

Date: June 18, 2003

Claimant: [name]

File Number: F-0470-11-01 (originally issued as 03-F0001)

OPM Contact: Deborah Y. McKissick

On July 12, 2002, the Center for Merit Systems Compliance, formerly the Merit Systems Oversight and Effectiveness, of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name]. The claimant worked in the Natural Resources Conservation Service (NRCS) as an Area Soil Scientist, GS-0470-11. The claimant is requesting compensation for time worked outside of his scheduled tour of duty for the period from November 12, 1997 to March 8, 1998. For the reasons discussed herein, the claim is denied.

We initially accepted the claim under provisions of the Fair Labor Standards Act, section 4(f) of title 29, United States Code (U.S.C.). The FLSA exemption status of the Area Soil Scientist, GS-0470-11, position was classified as exempt. However, the record shows that the claimant does not dispute the agency's designation of his position as exempt from the FLSA or the duties and responsibilities as described in his position description. Therefore, the claim must be decided as a Title 5 compensation claim, and not an FLSA claim. Section 178.105 of Title 5, Code of Federal Regulations (CFR), specifies that claims are settled on the basis of the written record, and the claimant has the burden of establishing the burden of proving his or her right to payment.

The claimant believes he is due pay for overtime worked during the claim period because his supervisor was aware of the extra hours that he had worked. The claimant states that he worked over 150 hours beyond his scheduled tour of duty to meet the established deadline on the National Resources Inventory project.

The agency administrative report states that the claimant's overtime payment request was denied because his position was FLSA exempt. The claimant and the agency agree that the claimant was not directed by his supervisor to work overtime.

The claimant has the burden of proving that he or she actually worked overtime that was officially ordered or approved, or actively induced by an agency official with authority to order or approve overtime work. *Jim L. Hudson, supra*. Under Section 5542(a) of title 5, United States Code (5 U.S.C.), overtime may be paid for work officially ordered or approved. The documents presented by the claimant do not include official documentation

showing that the additional hours performed outside of the claimant's scheduled work hours were ordered and approved by authorized officials during the claim period.

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

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

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

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