

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

San Francisco Oversight Division  
120 Howard Street, Room 760  
San Francisco, CA 94105-0001

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

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

**Position:** Operations Clerk  
VC-0303-06

**Organization:** Veterans Canteen Service  
Department of Veterans Affairs  
Medical Center  
[location]

**Claim:** Received no overtime pay for work  
performed before and after  
scheduled tour of duty

**OPM decision:** Overtime pay is due for some work  
performed before the scheduled  
tour of duty plus interest on back pay

**OPM decision number:** F-0303-06-01

/s/

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Carlos A. Torrico  
FLSA Claims Officer

May 31, 2001  
Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the U. S. Office of Personnel Management (OPM) administers the Fair Labor Standards Act (FLSA or the Act). The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with this decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708 (address provided in 5 CFR 551.710). 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, which is enclosed with this decision, 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. If the claimant believes that the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.

### **Decision sent to:**

**Claimant:**

[claimant's name]  
[claimant's address]

**Agency:**

[claimant's servicing personnel office]  
Human Resources Management Service  
Department of Veterans Affairs Medical  
Center  
[location]

Mr. Joseph R. Tober, Associate Director  
Human Resources and Support  
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Deputy Assistant Secretary for Human  
Resources Management  
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## **Introduction**

On July 13, 2000, the San Francisco Oversight Division of the U. S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA or the Act) claim from [claimant's name]. Initially, he claimed that from January 4, 1999, through January 21, 2000, he worked overtime hours both before and after his scheduled work hours for which he should have been paid under the Act. During this period, he worked first as the Operations Clerk, a nonexempt position, classified as VC-0303-06. On July 18, 1999, he was converted to the exempt position of Assistant Canteen Chief, VC-1101-09. Both positions were with the Department of Veterans Affairs Medical Center (DVAMC), Veterans Canteen Service (VCS), [location]. During a telephone conversation with a representative of this office on February 12, 2001, the claimant said that he was not appealing the exempt status of the latter position, and he was limiting the claim period to January 4, 1999, through July 17, 1999. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

To help decide the claim, a representative of this office held telephone interviews with the claimant on February 12 and 23, and March 23, 2001. Phone interviews were also held on February 13 through February 26, 2001, with [names of claimant's coworkers]. These individuals were coworkers of the claimant during the claim period. Phone interviews were also held with [name], the claimant's immediate supervisor during the claim period, on February 15, 2001; [name], Regional Director, VCS, [location], on February 16, March 20, and March 23, 2001; [name], the former Assistant Canteen Chief who sometimes acted as the claimant's supervisor during the claim period, on February 16, 2001; [name], Human Resources Specialist, DVAMC, on February 20, 2001; and [name], Human Resources Specialist, VCS, on February 23, 2001. In reaching our FLSA decision, we have reviewed information gained from these interviews and all material of record furnished by the claimant and his agency.

## **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 how much FLSA overtime pay he is owed if any. We must make that decision solely 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 our making that comparison.

## **Evaluation**

The claimant believes that he performed a total of 232.5 hours of uncompensated work from January 4, 1999, through July 17, 1999, for which he should be paid under the FLSA. Agency records show that he performed work outside of his regularly scheduled tour of duty during the claim period and was compensated for this work with eight hours of paid overtime and 43.5 hours of compensatory time. The records also show that he used all 43.5 hours of compensatory time earned before the claim period ended. These records do not show that he performed the additional 232.5 hours covered in his claim. Several Comptroller General decisions including

one concerning Christine D. Taliaferro (B-199783, March 9, 1981) indicate that in this situation, the claimant is due FLSA overtime pay if the two following criteria are met.

1. He shows that he has performed overtime work under the FLSA for which he was not paid; and
2. He produces enough evidence to show the amount and extent of that work as a matter of reasonable inference.

Our discussion of each criterion follows.

1. Did the claimant show that he performed FLSA overtime work?

To decide if the claimant performed overtime work under the FLSA, we must first determine whether he performed any work that was "suffered or permitted" under the Act. Section 551.104 of Title 5 CFR shows that he performed such work if the following conditions are met:

- a) He performed work for the benefit of the agency, whether requested or not, beyond normal duty hours during the periods specified;
- b) His supervisors knew or had reason to believe that the work was being performed; and
- c) They had opportunity to prevent the work from being performed.

We discuss these three conditions below.

*a) Did the claimant perform work beyond normal duty hours?*

To document the additional uncompensated hours worked during the claim period, the claimant provided monthly calendars showing daily hours worked during the claim period. The claimant prepared these calendars in February 2001 after receiving, upon his request, copies of the agency's official time and leave records showing when, during the claim period, he had already received overtime pay and compensatory time. The agency's official records indicate the claimant's regularly scheduled tour of duty for each two-week pay period was as follows: Week 1) 7:15 a.m. through 3:45 p.m. Monday through Friday; and Week 2) 7:15 a.m. through 3:45 p.m. Tuesday through Friday and 8:00 a.m. through 4:30 p.m. on Saturday. On his calendars, the claimant indicates that he worked only his normal duty hours on Saturdays, but he worked from 6:00 a.m. to 4:30 p.m. almost every weekday, with the exception of Wednesdays when he stayed until 5:00 p.m. Because these calendars were prepared two years after the claim period, a representative of this office interviewed the claimant and asked how he recalled that he worked until 5:00 p.m. on Wednesdays. He said that this was the store's weekly closeout day, causing him to remain at work an additional 30-40 minutes. The calendar also contained 14 days (5 in April; 7 in May; and 2 in June 1999) where the claimant indicates that he worked from 6:00 a.m. through 6:30 p.m. The agency's official time and leave records show the claimant working from 7:15 a.m. through 5:45 p.m. on each of those days, earning two hours compensatory time each day. When asked, the claimant said that he was required to stay late and close the food court on

those days. The claimant was also asked to describe the duties he performed between 6:00 a.m. and 7:15 a.m. everyday. He said that he recounted the retail cashier drawers from the previous night and prepared the drawers for the cash registers, counted the food court cashier drawers that had been placed in the safe the previous night, prepared bank deposits, stocked store shelves, straightened up the store, and placed supply orders.

Four of the five coworkers interviewed stated that the claimant would sometimes come in at 6:00 a.m. and leave anywhere from 5:00-6:00 p.m. Three of these coworkers were in the food section, while the claimant worked in the retail store and office, and two had tours of duty ending at 1:30 p.m. None was sure whether any hours worked beyond the claimant's regularly scheduled tour of duty were compensated and whether this work was performed during or after the claim period. Two of these coworkers mentioned that the claimant's immediate supervisor, [name], was sometimes absent due to illness, and the claimant worked longer hours when this occurred. Another coworker, [name], the office clerk and timekeeper, reported that she observed the claimant working outside of his regularly scheduled hours occasionally, but he usually left work at approximately 3:45 p.m. She said she remained in the office until 4:30 p.m., while all other store and office workers, including the claimant, were gone by 3:45 p.m., leaving her alone in the office at the end of her workday. She also said she regularly came into work at 8:00 a.m. and, therefore, did not observe the claimant's arrival time. She recalled an occasion in March 1999 where the claimant returned from a business trip he had made with the Regional Director. At that time, he asked [name], the timekeeper, to record eight hours of overtime for Saturday work. The agency's official time and leave records show that the claimant received eight hours of compensatory time for work performed on Saturday, March 20, 1999.

In her interview, [name], Regional Director, said that she only observed the claimant during work hours intermittently. However from March 17 through March 22, 1999, she and the claimant traveled to another store. She recalled that the claimant worked overtime during that trip, and she told him to report all his overtime to the timekeeper upon their return. [The Regional Director] gave the claimant a choice between paid overtime and compensatory time. As previously noted, the claimant reported and received eight hours compensatory time for work performed on Saturday, March 20, 1999. Although she did not observe his comings and goings, [the Regional Director] was puzzled as to why the claimant would come in at 6:00 a.m. everyday. She said that [the immediate supervisor] came in at 6:00-6:30 a.m., and the food leader was also scheduled to come in at 6:00 a.m. Either one of these individuals could unlock the building and put out the cash drawers. [The Regional Director] checked her personal calendar and determined that [the immediate supervisor] was only absent intermittently on 20 days during the claim period. When [the immediate supervisor] was absent, the claimant was among the individuals that he might have called to open the building at 6:00 a.m. if the day was a regularly scheduled workday for the claimant. The other individuals who might have been called to open the building in [the immediate supervisor's] absence were [name], Assistant Canteen Chief, [name], Office Clerk, and [name], Assistant Canteen Chief following [name]. (Note: [The latter Assistant Canteen Chief] could not be reached during this investigation.) The claimant was only scheduled to work on 17 of the 20 days that [the immediate supervisor] was absent. The 17 days that [the immediate supervisor] was absent and the claimant was scheduled to work during the claim period were 1/12, 1/13, 2/12, 2/16, 2/17, 2/18, 2/19, 3/31, 4/1, 4/2, 5/18, 5/19, 5/20, 5/21, 5/24, 6/1, and 7/2/99. [The Regional Director] also questioned the duties the claimant said

he performed everyday from 6:00 a.m. until 7:15 a.m. She said that the cashiers themselves recounted their cash drawers, the office clerk prepared the bank deposit, sales clerks were mainly responsible for stocking shelves and straightening up their assigned store areas, and [the immediate supervisor] ordered most of the store supplies. [The Regional Director] said that the claimant was supposed to handle the ordering responsibilities. However, [the immediate supervisor] ordered supplies because the claimant was not performing this task timely and the store was running out of supplies. [The Regional Director] also said that the claimant would not need to stay until 6:30 p.m. on days he was closing the food court. On those days, all he was required to do to close was take the food court cash drawers and place them in the safe. The money in these drawers was then counted the next morning. [The Regional Director] believed that the claimant could have completed this task by 5:45 p.m. and, therefore, was fully compensated by the two hours compensatory time he received from 3:45 p.m. to 5:45 p.m. on those days.

[Name], Canteen Chief, said that at times during the claim period, the claimant's schedule changed from his official tour of duty. However, if the claimant had to come in early, [the immediate supervisor] told the claimant to leave early and "made sure" that he, in fact, did leave after an eight-hour workday plus a 30-minute lunch period. When work necessitated the claimant staying later, [the immediate supervisor] would grant him compensatory time and, occasionally, paid overtime with the authorization of the Regional Director. [The immediate supervisor] was "confident" that the claimant worked no uncompensated overtime when he was on duty as the claimant's immediate supervisor.

[Name] was the Assistant Canteen Chief through March 29, 1999. When [the immediate supervisor] was absent, [the Assistant Canteen Chief] was designated as the acting manager. His primary responsibilities were in the food section, and his scheduled tour of duty did not begin until 9:30 a.m.; therefore, he did not observe the claimant's arrival at work. He did, however, observe the claimant regularly leaving the office at approximately 3:45 p.m. He also said that employees were only supposed to work overtime with the advance approval of management.

[Name], Human Resources Specialist, VCS, checked the leave records for [the immediate supervisor] during 1999. He confirmed that [the immediate supervisor] had isolated days of absence during the claim period followed by three months of leave after the claim period ended.

Based on the above information, we generally conclude that the claimant performed work beyond his normal duty hours for which he has already been compensated. However, we also conclude that the claimant very likely opened the doors at 6:00 a.m. on the 17 days that the claimant was scheduled to work and [the immediate supervisor] was absent during the claim period. We reached the latter conclusion because two of the other individuals who may have been called to open the building at 6:00 a.m., [the office clerk] and [the Assistant Canteen Chief], said they arrived at work later than that; thus, they were not present to open the doors. [The office clerk] began work at 8:00 a.m., and [the Assistant Canteen Chief] reported to work at 9:30 a.m. Both said they did not observe the claimant's arrival at work. When the claimant opened the building at 6:00 a.m., it is very likely that he remained at work, putting out the cash drawers in [the immediate supervisor's] absence, until his regularly scheduled tour of duty began at 7:15

a.m. While some coworkers interviewed reported observing the claimant open the building at 6:00 a.m. on occasion, no one said he then left the building and returned at 7:15 a.m.

b) *Did the claimant's supervisors know or have reason to believe the work was being performed?*

OPM precedent decisions indicate that a supervisor has reason to believe that work is being performed if a responsible person in the supervisor's position would find reason to believe that this was the case. Below we discuss our application of this concept to the 232.5 hours of uncompensated work claimed and to the 17 days that the claimant was scheduled to work and [the immediate supervisor] was absent during the claim period.

Our phone interviews indicate that the claimant sometimes came in at 6:00 a.m. and stayed beyond 3:45 p.m. However, coworkers interviewed could not estimate with any consistency the frequency with which the claimant worked beyond his regularly scheduled tour of duty nor could they say whether or not this overtime was compensated or if it occurred during or after the claim period. One coworker, as well as management officials interviewed, observed the claimant leaving work at 3:45 p.m. regularly. The claimant's immediate supervisor said that he ensured that the claimant either left work after eight hours (plus a 30-minute-lunch period) or was compensated for his overtime. Additionally, the Regional Director said that others were responsible for performing the duties the claimant says he came in early to complete. However, on the 17 days when the claimant was scheduled to work and his immediate supervisor was absent, it is likely that the claimant was asked to report to work at 6:00 a.m. to open the building in his supervisor's place. It is also likely that, on these 17 days, the claimant remained at work, putting out cash drawers in [the immediate supervisor's] absence, until the claimant's tour of duty began at 7:15 a.m. No one interviewed observed the claimant leave work after opening the building at 6:00 a.m. Given these considerations and the information in the preceding section, we conclude that the claimant's immediate supervisor and the Regional Director had reason to believe that the claimant was performing work from 6:00 a.m. through 7:15 a.m. on the 17 days he was scheduled to work and his immediate supervisor was absent (17 days X 1.25 hours per day = 21.25 hours). Two of the three individuals other than the claimant, who might have been asked to report at 6:00 a.m. on those days, [the office clerk] and [the Assistant Canteen Chief], said they reported to work at 8:00 a.m. and 9:30 a.m. respectively. The third individual could not be reached.

b) *Did the claimant's supervisor have opportunity to prevent the work from being performed?*

OPM precedent decisions indicate that the claimant's supervisors had opportunity to prevent the work from being performed unless:

- (1) They did not know or have reason to believe that the work was being performed;
- (2) The work occurred so seldom that it was impossible to prevent; or
- (3) They tried by every reasonable means to prevent the work from being performed, including counseling the claimant, controlling his work hours more strictly, and if needed, taking

escalating formal disciplinary actions up through written reprimands, suspensions, and removal.

We have established that the claimant's supervisors had reason to believe that a total of 21.25 work hours were performed between 6:00 a.m. and 7:15 a.m. on the 17 days when the claimant was scheduled to work and his immediate supervisor was absent. However, they had no reason to believe that the remaining 211.25 hours listed on the claimant's calendar were performed by him for the following reasons: 1) Some employees saw the claimant regularly leave work at 3:45 p.m.; and 2) The duties the claimant says he regularly performed between 6:00 a.m. and 7:15 a.m. were others' responsibilities.

Concerning criterion (2), the 21.25 hours of work occurred only on the 17 days that the claimant was scheduled to work and [the immediate supervisor] was absent during the six-month claim period. Therefore, the extra work was seldom, and management may have needed the claimant to arrive at work at 6:00 a.m. on those days to perform the functions normally performed by his immediate supervisor, [name]. While this work occurred intermittently during the six-month claim period, management needed the building to be open and accessible to VCS employees reporting to work at 6:00 a.m. Regarding the additional 211.25 hours of overtime being claimed, the evidence indicates that the claimant did not perform this work.

With respect to criterion (3), both [the immediate supervisor] and [name], the Regional Director, tried several means to prevent the claimant from performing work beyond his regularly scheduled hours, with the exception of the 17 mornings previously mentioned and overtime for which he already received compensation. [The immediate supervisor] said that he ensured that the claimant went home after working eight hours on days when the claimant had to come in early. If there was additional work to be done and [the immediate supervisor] asked the claimant to stay later, he ensured that the claimant was compensated with either paid overtime or compensatory time. [The Regional Director] said that she counseled the claimant regarding his closeout duties. The claimant said that he could not perform his closeout duties between 3:30 p.m., when the store closed for business, and 3:45 p.m. when his tour of duty ended. [The Regional Director] gave the claimant instructions on how to begin his closeout duties at 2:00 p.m. to ensure that he would be finished by 3:45 p.m. [Name], the Assistant Canteen Chief, concurred that closeout duties were to begin prior to store closing, and could be completed by 3:45 p.m. Additionally, [name], a store cashier, confirmed that one or two of the cashiers would usually close out their cash drawers prior to the store closing at 3:30 p.m.

Based on the preceding discussion, conditions a.-c. as listed on page 2 of this decision are not fully met. Criterion a. is met only as it relates to the early morning work that the claimant may have performed on the 17 days [the immediate supervisor] was absent and the claimant was scheduled to work; however, this work only encompasses 21.25 hours of the 232.5 hours claimed. Criterion b. is not fully met for the additional 211.25 hours claimed, because management knew or had reason to believe that extra work was being performed only on those mornings when the claimant was scheduled to work and [the immediate supervisor] was absent. They had no reason to believe the claimant was performing the additional 211.25 hours of work claimed. Regarding criterion c., management could not prevent the portion of the work they had no reason to believe was being performed; i.e., the additional 211.25 hours claimed. Thus the



claimant only performed work during this period which was "suffered or permitted" under the FLSA on the 17 mornings (21.25 hours) during the claim period when he was scheduled to work and [the immediate supervisor] was absent.

Five CFR 551.401 shows that all time spent by the claimant performing suffered or permitted work was "hours of work" under the FLSA. We have attached Federal Personnel Manual (FPM) Letter 551-24, which provides guidance on how to determine whether an employee's "hours of work" are overtime hours under the Act. The FPM has been abolished. However, the guidance in the FPM letter is still valid, as is other FPM guidance cited later in this decision. As indicated in the following pages, the hours spent by the claimant performing suffered or permitted work were overtime hours, according to the criteria in the FPM letter. The claimant was not paid for that overtime. Therefore, he worked overtime hours under the FLSA for which he was not paid.

The above conclusion is based on evidence provided by the claimant and the agency. The evidence provided by the claimant includes his written submissions, his statements over the phone, and statements made over the phone by coworkers whose names and numbers he provided. A representative of this office obtained the names and phone numbers of the former office clerk and the management officials in order to obtain additional information.

2. Is there enough evidence to show the amount and extent of overtime work as a matter of reasonable inference?

We must now decide if the claimant has produced enough evidence to show the amount and extent of his overtime work as a matter of reasonable inference. To do this, we first examine what evidence the claimant provided concerning the amount and extent of his overtime work.

- The claimant submitted a daily calendar, prepared in February 2001, specifying hours worked for most days of the claim period, including most of the overtime pay and compensatory time already received. Although the claimant had the agency's official time and leave records available to him when preparing the calendar, he failed to include all days worked, all overtime pay received, and all compensatory time earned and used.
- The claimant submitted a letter describing his duties, and a list of five coworkers to contact who he said would know what hours he worked. Four of the coworkers interviewed said that the claimant worked extra hours, but none knew if this work occurred during the claim period or if the claimant was compensated for the time. These coworkers also gave various estimates of the frequency and duration of the claimant's extra hours of work. Three of the four coworkers interviewed worked in the food section while the claimant worked in the store and office and, therefore, could not directly observe the claimant working, due to their physical location. Two of the three food section coworkers were regularly scheduled to leave work at 1:30 p.m., approximately two hours prior to the end of the claimant's scheduled tour of duty, and the coworker who did work in the store was scheduled to begin work at 8:00 a.m. Therefore, these individuals only observed either the claimant's arrival or departure times, but not both. A representative of this office determined that the fifth coworker provided by the claimant did not work for the VCS during the claim period.

- A representative of this office also interviewed the claimant via telephone. He said that he devised the calendars based on his recollection of his duties and responsibilities at VCS rather than records of the hours he actually worked. For example, the claimant indicated that he worked until 5:00 p.m. every Wednesday due to weekly store closeout responsibilities. From March 17 through March 22, 1999, the claimant was in travel status with the Regional Director. Yet his calendar shows that he worked from 6:00 a.m. to 5:00 p.m. on Wednesday, March 17, 1999, just as on all other Wednesdays on his calendar. For the other days of this trip, the claimant completed the calendar as if he were working in the [location] store. Although he received eight hours compensatory time for work performed on Saturday, March 20, 1999, his calendar does not show this as a workday. The claimant also said that the timekeeper would input 40 hours of work per week regardless of the actual time worked per instructions of the Regional Director. He could not explain the discrepancy between this statement and the agency's official time and leave records, which showed exceptions to his regularly scheduled tour of duty and compensation for overtime hours of work. Lastly, the claimant said that his immediate supervisor, [name], didn't arrive at work until 7:00-7:30 a.m. and did not observe the claimant's early arrival nor did the immediate supervisor discuss overtime with him. However, one of the coworkers interviewed said that [the immediate supervisor] was at work early to unlock the building and let workers in at 6:00 a.m. [Name], Regional Director and [name] immediate supervisor, confirmed [the immediate supervisor's] arrival time as approximately 6:00-6:30 a.m. based on contemporaneous notations of his work attendance that she made in her personal calendar.

Based on the evidence discussed above, one can make a reasonable inference that the claimant may have worked some extra, uncompensated hours during the claim period, but the frequency and duration of this overtime cannot be determined without considering the evidence obtained from the agency. A discussion of this evidence follows.

- The Office Clerk and Assistant Canteen Chief both said that they regularly saw the claimant leave work at 3:45 p.m., the end of his regularly scheduled tour of duty. They did not, however, observe his arrival time.
- The Canteen Chief, the claimant's immediate supervisor, said that when he observed the claimant arrive at work earlier than 7:15 a.m., he would ensure that the claimant left work following eight hours of work plus a 30-minute lunch break. On days where workload necessitated that the claimant stay longer, the Canteen Chief said he always granted compensatory time to the claimant or, on occasion, sought approval for paid overtime from the Regional Director.
- The Regional Director said that the Canteen Chief always reported for work at approximately 6:00-6:30 a.m. However, the Canteen Chief was absent during the claim period on 17 days that the claimant worked. The Regional Director said that the claimant might have been called by the Canteen Chief on those days and asked to report at 6:00 a.m. to open the building and put out the cash drawers. Regarding the duties that the claimant said he was performing from 6:00 a.m. to 7:15 a.m. everyday, the Regional Director indicated that many of these duties belonged to other employees with oversight by the claimant. A review of the Operations Clerk position description confirms this information. The Regional Director also

denied instructing the timekeeper to input 40 hours of work per week for the claimant regardless of his actual hours worked. For example, she said that she instructed the claimant to report all overtime hours that he worked during the business trip they took together, and she gave him a choice between paid overtime and compensatory time. The claimant did, in fact, report eight hours of overtime for Saturday, March 20, 1999, as confirmed by the agency's official time and leave records and the timekeeper's statement. The agency's records also show other workweeks where more than 40 hours of work were recorded.

Based on all the evidence considered together, one can make a reasonable inference that the claimant worked extra hours from 6:00 a.m. to 7:15 a.m. on the days he was scheduled to work and his immediate supervisor was absent. The precise days that this occurred are listed on page 3 of this decision. However, we cannot readily infer that he performed extra, uncompensated hours outside these days.

#### What overtime pay is due?

We must now consider what overtime pay the claimant is due. Generally, he is due FLSA overtime pay for all "hours of work" exceeding 40 in a workweek. Therefore, to find what overtime pay he is owed, we must first determine his total hours of work for each workweek during the claim period. We then must determine his total hours of work exceeding 40 for each workweek. We also must account for those hours of work exceeding 40 in a workweek for which the claimant has already been compensated. We have done this in the appendix to our decision. In doing so, we have used the following guidelines:

- We have followed the basic principles on "hours of work" in 5 CFR 551.401. Under those principles, "hours of work" include all time an employee is required to be on duty or is suffered or permitted to work. They also include all paid nonwork hours, such as annual leave, sick leave, holidays, excused absences, and compensatory time off. However, they do not include any unpaid nonwork hours, such as leave without pay, furlough, or absence without leave.
- As just noted, "hours of work" include suffered or permitted hours. However, we have excluded suffered or permitted hours in determining total hours worked exceeding eight per day. This is in accordance with guidance in Attachment 1 to FPM Letter 551-24, paragraph 4.
- In computing total overtime hours worked per workweek, we have used a formula that is consistent with guidance in FPM Letter 551-24:
  - Total overtime hours = total hours worked exceeding 8 per day + (total hours worked - total hours worked exceeding 8 per day - 40 hours). If the amount in parentheses is negative, it is set equal to 0.
- In determining the claimant's hours of work, we have relied on the agency's official time and leave records, with the exception of the 17 days during which the claimant was scheduled to work and his immediate supervisor was absent. The time and leave records provide no direct

evidence that the claimant did, in fact, begin work at 6:00 a.m. on those days. However, we are relying on the Regional Director's personal records of the immediate supervisor's absences, as well as the statements by others who might have been requested to open on those days, to infer that the claimant did come into work at 6:00 a.m. in those instances only. We are also relying on coworkers' statements to infer that the claimant remained at work after opening the building on those 17 days.

As noted earlier, the claimant is generally due FLSA overtime pay for his total overtime hours worked for each workweek in the claim period. The appendix to this decision lists all these overtime hours. So for each workweek in the claim period, the claimant is generally due FLSA overtime pay for his total overtime hours worked, as listed in the appendix, for which he has not already been compensated. This is subject to guidance in the "Compliance instructions" section of our decision.

### **Decision**

For each workweek in the claim period, the claimant is generally due FLSA overtime pay for his total uncompensated overtime hours worked as listed in the appendix to this decision. This is subject to the guidance provided below.

### **Compliance instructions**

FPM Letter 551-24 contains guidance for computing pay when FLSA overtime is due. As indicated earlier, the claimant's overtime pay must be calculated on a workweek basis. Therefore, for each workweek in the claim period, the agency is to compute the claimant's pay entitlement using the guidance in the FPM letter. The claimant is due this amount minus whatever he has already been paid for the week.

Five United States Code (USC) 5596, Subpart H of title 5 CFR 550, and the attached FPM Letter 550-78 show that the claimant is also owed interest on the back pay discussed above. Therefore, the agency is to compute that interest as described in the regulation and the FPM letter. To help with this, the agency may refer to OPM's web site at <http://www.opm.gov/oca/PAY/backpay/backpay.htm>.

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.

Attachments

**APPENDIX: CLAIMANT'S HOURS OF WORK**

<b>Workweek</b>	<b>Total Hours Worked per Workweek</b>	<b>Total Non-suffered or Permitted Hours Worked Exceeding 8 per Day</b>	<b>Total Overtime Hours</b>	<b>Total Uncompensated Overtime Hours per Workweek*</b>
1/3-1/9/99	40	0	0	0
1/10-1/16	42.5	0	2.5	2.5
1/17-1/23	40	0	0	0
1/24-1/30	48	8	8	0
1/31-2/6	40	0	0	0
2/7-2/13	41.25	0	1.25	1.25
2/14-2/20	45	0	5	5
2/21-2/27	40	0	0	0
2/28-3/6	40	0	0	0
3/7-3/13	40	0	0	0
3/14-3/20	48	8	8	0
3/21-3/27	40	0	0	0
3/28-4/3	43.75	0	3.75	3.75
4/4-4/10	40	0	0	0
4/11-4/17	45.5	5.5	5.5	0
4/18-4/24	40	0	0	0
4/25-5/1	52	12	12	0
5/2-5/8	48	8	8	0
5/9-5/15	46	6	6	0
5/16-5/22	45	0	5	5
5/23-5/29	41.25	0	1.25	1.25
5/30-6/5	41.25	0	1.25	1.25
6/6-6/12	40	0	0	0
6/13-6/19	40	0	0	0
6/20-6/26	44	4	4	0
6/27-7/3	41.25	0	1.25	1.25
7/4-7/10	40	0	0	0
7/11-7/17	40	0	0	0
<b>Total Uncompensated Overtime Hours in the Claim Period</b>				<b><u>21.25</u></b>

\* The precise dates on which these hours were worked are listed on page 3 of this decision.