

Fair Labor Standards Act Decision
Under section 4(f) of title 29, United States Code

Claimant: [name]

Agency classification: Lead Transportation Security Screener
SV-0019-F

Organization: [name]
Transportation Security Administration
U.S. Department of Homeland Security
[location]

Claim: Received No Overtime Pay for 20
Hours of Overtime Worked

OPM decision: Hours Worked Were Not Overtime
No Money Due

OPM decision number: F-0019-F-01

/s/

Kevin E. Mahoney
Deputy Associate Director
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

7/16/06

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. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure 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. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision, but 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.

Those aspects of this decision reviewed under the authority of 31 U.S.C. § 3702 and 5 CFR part 178 are not subject to further administrative review. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States Court.

Decision sent to:

[name and address]

Assistant Director for Human Capital
Transportation Security Administration
U.S. Department of Homeland Security
Arlington, VA 22202-4220

Introduction

On August 12, 2005, the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name]. During the claim period, he occupied a Lead Transportation Security Screener, SV-0019-F, position at [name] Airport, Transportation Security Administration (TSA), U.S. Department of Homeland Security (DHS), in [location]. The claimant was terminated from employment by the agency on December 13, 2003. He claims he should have been paid for 20 hours of overtime as a result of having worked six ten-hour days in a row during pay period 13 of 2003, and seeks reinstatement to the position he previously held with back pay at the same pay rate, “including any increases in salary and appropriate promotions and with tenure.” He claims the agency willfully violated the FLSA on May 29, 2003, the day on which his request for the overtime at issue was denied. OPM received the agency’s administrative report (AAR) on January 26, 2006, and comments on the AAR from the claimant on February 6, 2006. We accepted and decided this claim under section 4(f) of the FLSA as amended, and 31 U.S.C. § 3702.

In reaching our decision, we reviewed all information of record furnished by the claimant and his former employing agency.

Background

TSA’s Human Resources Management Policy Manual, HRM Letter 551-1, dated April 26, 2003, states:

This policy applies to all TSA non-exempt employees. Premium pay for FLSA exempt employees is covered by HRM Letter 550-2, Interim Policy for Fair Labor Standards Act (FLSA) Exempt Employees. TSA is not legally required to follow the provisions of the FLSA. However, TSA will apply the provisions of the act, with minor modifications.

In his claim, the claimant appears to attempt to link his request for overtime pay with his eventual dismissal by the agency, and seeks reinstatement and what appears to be a make whole remedy based on the FLSA. We will address these issues in our evaluation of the claim.

General Issues

In his correspondence with OPM, the claimant makes various statements about TSA’s management practices and believes other employees were paid differently than he. In adjudicating this claim our only concern is to make our own independent decision about how much FLSA overtime pay claimant is owed, if any. We must make that decision by analyzing the facts in the case against criteria in Federal regulations and other Federal authorities. Therefore, we have considered the claimant’s statements only insofar as they are relevant to making that analysis.

Evaluation

Jurisdiction

The agency asserts in its January 10, 2006, final agency FLSA claim decision sent to the claimant, that pursuant to the Aviation and Transportation Security Act (ATSA), TSA is not subject to the provisions of the FLSA:

When Congress created the TSA by enacting ...ATSA, section 111(a) of that Act authorized the TSA Administrator to establish hiring and training qualifications standards for screener "notwithstanding"[sic] any other provisions of law." Additionally, Congress granted the Administrator exclusive control over personnel and compensation actions involving Screeners by enacting section 111(d) of the Act. The provisions of the FLSA are not, therefore applicable to claims such as yours, and OPM does not have jurisdiction to review TSA action on such claims.

TSA appears to assert that its authority over all compensation and benefits matters for screener personnel is without limit based on the language of section 111(d) of the ATSA:

SCREENER PERSONNEL- Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

An analysis of the agency's position regarding applicability of the FLSA to the agency's employees requires an understanding of basic principles of statutory construction. It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

Further, laws *in pari material* (i.e., upon the same subject matter) must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). Where the provisions of two different statutes may be read together to give effect to provisions in both statutes, such an interpretation will prevail. If possible, the provisions of both statutes must be given effect unless: 1) provisions of one statute conflict with the other so as to require a different reading, 2) the later-enacted statute amends or overrides the provisions of the previously-enacted statute, or 3) provisions of one statute specifically authorize a different reading (e.g., statutory language specifically excludes one statute from coverage under another).

We agree section 111(d) of the ATSA provided apparent unfettered discretion to the agency to “fix the compensation” of and “establish levels of compensation” for screener personnel. However, we reject the agency’s assertion that the application of the FLSA to the screener workforce interferes or conflicts with either of these authorities. The language relied upon by the agency in determining that the FLSA does not apply to its employees generally speaks to pay setting, not to FLSA coverage or FLSA claims adjudication authority. The plain language of the ATSA does not support the exclusion of TSA employees from FLSA coverage, nor does it support the exclusion of TSA employees from OPM’s FLSA claims adjudication authority. It is noteworthy that numerous other agencies have been granted independent pay authorities conferred by similar statutory language and are still subject to the provisions of the FLSA. See, e.g., 7 U.S.C. § 2, 12 U.S.C. § 1441a, 12 U.S.C. § 2245.

The ATSA does not contain language expressly removing screener personnel from coverage under the FLSA. Therefore, we reject the agency’s assertion that screener personnel are not directly covered by the overtime provisions of the FLSA. Because TSA is not excluded from OPM’s jurisdiction under section 4(f) of the Act, this claim is subject to OPM’s regulations in 5 CFR part 551.

Unlike title 5 pay setting provisions and other laws that fix the compensation or establish levels of compensation for other groups of Federal employees, the FLSA is a law of general applicability, affecting both private and public (including Federal) sector employment. Further, the FLSA is a protective act in that its purpose is to eliminate labor conditions which are detrimental to maintaining the minimum standard of living necessary for the health, efficiency, and general well-being of employees. See 29 U.S.C. § 202. Therefore, the provisions regarding the applicability of the FLSA should be narrowly construed, and employees are not excluded from the Act’s coverage unless specifically authorized by law.

The FLSA is an act applicable to the majority of the United States work force. The Act’s coverage was extended to the Federal work force in 1974. The FLSA does not “fix the compensation” and does not “establish levels of compensation and other benefits.” Eligibility for overtime does not conflict with or interfere in any way with TSA’s authority or ability to establish rates or levels of compensation. Overtime is not a benefit within the common meaning of the term, e.g., health, life insurance and retirement benefits. In addition, a plain language reading of the relevant sections of the FLSA indicates that TSA and its employees meet the definitions of “employer” and “employee” under the FLSA. 29 USC § 203. As there is no specific statutory language under either the ATSA or the FLSA excluding these employees from FLSA coverage, the provisions of the FLSA apply to TSA employees; and this claim is subject to OPM’s FLSA claims adjudication authority.

Based on the analysis which follows, the claimant’s entitlement to overtime is not covered by the FLSA. Rather, it is covered by the compressed schedule premium pay provisions of 5 U.S.C. § 6128. The ATSA does not provide claims settlement authority to TSA. OPM’s compensation and leave claims settlement authority under 31 U.S.C. §.3702 does not interfere or conflict with TSA’s authority to “fix the compensation” of and “establish levels of compensation” for screener personnel. As in the case of the FLSA, there is no specific statutory language in the ATSA excluding these employees from the compensation and leave claims settlement provisions applicable to Federal civilian employees under 31 U.S.C. §.3702. Therefore, this claim is also subject to OPM’s compensation and leave claims adjudication authority.

Evaluation of Overtime Claim

TSA determined that claimant's position is nonexempt from the overtime provisions of the FLSA under TSA's own rules extending coverage of the Act to screener personnel. Based on careful review of the record, we concur based on direct application of the Act and its implementing regulations.

We will now explore whether the claimant performed overtime work for which he should be paid under the FLSA. The claimant's rationale is that he is entitled to 20 hours of overtime pay because he "was required to work 6 consecutive 10-hour days." He states his "workweek began on Wednesday, May 28th and ended on Monday, June 2nd [2003]....My issue is that I have a right to be paid overtime for the time I worked over forty hours in a 168 hour period."

The January 10, 2006, agency decision on the claim for overtime issued to the claimant states:

Our records show you were a full time employee on a compressed work schedule, working four ten-hour days per administrative work week [sic]. TSA's Human Resources Management (HRM) guidance in effect at the time defines the administrative workweek as "any 7 consecutive days designated in advance.".... The administrative workweeks for TSA were established to coincide with the 26 pay periods established for other federal employees. Overtime is defined as "hours of work in excess of eight hours in a day or forty hours in a week for a full time employee, unless the employee is on a compressed work schedule." Your time and Labor (T&L) Reports for pay periods 12, 13, and 14 of 2003 show you worked forty hours each administrative workweek and eighty hours in a pay period. In pay period 13, a new work schedule was implemented that changed your days off from Sunday, Monday, and Tuesday to Tuesday, Wednesday, and Thursday. The schedule change resulted in your working six ten-hour days in a row, but you did not work those days in a single established work week, and it did not result in your working more than eighty hours in a single pay period. Therefore, under TSA policy applicable at the time, you were not eligible for overtime compensation for the hours worked on June 1 and 2, 2003.

In this regard, TSA's policy is consistent with Federal law, which provides that premium pay for overtime worked does not apply to hours which constitute a compressed work schedule. (See 5 U.S.C. §6128). It is also consistent with Federal cases that acknowledge the discretion of agency management to establish and if necessary amend, the period within the administrative workweek during which employees are required to be on duty regularly; those cases further provide that the number of consecutive days worked by employees, spanning more than one administrative workweek, is irrelevant to the issue of the requirement to pay overtime. The requirement to pay overtime is driven by whether the employee worked more than the 40 hours of duty scheduled within the administrative workweek. (See *Sanford v. Weinberger* (CAFC), 752 F.2d 636) Since you worked no more than 4 ten-hour days in any administrative work week, you are not entitled to overtime.

In his February 3, 2006, response to the AAR, the claimant states the agency:

...did not include a definition of compressed work schedule (CWS). However, I have acquired a definition from the Office of personnel [sic] Management, which states that '*Compressed work schedule (CWS) means, in the case of a full-time employee, an 80-hour biweekly basic work requirement that is scheduled by and [sic] agency for less than 10 workdays...*'

Also included...are several TSA Time and Labor Reports. These forms are used to further, intentionally mis-represent [sic] the facts....

I have attached a copy of the 2003 Payroll Calendar issued by TSA/HOU, which was used during the time in question. This schedule clearly shows that between pay periods 12 & 13, I worked 100 actual hours (in the single pay period.)

...between pay periods 12 and 13, I worked exactly 10, ten-hour days, not less than 10, totaling 100 hours, 20-hours [sic] more than the 80-hour bi-weekly basic work requirement. What's more, if you total the **required work hours** for the month of June (pay periods 13 and 14), it comes to 180-hours [sic], not the 160-hours [sic] that combine two pay periods with no overtime.

The Administrative Workweek (Sunday through Saturday) and the Basic Workweeks (my designated 40-hour work schedule) always overlapped, but did not normally exceed the work requirements of the specific pay periods.

1. Did the claimant perform unpaid overtime work?

The claimant asserts that he is due overtime pay because (1) his administrative workweek (Sunday through Saturday) and basic workweek (his designated 40-hour work schedule) "always overlapped" and (2) the pay periods on the payroll calendar prove that statement; i.e., each pay period consists of two Sunday through Saturday weeks.

Based on information provided by the agency, we conclude TSA, under its own authority to set terms and conditions of employment for screener personnel, has adopted the pertinent provisions of subchapters I and II of chapter 61 of title 5, U.S.C. (§§ 6101-6133), regarding hours of work and, therefore, also falls under the implementing regulations in 5 CFR part 610. The record shows the claimant was covered by a compressed work schedule (CWS) as provided for in §§ 6127-6128 in that both he and the agency acknowledge he worked eight ten-hour days each pay period. Therefore, he is covered by the compressed schedule premium pay provisions of 5 U.S.C. § 6128 which, in the case of any full-time employee, provides for payment of overtime pay for "hours worked in excess of the compressed work schedule." In the claimant's situation, he would be due premium pay for all hours worked in excess of his 80-hour biweekly compressed work schedule based on 5 U.S.C. § 6128 which states that FLSA overtime provisions do not apply to the hours which constitute a compressed work schedule. As such, the claimant's assertions regarding administrative workweeks and FLSA overtime entitlement are moot since CWS requirements are not workweek based, but biweekly pay period based; i.e., an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays (section 6121(5)(A)).

However, we will respond to the issues raised in the claimant's rationale. Contrary to the claimant's assertions, the payroll calendar does not define and has no bearing on what constitutes an administrative workweek. As stated in 5 U.S.C. § 6101(2)(A), the head of an Executive agency shall "establish a basic administrative workweek of 40 hours for each full-time employee...." In addition, 5 U.S.C. § 6101(2)(B) states "the hours of work within that workweek [are to] be performed within a period of not more than 6 of any 7 consecutive days."

An agency is not required to follow a Sunday through Saturday pattern. While 5 U.S.C. § 6101(3)(B) encourages such a schedule: "the basic 40-hour workweek is scheduled on 5 days, Monday through Friday **when possible** (emphasis added), and the 2 days outside the basic workweek are consecutive," this is not a requirement. The flexibility to deviate from this practice for reasons of mission accomplishment or cost control is made clear and unambiguous in 5 U.S.C. § 6101(3). Changes in such schedules are anticipated in 5 U.S.C. § 6101(3)(A): "assignments to tours of duty are scheduled in advance over periods of not less than 1 week."

These flexibilities are restated in 5 C.F.R. § 610.121(a) which explicitly permits an agency to change employees' work schedules without limitation "when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased." 5 C.F.R. § 610.121(a) also provides that the basic workweek should be scheduled on Monday through Friday, when possible. However, it is well established that agencies have discretion to deviate from the basic workweek. *See Acuna v. United States*, 479 F.2d 1356 (Cl. Ct. 1973), *cert. denied*, 416 U.S. 905 (1974). In addition, 5 C.F.R. § 610.102 provides that the authority to establish employee work schedules may be delegated by agency heads to lower-level officials as in the instant case. Agency management retains these same flexibilities with regard to establishing and changing compressed work schedules (see 5 U.S.C. § 6121(3)).

Section 7(a)(1) of the FLSA provides for the payment of overtime "at a rate not less than one and one-half times the regular rate of pay" for hours worked in excess of 40 hours in a workweek (or, under 5 U.S.C. § 6128, hours worked in excess of the 80-hour biweekly compressed work schedule). However, the FLSA does not define "workweek" and does not proscribe the scheduling of any number of consecutive days. As discussed in *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985):

...the FLSA refers only to "workweek." It has long been established under the FLSA, however, that the "workweek" consists of any 7 consecutive days starting with the same calendar day each week, **designated by the employer** (emphasis added). See *Harned v. Atlas Powder Co.*, 301 Ky. 517, 192 S.W. 2d 378, 380 (1946).

The record shows the claimant's schedule was changed in pay period 13 of 2003 as described by the agency in its decision. As a result, the last two of his six consecutive workdays are not in the same workweek as the first four days, but were in a different biweekly pay period and, as such, do not constitute overtime hours of work as asserted by the claimant. His assertions regarding CWSs are misplaced for the same reasons; i.e., the last two of the six days at issue are in a different biweekly pay period than the first four days.

Based on the preceding discussion, we find the claimant has not shown he performed overtime work for which he was not paid.

2. *Did the agency willfully violate the Act?*

The claimant believes the agency willfully violated the FLSA. The agency did not address the issue in its decision or AAR. The claimant alleges that his termination by TSA was as a result of his efforts to be paid overtime for the time period at issue in his claim.

5 CFR 551.104 defines “willful violation” specifically as follows:

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

Clearly, not all violations of the FLSA are willful as this term is defined in the regulations. However, error alone does not reach the level of willful violation as defined in the regulations. A finding of willful violation requires that either the agency knew that its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. The regulation further instructs that the full circumstances surrounding the violation must be taken into account.

In the instant case, since the claimant is not due any overtime, and TSA’s determinations regarding the pay matters at issue in this claim are appropriate, we must conclude TSA did not willfully violate the Act defined in the regulations on matters of overtime compensation or the compressed schedule premium pay provisions of 5 U.S.C. § 6128.

Documentation submitted by the claimant and TSA show his removal was for failure to meet annual recertification requirements unrelated to the provisions of the FLSA. Review of the removal process as applied to the claimant is a matter beyond the scope of OPM’s claims adjudication authority under the FLSA or 31 U.S.C. § 3702. As such, we will not address this issue.

Decision

The hours worked at issue in the claim were not overtime and no money is due the claimant.