents, taken in light of the admission of agency officials that they entered into an agreement with the claimant that he would continue to work overtime, when coupled with corroborating statements from co-workers, lend credibility to the claim.

Exemption Status

The agency contends the claimant's supervision of other workers while a Cook exempts his position from FLSA overtime payment. As a wage grade employee, the claimant would have to spend eighty percent of his time performing supervisory or closely related duties before his position would be considered exempt from the overtime provisions of the FLSA.

The agency provided an evaluation statement for the position which noted that Cooks do not always have three full time equivalent employees to lead. With so few subordinates it is unlikely that the claimant would need to devote eighty percent of his time to supervising, versus personally performing work. The duty manager on the claimant's shift stated that at times there would be up to five people under the claimant's direction, but even then estimated the claimant was spending only fifty percent of his time performing supervisory duties.

Based on this information, we find the agency's original determination correct that the claimant was not exempt from the overtime provisions of the FLSA. However, his September 2, 1993, conversion to a Food Service Supervisor, NT-1667-3, placed him in an FLSA exempt position. That agency determination was not challenged by the claimant. Consequently, any overtime claims following his conversion are not considered.

DECISION

We find that the claimant is due compensation under the FLSA for overtime work during a portion of his claim period, specifically, May 30, 1991, through September 1, 1993. Prior to that time, agency records accurately record overtime hours and their payment. Following that time, the claimant held a supervisory position exempt from the FLSA's overtime provisions. The hours he was permitted to work and for which he did not receive proper overtime payment are detailed in the appendix. The total payment owed must be calculated by the agency in accordance with the requirements in 5 C.F.R. 551. The agency is liable for payment at the overtime rate in effect when it was earned, less the value of any compensatory time that it can precisely establish was taken by the claimant.

Non-appropriated fund employees are considered employees for the purposes of the FLSA but not for the purposes of the interest on back pay statute. Consequently, though the claimant is owed overtime under the FLSA, no interest may be paid on the amount owed.

United States
**Office of
Personnel Management**

Chicago Oversight Division
230 South Dearborn, 30th Floor
Chicago, Illinois 60604-1687

In Reply Refer To:

Your Reference:

[name]
Civilian Personnel Officer
[activity]
[location]

Dear [name]:

Enclosed is our final decision on the overtime claim of [claimant's name]. As you will note, we have determined that he is entitled to payment for overtime hours under the Fair Labor Standards Act.

Our decision determined the agency is liable for payment during the claim period, but leaves calculation of the payment amount to the agency. Before making payment on this claim, however, we ask that your office provide us within 30 days of receiving the decision a worksheet showing the daily and weekly overtime pay computations made in accordance with the requirements of 5 C.F.R. 551. Examples of such computations were originally provided in FPM Letter 551-24, dated January 14, 1992. Our office will provide assistance in laying out a worksheet for these computations if you provide us with a point of contact name and phone number.

Should you have any questions concerning this matter, please call Mr. John McConnell at (312) 353-0387.

Sincerely,

Anna Marie Schuh
Director, Chicago Oversight Division

Enclosure

cc: Mr. David L. Snyder
Director, Civilian Personnel Management
U.S. Total Army Personnel Command
Attn: TAPC-CPF-P

200 Stovall Street
Alexandria, Virginia 22332-0360

Mr. Harold Scholler
Director, U.S. Army Civilian
Personnel Evaluation Agency
1941 Jefferson Davis Highway
Arlington, Virginia 22202-3525

Defense Civilian Personnel Management
Service
Field Advisory Services
1400 Key Boulevard
Arlington, Virginia 22209-5144

bcc: U.S. Office of Personnel Management
1900 E Street, NW Room 7305
Washington, DC 20415-0001

Service Center Director
Dayton Service Center

CHOD:JMCCONNELL:8/6/01(amp)

United States
**Office of
Personnel Management**

Chicago Oversight Division
230 South Dearborn, 30th Floor
Chicago, Illinois 60604-1687

In Reply Refer To:

Your Reference:

[claimant's name]
[address]
[city, state]

Dear [claimant's name]:

Enclosed is our final decision on your overtime claim. As you will note, we have determined that you are due payment for overtime hours under the Fair Labor Standards Act. We have asked the agency to compute the total amount due in accordance with pay regulations and to present their calculations to us for verification within 30 days.

This is the final administrative decision of the Government, subject to review at the discretion of the Office of Personnel Management Director. If dissatisfied with this decision, you may pursue your overtime claim in Federal court.

Sincerely,

Anna Marie Schuh
Director, Chicago Oversight Division

Enclosure

CHOD:JMCCONNELL:8/6/01

Appendix

The table **Claimant's Hours of Work** covers May 30, 1991, the beginning of the most likely pay period when the agreement to substitute compensatory time for overtime pay was implemented, up to September 2, 1993, the beginning of the pay period when the claimant was promoted to a supervisory position.

The **Hours Scheduled** column reflects the weekly sum of hours the claimant was scheduled to work, based upon available duty schedules. **NA** appears in this column for periods where duty schedules are missing. Overtime hours were then inferred, according to the most likely work schedule for the missing period. These hours are listed in the **Inferred Overtime Hours** column of the table and are based upon the immediate work trend (the preceding and following week) for occasional breaks in duty schedule coverage, or an average (4 hours) of scheduled overtime hours where duty schedules are missing for an extended period. Although the duty schedule for the week of November 27, 1991, is missing, the overtime (3 hours) paid that period is presumed accurate.

The **Total Hours of Actual Work** column reflects all hours scheduled or inferred and includes paid hours in non-work status, e.g., annual leave, holidays, etc. **Overtime Due** shows hours exceeding 40 per week, payment for which the agency is liable.

CLAIMANT'S HOURS OF WORK

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
06/05/91	NA	4	44	4
06/12/91	NA	4	44	4
07/03/91	NA	4	44	4
07/10/91	NA	4	44	4
07/17/91	NA	4	44	4
07/24/91	NA	4	44	4
07/31/91	NA	4	44	4
08/07/91	NA	4	44	4
08/14/91	NA	4	44	4
08/21/91	NA	4	44	4

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
08/28/91	NA	4	44	4
09/04/91	NA	4	44	4
09/11/91	NA	4	44	4
09/18/91	NA	4	44	4
09/25/91	NA	4	44	4
10/02/91	NA	4	44	4
10/09/91	NA	4	44	4
10/16/91	NA	4	44	4
10/23/91	NA	4	44	4
10/30/91	NA	4	44	4
11/06/91	NA	4	44	4
11/13/91	NA	4	44	4
11/20/91	NA	4	44	4
11/27/91	NA	0	43*	0
12/04/91	NA	4	44	4
12/11/91	NA	4	44	4
12/18/91	NA	4	44	4
12/25/91	NA	4	44	4
01/01/92	39	0	39	0
01/08/92	NA	4	44	4
01/15/92	38	0	38	0
01/22/92	39.5	0	39.5	0
01/29/92	40	0	40	0
02/05/92	39	0	39	0
02/12/92	40	0	40	0

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
02/19/92	40	0	40	0
02/26/92	46	0	46	6
03/04/92	43.5	0	43.5	3.5
03/11/92	44.5	0	44.5	4.5
03/18/92	47.5	0	47.5	7.5
03/25/92	47.5	0	47.5	7.5
04/01/92	47.5	0	47.5	7.5
04/08/92	47.5	0	47.5	7.5
04/15/92	47.5	0	47.5	7.5
04/22/92	55	0	55	15
04/29/92	47.5	0	47.5	7.5
05/06/92	47.5	0	47.5	7.5
05/13/92	55	0	55	15
05/20/92	47.5	0	47.5	7.5
05/27/92	38	0	38	0
06/03/92	47.5	0	47.5	7.5
06/10/92	47.5	0	47.5	7.5
06/17/92	47.5	0	47.5	7.5
06/24/92	43	0	43	3
07/01/92	47.5	0	47.5	7.5
07/08/92	40	0	40	0
07/15/92	40	0	40	0
07/22/92	40	0	40	0
07/29/92	47.5	0	47.5	7.5
08/05/92	46	0	46	6

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
08/12/92	NA	6	46	6
08/19/92	NA	6	46	6
08/26/92	46	0	46	6
09/02/92	51	0	51	11
09/09/92	46	0	46	6
09/16/92	47.5	0	47.5	7.5
09/23/92	46	0	46	6
09/30/92	47.5	0	47.5	7.5
10/07/92	47.5	0	47.5	7.5
10/14/92	46	0	46	6
10/21/92	47.5	0	47.5	7.5
10/28/92	38	0	38	0
11/04/92	46	0	46	6
11/11/92	47.5	0	47.5	7.5
11/18/92	48	0	48	8
11/25/92	47.5	0	47.5	7.5
12/02/92	NA	7.5	47.5	7.5
12/09/92	47.5	0	47.5	7.5
12/16/92	NA	7.5	47.5	7.5
12/23/92	47.5	0	47.5	7.5
12/30/92	46	0	46	6
01/06/93	41	0	41	1
01/13/93	40	0	40	0
01/20/93	40.5	0	40.5	0.5
01/27/93	42.5	0	42.5	2.5

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
02/03/93	42.5	0	42.5	2.5
02/10/93	42.5	0	42.5	2.5
02/17/93	42	0	42	2
02/24/93	42.5	0	42.5	2.5
03/03/93	42.5	0	42.5	2.5
03/10/93	42.5	0	42.5	2.5
03/17/93	42.5	0	42.5	2.5
03/24/93	42.5	0	42.5	2.5
03/31/93	42.5	0	42.5	2.5
04/07/93	40.5	0	40.5	0.5
04/14/93	40	0	40	0
04/21/93	40	0	40	0
04/28/93	NA	0	40	0
05/05/93	40	0	40	0
05/12/93	NA	0	40	0
05/19/93	47	0	47	7
05/26/93	40	0	40	0
06/02/93	40.5	0	40.5	0.5
06/09/93	40	0	40	0
06/16/93	40	0	40	0
06/23/93	32	0	40	0
06/30/93	49	0	49	9
07/07/93	NA	4.5	44.5	4.5
07/14/93	40	0	40	0
07/21/93	NA	0	40	0

Work Week Ending	Hours Scheduled	Inferred Overtime Hours	Total Hours of Actual Work	Overtime Due
07/28/93	NA	0	40	0
08/04/93	NA	0	40	0
08/11/93	40	0	40	0
08/18/93	40	0	40	0
08/25/93	40	0	40	0
09/01/93	40	6.75**	46.75	6.75
Total hours of overtime owed complainant				458.75

* Three hours of overtime were paid for the pay period ending 11/27/91.

** From claimant's diary.