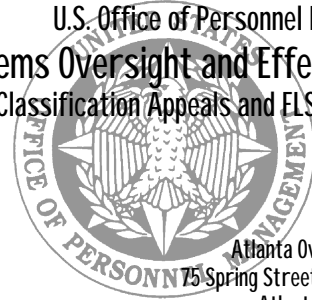


U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and ELSA Programs



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: Environmental Engineer
GS-819-12

Organization: Corps of Engineers
Department of the Army

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

OPM decision: Nonexempt during emergency
duty. Due payment for overtime.

OPM decision number: F-0819-12-01

Kathy W. Day
FLSA Claims Officer

1/28/00
Date

/s/ _____

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

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed him. A copy of the computations and the date payment was made to the claimant should be furnished to this office within four pay periods following the date of the decision. If the 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:

[Claimant]

[Personnel Officer
Civilian Personnel Advisory Center]

Dr. Susan Duncan
Director of Human Resources
Army Corps of Engineers
(CEHR-2A)
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Ms. Carol Ashby Smith
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Mr. Harrel Sholar
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Arlington, VA 22202-4508

Mr. James Feagins

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
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Introduction

On August 26, 1999, the Atlanta Oversight Division of the U.S. Office of Personnel Management (OPM) accepted a Fair Labor Standards Act (FLSA) claim from [claimant]. The claimant believes that emergency duties he performed for the Army Corps of Engineers, Emergency Field Office, [location], from March 1, 1999, through April 30, 1999, were improperly designated as exempt under the Act, and he is owed payment for overtime worked. During the claim period, [claimant] was officially assigned to the position of Environmental Engineer, GS-819-12, in the [District] Corps of Engineers, Department of the Army. We have accepted and decided his claim under section 4(f) of the FLSA, as amended.

Determination of emergency

The President of the United States declared parts of [state] 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, participation of Corps personnel was authorized under Emergency Declaration FEMA-1247-DR-PR.

In such a designated emergency, the regulation found in 5 CFR 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 claimant states that he was temporarily assigned to emergency duty in [state] in response to Hurricane Georges during the period from March 1, 1999, to April 30, 1999. He believes that over 20 percent of the work he performed each week was nonexempt. He provided work description sheets signed by his supervisor for each pay period.

In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency and conducted interviews with the claimant and his supervisor at the emergency site.

We also interviewed other Corps of Engineers employees who were familiar with the work performed by the claimant while onsite in [state].

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 the 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 claimant's duties were exempt based on the administrative exemption criteria in section 551.206 of 5 CFR. The claimant's 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 claimant nor his agency contests this.

The claimant was primarily responsible for a variety of work related to the transportation and proper disposal of debris resulting from Hurricane Georges. Debris was collected and transported to a central collection facility. Hurricane debris (woody materials, tin from roofs, dirt from landslides, damaged appliances and other household items) was isolated from regular garbage. This material was further processed to reduce its overall volume and then transported to landfills for disposal. The claimant was involved in the preparation and receipt of authorizing documents for transportation, ensuring only authorized materials were transported to landfills, measuring and calculating the volume of materials transported, and performing miscellaneous other duties as assigned by his supervisor. His duties remained the same until his return to his home station.

ADMINISTRATIVE EXEMPTION CRITERIA (5 CFR 551.206)

To meet these criteria, the employee must be an advisor or assistant to management, representative of management, or a specialist in a management or general business function or supporting service who meets *all* of the following:

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

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

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 of his emergency work, [claimant] observed active duty military enlisted personnel at a satellite dump site prepare tickets for trucks to transport debris to a landfill for disposal. This consisted of recording the vehicle's license plate number and time of arrival, and measuring and calculating the debris volume being transported. After a period of observation, he prepared a small number of these tickets himself. During the second week, [claimant] was transferred to the main municipal dump. At this facility, woody debris was chipped to reduce its volume and hurricane debris was separated from regular garbage prior to transport to a landfill. The claimant recorded the amount of time the chipper was operational or nonoperational; ensured that only hurricane debris was loaded on trucks for transport to the landfill; prepared trip tickets for trucks transporting debris; and ensured that trucks were fully loaded when they departed the

main site. He also spent some time at the landfill where he received tickets from trucks containing debris and recorded the vehicle number and cubic yards of debris it contained, measured the vehicle to compute its volume, and checked the driver's license and the vehicle registration. These were the claimant's primary duties for the remainder of his time onsite.

The claimant did not perform program management duties.

The claimant's 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 claimant prepared simple documents required for transporting debris and recording the operational status of reducing equipment, and he measured debris piles and trucks to determine the volume of debris transported. These duties required little knowledge by the claimant of the technical aspects of debris collection and processing or landfill and disposal operations. The work performed by the claimant for a majority of the time is most comparable to lower-level clerical work, and as such, would not have the substantial impact on management functions required to meet (a)(2).

The claimant's 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 claimant did not perform in this manner.

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

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 claimant's work was not concerned with a variety of subject-matter fields nor did it require substantial judgment, adaptation, or innovation. The claimant prepared and processed trip tickets that recorded information related to the contents of vehicles transporting hurricane debris between collection and disposal sites; recorded the operating times of debris reduction equipment; calculated the amount of debris transported; and ensured that only authorized debris was transported. He followed standard procedures to record and calculate debris. The problems he dealt with were limited in nature with easily recognizable solutions and did not require judgment and innovation or involve the range of possible actions necessary to meet the criteria in (b)(1).

The claimant's 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 claimant did not have to possess specialized or technical knowledge to perform his assigned duties. The knowledge employed by the claimant was learned quickly (in a few hours) and easily onsite through observation of others.

The claimant's 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 claimant worked independently; however, he typically performed the same few duties over and over with little or no room for discretion. He followed standardized procedures which were applicable to the situations he handled.

Paragraph (d) is not applicable.

The claimant is not a GS-5 or GS-6 level employee.

Summary

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

Decision

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

Compliance instructions

The claimant is entitled to FLSA compensation for all overtime hours worked for the period of the claim: March 1, 1999 through April 30, 1999. Based on regulations in 5 CFR 550.806, the claimant is also owed interest on the back pay. Therefore, the agency is instructed to compute the interest as described in the regulation and pay the claimant the total amount owed him less the amount of any overtime already paid under title 5.