

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

Office of Merit Systems Oversight and Effectiveness  
1900 E Street, NW  
Washington, DC 20415-6000

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

**Claimant:** [name]

**Agency classification:** Soil Conservationist  
GS-0457-11

**Organization:** United States Department of Agriculture  
National Resources Conservation Service  
[city, state]

**Claim:** Exemption status. Due back pay for  
overtime worked.

**OPM decision:** Exempt. No overtime payment due.

**OPM decision number:** F-0457-11-01

        /s/          
Deborah Y. McKissick  
FLSA Claims Officer  
        6/28/02          
Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which 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 5 CFR 551.708 (address provided in 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

**Decision sent to:**

[claimant's name and address]

[name]  
Acting State Conservationist  
United States Department of Agriculture  
Natural Resources Conservation Service  
[address]

[name]  
Assistant State Conservationist  
Acting Human Resources Officer  
United States Department of Agriculture  
Natural Resources Conservation Service State Office  
[address]

## **Introduction**

On December 12, 2001, the Office of Merit Systems Oversight and Effectiveness (OMSOE) of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. He believes that the FLSA exemption status of his position should be nonexempt, and that he is owed additional payment for overtime worked for the period from December 9, 1993 to August 1, 1999. The claimant works in the Natural Resources Conservationist Office as a Soil Conservationist, GS-0457-11. We have accepted and decided his claim under section 4(f) of title 29 (FLSA), United States Code. We received the agency administrative report on April 1, 2002.

As is customary with our analysis of an FLSA claim, we reviewed the position description of record and other information provided by the claimant and the agency.

## **General issues**

The claimant believes that his exemption status, exempt, is not correct. We must make our decision solely by comparing the claimant's duties and responsibilities to Federal regulations and other Federal guidelines. Since comparison to Federal guidelines is the exclusive method for making exemption decisions, we cannot compare the claimant's position to others as a basis for deciding his claim.

The claimant believes all his overtime hours worked during the period from December 9, 1993 to August 1, 1999 are valid, and he is requesting compensation for these overtime hours.

## **Job information**

The FLSA designation exemption status of the claimant's position is classified as exempt. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (5 CFR 551.202). The claimant's position is a Soil Conservationist, GS-0457-11.

According to the position description for the claimant's position, Soil Conservationist, GS-0457-11, the claimant performs as the district conservationist, coordinating the soil and water conservation program. His major duties include, but are not limited to,

- analyzing the workload and recommending conservation goals and work priorities;
- planning operations to achieve established goals;
- preparing, revising, and/or directing the preparation and revision of resource conservation plans and long-term contracts;
- planning, applying, and/or directing the planning and application of structural, vegetative, cultural, and management practices; and

- organizing and carrying out an informational program on resource conservation activities through the various news media and other public relations tools.

## **Evaluation**

The statute of limitations for FLSA claims is explained in 5 CFR § 551.702(b). There is a two-year statute of limitation on FLSA claims filed on or after June 30, 1994, except in cases of a willful violation committed by the agency. There is a three-year statute of limitations on FLSA claims when an agency commits a willful violation.

Sections 551.205, 551.206, and 551.207 of title 5, Code of Federal Regulations (5 CFR) contain criteria governing whether the claimant's position should be exempt from the FLSA. The executive exemption criteria in 5 CFR 551.205, define an "executive" as a supervisor, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees. The claimant's work does not meet the exemption definition of executive criteria as described in 5 CFR 551.205.

The administrative exemption criteria in 5 CFR 551.206, define an "administrative employee" as an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four criteria. The claimant's work does not meet the exemption definition of administrative criteria as described in 5 CFR 551.206.

Our application of the professional exemption criteria follows.

### Professional Exemption Criteria

Under the professional exemption criteria in 5 CFR 551.207, a professional employee is an employee who meets all of the criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) *Primary duty test.* The primary duty test is met if the employee's work consists of :

- (1) 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; or

- (2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or
  - (3) Work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. specifications; or
- (b) *Intellectual and varied work test.* The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.
  - (c) *Discretion and independent judgement test.* The employee frequently exercises discretion and independent judgement, under only general supervision, in performing the normal day-to-day work.
  - (d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

The claimant does meet (a)(1).

To meet (a)(1), the claimant must perform 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. The claimant applies a wide range of soil and water conservation principles, methods, and techniques to analyze and evaluate complex natural resource factors and interpret related social and economic conditions. In addition, he devises and implements comprehensive, integrated resource conservation plans. Such knowledge is characteristically acquired through specialized academic education of soil and water conservation principles, methods, and techniques.

The claimant does not meet (a)(2).

The claimant's work is not in a field of artistic endeavor.

The claimant does not meet (a)(3).

OPM guidance indicates work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the items listed under 5 CFR § 551.207(a)(3).

The claimant does meet (b).

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work involving mental processes which involve substantial judgement based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized procedures, or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting and recommending the best alternative from among a broad range of possible actions.

The claimant analyzes and evaluates complex natural resource factors, interprets related social and economic conditions, and devises and implements comprehensive, integrated resource conservation plans. He recommends optimum and alternative natural resource development strategies. The claimant spends over 50 percent of his time on professional work. The position description evaluation statement states that the claimant provides training, guidance, mentoring and leadership in all aspects of planning and application of resource conservation. It also states that the claimant exercises full knowledge of planning processes applicable to natural resource planning in order to develop complex individual, group and area-wide resource plans.

The claimant does meet (c).

Established OPM guidance is that the exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. The work must involve sufficient variables as to regularly require discretion and judgment; the employee must have the authority to make determinations or take action; and the decisions must be significant. Employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents or other guidelines that specifically govern their actions would not meet this element. In addition, deciding whether a situation does or does not conform to clearly applicable criteria would not be considered making significant decisions.

The claimant independently evaluates objectives for resource conservation projects or for activities under his jurisdiction. He also determines appropriate criteria and techniques applicable to the assignment. The claimant extends or adjusts conservation methods and measures to accomplish sound resource development under diverse environmental or community circumstances. The agency states that the claimant recommends broad conservation actions, explaining and describing benefits to be gained, related expenditures, and regulatory requirements and develops the technical conservation alternatives, taking into consideration different implications and viewpoints. The claimant exercises discretion and independent judgement under general supervision to perform the normal day-to-day work.

Criterion (d) is not applicable to the claimant's position.

The claimant meets all of the professional exemption criteria.

## Decision

Based on the above analysis, the claimant's position does not meet the executive exemption nor the administrative exemption criteria. We concur with the agency that the claimant's position meets the professional exemption criteria, and is therefore, exempt, i.e., not covered by the provisions of the Fair Labor Standards Act.

### The matter of overtime

The claimant is requesting compensation for time worked outside of his scheduled tour of duty for the period from December 9, 1993 to August 1, 1999.

OPM's fact-finding revealed that the claimant's position was exempt from the FLSA. Therefore, the claimant's claim must be decided as a Title 5 compensation claim, and not a FLSA claim. Agency instructions state that procedures for requesting overtime must be officially ordered or approved. Section 178.105 of Title 5, Code of Federal Regulations, specifies that claims are settled on the basis of the written record, and the claimant has the burden of establishing the burden of proving his or her right to payment.

According to an agency memorandum, dated April 24, 2002, the agency approved payment for 295.50 hours of the 440.25 hours of overtime time submitted by the claimant. The agency decided that all the overtime hours claimed for attending district board meetings were valid, and the agency approved payment. The agency determined that the hours claimed during limited Conservation Reserve Program (CRP) signups and CRP-related hours claimed in the immediate 4 weeks following the limited signup period fell under the "suffered and permitted" category. Hence, the agency approved payment for the hours claimed during the limited CRP signups, CRP-related hours, and credit leave earned and forfeited during these periods. The agency stated that the other hours were not approved because the hours were not "officially ordered or approved" and do not fall under the definition of "suffered and permitted." The claimant was paid back pay, plus interest for 295.50 hours.

We concur with the agency that, in order to be entitled to overtime pay or compensatory time in lieu of such pay, the overtime must be ordered or approved by an authorized official. *OPM Decision #S004070* (January 19, 2000); *United States Information Agency – Compensatory Time*, B-251636 (June 11, 1993); *Richard R. Bourbeau*, B-238987 (September 7, 1990), *affirmed*, 71 Comp. Gen. 432 (1992); *John W. Wright*, B-236750 (November 7, 1989); *Jim L. Hudson*, B-182180 (January 6, 1982); *Donald W. Plaskett*, B-183916 (March 8, 1976); *Garrett F. Masco*, B-179908 (December 20, 1973). Mere knowledge that an employee is working beyond his normal duty hours, without active inducement of the employee to perform the additional work, is not enough to support payment in the absence of an official order or approval for overtime work to be performed. *John W. Wright, supra.*; 68 Comp. Gen. 385 (1989); *Jim L. Hudson, supra.*; *Donald W. Plaskett, supra.*; *Garrett F. Masco, supra.* Indeed, it is not sufficient that an employing agency tacitly expected that overtime work be performed. *Jim L. Hudson, supra.*

The claimant also has the burden of proving that he or she actually worked overtime that was officially ordered or approved, or actively induced by an agency official with authority

to order or approve overtime work. *Jim L. Hudson, supra*. Under Section 5542(a) of title 5, United States Code (5 U.S.C.), overtime may be paid for work officially ordered or approved. The documents presented by the claimant do not include official documentation showing that the additional 144.75 hours performed outside of the claimant's scheduled work hours were ordered and approved by authorized officials during the claim period. Based on our review of the documents submitted by the claimant, we conclude that the claimant has not established that the additional hours worked by the claimant during the period from December 9, 1993 to August 1, 1999 were ordered or approved consistent with the agency's regulations for doing so. Accordingly, we must uphold the decision of the agency to not pay the claimant the requested additional 144.75 hours of overtime.

OPM does not conduct adversary hearings, but settles claims on the basis of the evidence submitted by the claimant and the written record submitted by the government agency involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Moreover, the burden of proof is on the claimant to prove the liability of the government and his or her right to payment. 5 CFR 178.105; *Matter of Jones and Short*, B-205282, June 15, 1982. Thus, where the written record presents an irreconcilable dispute of fact between a government agency and an individual claimant, the factual dispute is settled in favor of the agency, absent clear and convincing evidence to the contrary. 5 CFR 178.105; *Matter of Staff Sergeant Eugene K. Krampotich*, B-249027, November 5, 1992; *Matter of Elias S. Frey*, B-208911, March 6, 1984; *Matter of Charles F. Callis*, B-205118, March 8, 1982. We are required to settle claims only in accordance with the applicable laws and regulations, and we cannot waive or modify their provisions in individual cases. Therefore, we concur with the agency's decision and the claim for overtime payment is denied.

This settlement is final. No further administrative review is available within the Office of Personnel Management. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.