

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



Atlanta Oversight Division
75 Spring Street, SW., Room 972
Atlanta, Georgia 30303

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

Claimant: [claimant]

Position: Civil Engineer
GS-810-12

Claimant: [claimant]

Position: Electrical Engineer
GS-850-12

Organization: Corps of Engineers

Claim: Exemption status during
emergency duty. Owed
payment for overtime.

OPM decision: Emergency duties nonexempt.
Due payment for overtime.

OPM decision number: F-0810-12-02 and F-0850-12-01

Kathy W. Day

FLSA Claims Officer

Date: 6/16/99

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 OPM administers 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 claimants have the right to bring action in the appropriate Federal court if dissatisfied with this decision. However, they may do so only if they do not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

The agency is to compute the claimants' overtime pay in accordance with instructions in this decision, then pay the claimants the amount owed them. A copy of the computations and the date payment was made to each claimant should be furnished to this office within four pay periods following the date of the decision. If either claimant believes that the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

Decision sent to:

[claimants]

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

[claimants' agency]

Director of Human Resources
Army Corps of Engineers
(CEHR-2A)
20 Massachusetts Avenue, NW.
Washington, DC 20314-1000

Director of Civilian Personnel
U.S. Department of the Army
Room 23681, Pentagon
Washington, DC 20310-0300

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

Introduction

On February 17, 1999, the Atlanta Oversight Division of the U.S. Office of Personnel Management (OPM) accepted Fair Labor Standards Act (FLSA) claims from [claimants' names]. The claimants believe that emergency duties they performed for the Army Corps of Engineers, [agency], from October 1998, through December 1998, were improperly designated as exempt under the Act, and they are owed payment for overtime worked. During the claim period, [claimant's name] was officially assigned to the position of Civil Engineer, GS-810-12, and [claimant's name] was officially assigned to the position of Electrical Engineer, GS-850-12, in the Army Corps of Engineers. The claimants performed essentially identical duties at the emergency site. We have, therefore, joined their claims and will issue one decision. We have accepted and decided their claim under section 4(f) of the FLSA, as amended.

Determination of emergency

The President of the United States declared parts of the Mississippi Gulf Coast an emergency disaster area in the aftermath of Hurricane Georges in September 1998. The Federal Emergency Management Agency (FEMA) is responsible for activating the Federal Response Plan when the President declares an emergency. The Secretary of the Army has designated the Corps of Engineers as Army's executive agent for the Federal Response Plan with responsibility for executing the emergency mission whenever FEMA activates the plan and needs assistance. Once FEMA notified the Corps of Engineers of a designated emergency requiring their help, the Commander of the Lower Mississippi Valley Division (as the division with geographic jurisdiction) authorized the participation of Corps personnel in the emergency efforts under Emergency Declaration FEMA-1251-DR-MS.

In such a designated emergency, the regulation found in title 5, Code of Federal Regulations (CFR) Part 551, Subpart B, Section 551.208 (d), governs the determination of exemption status. The regulation states: . . . *regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency. . . an exempt employee becomes nonexempt for any workweek in which the employee performs nonexempt work or duties for more than 20 percent of the worktime in a given workweek.*

If the agency determines that an emergency situation exists and sends an employee to perform work at the emergency site, 5 CFR Part 551, Subpart B, Section 551.208 (d) applies (i.e., if the employee performs nonexempt work for more than 20 percent of any workweek, the employee is considered nonexempt for that entire workweek).

General issues

The claimants state that they were temporarily assigned to emergency duty in Biloxi, Mississippi, in response to Hurricane Georges, during the period from October 1, 1998, to December 23, 1998, for [claimant] and from October 1, 1998, to November 15, 1998, for [claimant]. The Vicksburg District determined the FLSA status of employees working on emergency duty in [city/state], and provided the claimants with standard position descriptions for Project Engineer, Construction Representative and Construction Inspector covering the temporary duties they would be performing. The claimants state they received these generic position descriptions after they had partially or fully completed their assignment, and the position descriptions did not accurately describe what they did onsite. They believe the contract compliance and inspection work they actually performed during the claim period was nonexempt work, and the Human Resources Office erred in basing their FLSA determination on the standard position descriptions.

In reaching our decision, we have carefully reviewed all information furnished by the claimants and their agency and conducted interviews with the claimants and the Officer in Charge of the emergency site. We also interviewed contractors and other Corps of Engineers employees who were familiar with the work performed by the claimants while onsite in Biloxi.

Numerous judicial precedents have firmly established the principle that FLSA exemptions must be narrowly construed and applied only to employees who are clearly within the terms and spirit of the exemptions.

Evaluation

An employee's exemption from the overtime provisions of the FLSA is determined by comparing the *actual duties and responsibilities performed* by an employee to the FLSA exemption criteria found in 5 CFR Part 551, Subpart B.

To be exempt from the overtime provisions of FLSA, the employee must meet the executive, administrative, or professional exemption criteria in sections 551.205 through 551.207 of 5 CFR. ***The agency determined that the claimants' duties were exempt based on the administrative exemption criteria.*** The claimants' duties do not meet the executive or professional exemption criteria as described in sections 551.205 and 551.207 of 5 CFR and neither the claimants nor their agency contests this.

The claimants were primarily responsible for ensuring compliance with the terms and conditions of contracts and purchase orders for repairs made to municipal wastewater facilities. Repairs were needed primarily for broken water lines, soil erosion, damaged pumps and pump motors, and damaged control panels. According to the claimants and verified by other employees onsite, local officials set up a clearinghouse of sorts and the claimants were sent to meet with the contractors who managed the wastewater and electrical systems or a city official who was familiar with the damage and what would be needed to get systems operational again. The contractors told the claimants what had been damaged and what parts would need to be replaced. The scope of work

for each project was written from this information. Quotes were then solicited from the contractors who already managed the systems as well as several others. In almost all cases, the managing contractor was awarded the job because it was less expensive for the contractor already present at the site to perform the work.

During the first week, [claimant] surveyed the damaged areas 50 percent of the time and prepared scope of work and cost estimates 50 percent of the time. [Claimant], for the first week, traveled from town to town looking for damaged systems that could be repaired by the Corps of Engineers and talking to representatives of various municipalities concerning these potential projects and what needed to be done. After the first week, the claimants spent approximately 50 to 75 percent of their time at the job sites inspecting contractor activities to ensure compliance with conditions of the contracts/purchase orders. The claimants reviewed and made recommendations concerning contractor payment requests; reviewed a limited number of contractor proposals for modifications of work and forwarded them to the Contracting Officer for approval; and provided recommendations concerning acceptance of completed work. The claimants' supervisor stated that he was onsite only for the first 10 days and to attend a final inspection of a project after the claimants had already left. He also stated that he had been an engineer for 16 years and was familiar with what it took to accomplish the kind of work the claimants performed.

ADMINISTRATIVE EXEMPTION CRITERIA (5 CFR 551.206)

To meet this criteria, the employee must be 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:

- (a) His 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) He 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; and
- (c) He must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) General schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems) must spend 80 percent or more of the workweek in administrative functions.

For an employee's work to satisfy one of the applicable parts of 5 CFR 551.206(a), the work in question must be the employee's primary duty. An employee's primary duty is defined as that

which constitutes the 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) constitutes a substantial, regular part of a position; and (2) governs the classification and qualification requirements of the position; 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.

During the first week, [claimant] primary duty was surveying damage and preparing scope of work and cost estimates. The scope of work was limited in nature (e.g., repair broken water pipe, replace pump motor, repair roof) and the information concerning what was damaged, what parts needed to be replaced, and cost estimates for parts and labor were provided by contractors interested in performing the work. [Claimant] primary duty was looking for damage that could be handled by the Corps of Engineers and talking with municipal representatives about what they wanted done. The claimants' primary duty for the remainder of their time onsite was verifying compliance with contracts/purchase orders for repair or replacement of damaged sewage systems and treatment facilities (e.g., correct materials being used, work being performed as contract stipulated, etc.).

The claimants' emergency duties do not meet (a)(1).

Established OPM guidance concerning work that affects the formulation or execution of management programs and policies recognizes that 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 individuals or organizations, both within or outside the Federal government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs).

During the first week, [claimant] visited damage sites and talked with the point of contact to determine what repairs were needed; wrote the scope of work based on specific information provided by the contractor; and prepared a cost estimate for the work. According to the claimant, the damage typically involved broken lines or damaged pump motors, etc., requiring him to write "repair broken sewer line" or "replace motor" as the scope of work. He then contacted two contractors for estimates. The contractors wrote the details of what work needed be done and the estimated cost. [Claimant] had no complicated systems to diagnose and he did not determine what materials would be used. He wrote repair and replace orders essentially based on the repairs and materials identified by the contractors bidding to do the work. The information was forwarded to the Contracting Officer who then wrote the contract or purchase order.

During that same week, [claimant] traveled from site to site essentially looking for work that the Corps of Engineers could handle. He contacted the municipalities concerned and offered the Corps' services. He obtained information from contractors or city officials concerning what work would need to be done.

For the remainder of their time onsite, the claimants performed contract compliance duties designed to verify that the work identified in contracts or purchase orders was being completed. They verified materials against shipping labels, visually watched contractors repair pipes, roofs, etc., and watched contractors demonstrate that pipes and systems were repaired (e.g., pipes did not leak, motors were working). The claimants did not test materials themselves. The municipalities also provided quality control personnel to ensure contracts were being satisfied, and manufacturers of some materials (e.g., roofing shingles) provided representatives to verify materials were installed properly to be covered by warranty. If any questions arose, the contractors made contacts with suppliers and vendors and reported back to the claimants.

The claimants did not perform program management duties.

The claimants' emergency duties do not meet (a)(2).

An employee meets this subpart if the primary duty is providing the agency with a necessary supporting service requiring the employee to exercise substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced. Guidance from OPM characterizes employees in general management, business, or supporting services as providing support to line managers through: (1) expert advice in a specialized subject matter; or (2) assuming aspects of overall management function in such areas as safety, personnel, or finance; or (3) representing management in business functions such as negotiating or administering contracts; or (4) providing supporting services such as automated data processing.

The claimants verified contract compliance, surveyed damage sites, solicited work and estimates for work to be done. While these duties required some technical knowledge, the claimants were not required to function as experts in sewer and treatment systems. They relied on the contractors and manufacturers to perform the required work and did not provide technical information on how to repair or replace damaged systems, etc. They did not negotiate or administer the contracts. The claimants provided information (e.g., repair broken pipe) and estimates from contractors to the Contracting Officer who was responsible for writing contracts and purchase orders, administering the contracts, making the modifications, etc. The work performed by the claimants for the majority of the time is most comparable to construction specialist work at the GS-8 level, and as such, would not have the substantial impact on management functions required to meet (a)(2).

The claimants' emergency duties do not meet (a)(3).

Work involving participation in the functions of a management official includes employees, such as secretaries and administrative assistants, who participate in portions of the managerial or

administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such assistants must have knowledge of the policies, plans, and views of the supervisor and must be delegated and exercise substantial authority to act for the supervisor.

The claimants do not perform in this manner.

The claimants' emergency duties do not meet (b)(1).

OPM has not defined the term “nonmanual work” as used in 5 CFR 551.206(b). Court decisions have, therefore, looked to the Department of Labor's (DOL) interpretation of the FLSA as set out in 29 CFR 541.203. The DOL has stated that “[i]f the work performed is 'office' work it is immaterial whether it is manual or nonmanual in nature” as long as it is 'white-collar' work, “since the accepted usage of the term 'white-collar' includes all office workers. The DOL further states that performing some manual work does not preclude a finding that an employee is administrative, provided the limited manual work performed is related to the employee's exercise of discretion and independent judgment. Many inherently exempt positions make physical demands and require manual skills. The physical efforts, however, are ancillary to and do not change the intellectual and/or creative nature of the work at the heart of the occupation. (For example, moving a computer is ancillary to setting up a computer system.)

Office or predominantly nonmanual 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 require substantial judgment 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, adapting or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

The claimants work was not concerned with a variety of subject-matter fields nor did it require *substantial* judgment, adaptation, or innovation. The claimants identified the damage by being told what the damage was by a municipal employee or contractor or by simply viewing a broken pipe. Their goal was to have the systems repaired with materials identical to those damaged in the hurricane. There were a very limited number of alternatives, if any. The broken part was replaced with an identical part and repaired to function as it did before. The claimants checked material numbers/descriptions against purchase orders or contracts. The work to be done was identified by the contractors and clearly defined in the scope of work. If a problem arose during the course of repairs (e.g., more damage was discovered), the claimants passed this information on to the Contracting Official. There was, however, only limited negotiation involved since the objective of the mission was to repair and replace any damage. If more damage was discovered, it was repaired to its original working condition using the same materials, etc. If original materials were not available, the contractor identified comparable materials in his estimate. All work and materials were described in the contract or purchase order, and the claimants simply

verified that those materials were being used on the job and that the contracted work was performed. They did not act as the engineers on any of the jobs and did not determine the technical aspects of how work would be accomplished (other than one occasion identified by the supervisor in which [claimant] developed a mathematical calculation to determine the quantity of stones placed on the project each week for payment purposes). The problems they dealt with were limited in nature with easily recognizable solutions and did not require the degree of judgment and innovation or range of possible actions required to meet the criteria in (b)(1).

The claimants' emergency duties do not meet (b)(2).

OPM guidance indicates that work which is of a specialized or technical nature requiring considerable specialized training, experience, and knowledge means specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject-matter field.

The claimants had to have some technical knowledge to understand some of the descriptions of work to be performed as written in the contracts, to survey the damaged systems, etc. However, the specialized knowledge employed by the claimants was equivalent to the GS-8 technician level and would not typically require several years of on-the-job training and experience to obtain.

The claimants' emergency duties do not 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 which 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 claimants worked independently; however, they typically followed standardized procedures to resolve the problems they handled. They read the contract or purchase order, checked materials received against the purchase order description, talked with the contractor concerning status of job, reported any delays to the Contracting Officer, etc. There was little room for discretion since the contracts were explicit in what was to be done and what materials were to be used. Routine procedures and solutions were generally applicable to the situations with which the claimants dealt.

Paragraph (d) is not applicable.

The claimants are not GS-5 or GS-6 level employees.

Summary

The claimants' emergency duties do not meet the administrative exemption criteria in 5 CFR 551.206 and are nonexempt.

Decision

The claimants' primary duty during the period of their emergency work was nonexempt and accounted for more than 20 percent of the work they performed each week. The claimants are due overtime pay under FLSA at the rate of one-and-a-half times their regular hourly rate of pay less any overtime pay already received under title 5 for the period of the claim.

Compliance instructions

The claimants are entitled to FLSA compensation for all overtime hours worked for the period of the claim: [claimant] - October 1, 1998 through November 15, 1998; and [claimant] - October 1, 1998 through December 23, 1998. Based on regulations in 5 CFR 550.806, the claimants are also owed interest on the back pay. Therefore, the agency is instructed to compute the interest as described in the regulation and pay the claimants the total amount owed them less the amount of any overtime already paid under title 5.