

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: Electronics Engineer
GS-855-12

Organization: Corps of Engineers
Department of the Army

Claim: Exemption status during
emergency duty and owed
payment for overtime

OPM decision: Nonexempt. Overtime payment due.
OPM decision number: F-0855-12-01

Kathy W. Day
FLSA Claims Officer

Date: 08/06/98
RD # 08551201.ATR

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]

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Introduction

On April 7, 1998, the Atlanta Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant]. The claimant believes that emergency duties he performed for the [Emergency Operations Center] in the [location] from May 23, 1997, through June 23, 1997, were improperly designated as exempt under the Act, and he is owed payment for overtime worked. During the claim period, the claimant was officially assigned to an Electronics Engineer, GS-855-12, position in the [District], Army Corps of Engineers. 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 North Dakota an emergency disaster area after severe flooding occurred in May 1997. 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 [Division] (as the division with geographic jurisdiction at the initial time of contact) authorized the participation of Corps personnel in the emergency efforts.

In such a designated emergency, the regulation found in title 5, Code of Federal Regulations (CFR) Part 551, Subpart B, Section 551.208 (f), 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 the exemption status of an employee shall be determined on a workweek basis and the employee shall be nonexempt for any workweek in which the employee performs more than 20 percent nonexempt work.*

The Department of Army issued a decision on this FLSA claim in which they referenced a previous OPM decision on a claim they considered similar. Army interpreted the OPM decision to say that office work in support of actual emergency field operations probably does not qualify for the emergency FLSA exemption, even if the office was located at the disaster site. That interpretation, however, is based on an isolated reading of portions of the OPM decision taken out of context. The discussion of office work in support of the actual field work is in reference to the credibility of the claim regarding the kind of work the claimant performed, not in reference to the applicability of the emergency regulations. 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 (f) 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 response to a major flood in [location], from May 23, 1997, to June 23, 1997. The [District] determined the FLSA status of employees working on emergency duty in [location] and provided the claimant with a standard position description covering his temporary duties that he states he received after he had completed his assignment. He further states that the standard position description was for a Computer Specialist and does not accurately describe what he did. He believes that the computer support work he actually performed during the claim period was nonexempt work and the Human Resources Office in [location] erred in basing their determination on the standard position description. He provided a list of 16 employees who were familiar with the work he performed in [location].

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 [location], as well as individuals assigned to the [Emergency Operations Office] who were knowledgeable about the claimant's work.

The regulations governing FLSA were revised as of December 23, 1997. However, since the claim period falls prior to that date, the FLSA regulations in place during the claim period will be used to decide this claim.

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 551.204 through 551.206 of 5 CFR. The agency determined that the claimant's position was exempt based on the administrative exemption criteria. The claimant does not meet the definition of executive or professional as described in sections 551.204 and 551.206 of 5 CFR and neither the claimant nor the agency contests this.

The claimant was assigned to perform various information management hardware and software support duties in conjunction with emergency flood reconstruction operations. The claimant provided a list of duties which he states he performed while assigned to [location]. His supervisor agreed that the description of the claimant's tasks was generally accurate with minor exceptions. The supervisor believes the claimant spent more time on software support than the claimant believes he did and less time on minor administrative duties, e.g., answering the telephone. He also believes the time spent by the claimant to physically move computers was minimal.

When the claimant arrived at the [location] flood operations site, the site consisted of 2 trailers with 6 to 7 work stations with computers, cables, and systems already connected and running and linked to the [District]. The networking plan was developed by someone else, and the cables, wiring hubs, and some computers were already onsite. Additional trailers were located later at various field locations and the [university] plant services building also housed some offices used for flood operations. The claimant had to set up additional computers for the other trailers and the offices at the university location. The computers came already configured and included a network file server which required the claimant to simply select from pre-determined options and hook up cables in order to get the system running. For a few of the computers, he had to configure the ability to share printers. He set up 10 to 15 computers within the first 2 weeks onsite and approximately 5 to 6 during the last 2 weeks. Because operations frequently changed (e.g., sewer cleanup was added, housing operations moved to field locations), the computers had to be physically moved by the claimant several different times and modems installed in the field computers. The claimant was required to make cables (i.e., strip wires and add connectors), determine the best way to temporarily run the cables since they could not be placed in walls and ceilings, and physically run the cables from location to location.

The claimant stated that the employees working at the flood operations site had only minimal computer skills for the most part, and he spent much of his time providing very basic instructions on software because the computers utilized Microsoft Word for word processing rather than WordPerfect which the employees normally used or the database programs available on the computers were not the programs with which the employees were most familiar. He provided advice and assistance on such tasks as transferring information from a floppy disk to the hard drive, preparing graphs for reports, entering and retrieving data in a database program, locating files saved to the wrong directory, and formatting from one version of a program to another. On some occasions, he personally prepared the tables or graphs or entered data because of time constraints (although the supervisor states that he instructed the claimant not to spend his time personally entering data). He visited each site daily to answer questions.

The problems the claimant dealt with were not complex but rather straight-forward with standard solutions. When a printer did not work, for example, he tried a different host to get into the system and then had the [District] identify the problem at their end and resolve it. When a keyboard stopped working, he simply plugged in a new one. He fixed paper jams in the printers and facsimile machines. He was not typically required to trace and isolate problems within the system. When the operations site needed electronic mail, the claimant was provided specific instructions on adding necessary files to tell the computer where the mail servers were located. The mail software was already installed. He explained the basics of the mail software to users (e.g., how to attach a file to a message). He also documented the location of computers, the software contained on each, and cable locations for each.

The claimant provided telephone support by reporting non-working lines; providing a list of numbers to the university for billing purposes; and identifying telephone numbers associated with specific groups so the university communications department could set up call forwarding. He provided

administrative support by answering the telephones during lunch and transporting passengers to and from the airport.

Written information substantiating the claimant's account of his duties was provided by 15 employees; and 3 employees, a Contracting Officer, a Mission Manager, and a Project Manager, were randomly selected and interviewed by telephone concerning the duties they witnessed the claimant performing. Each employee completely verified the information furnished by the claimant and provided examples of the personal assistance they received from him, which included such support as moving the computers, hooking up telephones, explaining the best database program to use for a specific report, and how to enter and retrieve data using specific software.

ADMINISTRATIVE EXEMPTION CRITERIA (5 CFR 551.205)

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 551.205(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 claimant's primary duty consisted of providing computer technician/assistant work comparable to the GS-5 or GS-6 level. The claimant's supervisor stated that his duties were evenly distributed throughout the four weeks he spent at the flood operations site and that the claimant's description of his tasks was generally accurate except that the supervisor believes he spent more time on software support and less time on incidental administrative duties, as well as less time physically moving computers. The claimant furnished the following breakdown of time spent on each duty: unpacking and assembling computers at work stations and orienting users - 11 percent; making, pulling and installing cables - 10 percent; physically moving computers from one location to another - 9 percent; software support - 15 percent; installing printers/facsimile machines and making minor repairs - 5 percent; setting up e-mail - 3 percent; documenting computer/cable locations - 9 percent; making minor hardware repairs and adjustments - 3 percent; and tracking inventory - 3 percent. These duties are technician/assistant duties or duties performed in conjunction with the technician/assistant duties and account for 68 percent of the claimant's time each week. The remainder of his time was spent providing telephone support, performing data entry, and performing administrative duties. He performed no other duties for a lesser amount of time that meet the criteria to be considered primary.

The claimant's position does 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.

The claimant performed a variety of computer technician duties designed to support the information management and communication systems at the flood operations site. He was not responsible for program management functions.

The claimant's position does 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 provided necessary technical support for the automated information management system requiring some technical knowledge of computers and computer software. He worked independently and provided a supporting service that improved the efficiency of operations. However, the work performed by the claimant is lower level technician work equivalent to grade GS-5 or GS-6 and, as such, would not have the substantial impact on management functions required to meet (a)(2).

The claimant's position does 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 does not perform in this manner.

The claimant's position does not meet (b)(1).

OPM has not defined the term “nonmanual work” as used in 5 CFR 551.205(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 the computers is ancillary to setting up the 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 claimant was responsible for setting up preconfigured computers at the various flood operations sites. He relied on standard methods and accepted procedures. The problems he 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). In addition, the time the claimant spent laying cables would not be considered ancillary to his office work and is credited as manual work.

The claimant's position does 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 had to have specialized knowledge of computer hardware and software to set up the computers, install the printers, hook up e-mail, and train others on the software. However, the specialized knowledge employed by the claimant was equivalent to the GS-5 or GS-6 assistant or technician level and would not typically require several years of on-the-job training and experience to obtain.

The claimant's position does 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 used standardized techniques and established procedures to resolve the technical problems he handled. These routine solutions were generally applicable to the situations with which he dealt. He relied on previously established guidelines to activate the e-mail system and relied on available manufacturer's instructions to explain the various software capabilities. He utilized standard procedures to assemble computer hardware (e.g., replaced a nonworking keyboard with a new keyboard, replaced defective cards).

Paragraph (d) is not applicable.

Summary

The claimant's primary duty does not meet the administrative exemption criteria in 5 CFR 551.205 and is 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 he 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.

Compliance instructions

The claimant is entitled to FLSA compensation for all overtime hours worked for the period of the claim, May 23, 1997, to June 23, 1997. 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.