

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

San Francisco Oversight Division  
120 Howard Street, Room 760  
San Francisco, CA 94105-0001

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

**Claimant:** [Name of claimant]

**Position:** Civil Engineering Technician  
GS-802-11

**Organization:** [Name of claimant's organization]  
U.S. Forest Service  
U.S. Department of Agriculture

**Claim:** Exemption status. Due back pay for  
difference in overtime between time  
and a half and GS-10 step 1.

**OPM decision:** Nonexempt. Overtime payment due.

**OPM decision number:** F-0802-11-05

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Carlos A. Torrico  
FLSA Claims Officer

October 12, 2001  
Date

As provided in section 551.708 of title 5, Code of Federal Regulations, this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which Office of Personnel Management administers the Fair Labor Standards Act. The agency should identify all similarly situated current and, to the extent possible, former employees, and ensure that they are treated in a manner consistent with this decision. There is no right of further administrative appeal. This decision is subject to discretionary review only under conditions and time limits specified in section 551.708 of title 5, Code of Federal Regulations (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit, which is enclosed with this decision, when they receive payment.

The agency is to compute the claimant's overtime pay, if any, in accordance with instructions in this decision, then pay the claimant the amount owed him. The agency must also submit a Standard Form 50 showing that the claimant's exemption status has been changed to comply with this decision. The SF50 should be sent to this office within 15 workdays of receiving the decision. If the claimant believes that the agency has incorrectly computed the amount owed, he may file a new FLSA claim with the Office of Personnel Management.

**Decision sent to:**

**Claimant:**

[Address of claimant]

**Agency:**

[Servicing personnel office]  
U.S. Forest Service  
U.S. Department of Agriculture

Director, Human Resources Management  
U.S. Forest Service  
Rosslyn Plaza  
1621 N. Kent Street, Room 900  
Arlington, VA 22209

Ms. Donna D. Beecher  
USDA-OHRM-OD  
U.S. Department of Agriculture  
J.L. Whitten Building, Room 302-W  
14<sup>th</sup> & Independence Avenue, SW  
Washington, DC 20250

## **Introduction**

On October 13, 2000, the San Francisco Oversight Division of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes that his FLSA exemption status should be nonexempt. The claimant works in the [name and location of claimant's organization], U.S. Forest Service, U.S. Department of Agriculture. We have accepted and decided his claim under section 4(f) of title 29 (FLSA), United States Code.

As is customary with our analysis of an FLSA claim, we reviewed the position description of record and other information provided by the claimant and the agency. We also interviewed the claimant and his supervisor. Based on our review, it appears that the claimant's position may not be functioning as it is currently classified. In addition to the FLSA, we administer the provisions of title 5, under which the employing agency has primary responsibility for proper classification. Therefore, since the agency is responsible for correctly classifying positions, we recommend that you review the classification of the claimant's position and take whatever actions are necessary to ensure the accuracy of its classification.

## **General issues**

The claimant occupies an Engineering Technician, GS-802-11, position. His agency determined that his position is exempt from the FLSA by application of the criteria for Administrative and Professional exemption discussed in 5 CFR 551.206 and 207. However, he believes that his position is nonexempt because it does not meet that criteria. The guidance found in 5 CFR 551.202(e)(2) is applicable to the claimant. This nonexempt group of employees covers nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9 and many, but not all, of those positions properly classified at GS-9 or above. The claimant's position is classified above GS-9 so the exemption criteria must be applied.

The claimant has filed a claim covering the period April 1997 to the present. By law, the claim is retroactive for 2 years from the date the claim was received or 3 years for willful violation. There is no evidence of willful violation on the part of the agency so the claim is retroactive for 2 years.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency. We also conducted telephonic interviews with the claimant's supervisor, [name of supervisor], Assistant Forest Engineer, GS-802-13, on June 19, 2001, and with the claimant on June 14, 2001.

## **Job information**

The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (5CFR 551.202). Following is a description of the duties actually performed by the claimant based on our interviews with him and his supervisor and other information provided by the claimant and the agency.

The claimant performs both work leader and team member functions in the [claimant's organization]. As work leader the claimant is responsible for organizing the work to be accomplished. However, a majority of the work he performs are hands on tasks requiring a high level of technical expertise acquired through experience in applying standardized techniques or established procedures for road management. He provides technical guidance and assistance to team members. He performs technical duties that require managing the transportation system on the [name of installation]. These duties include taking traffic counts on primary and secondary routes and keeping all data in the Forest's Transportation Inventory System up-to-date and accurate. He is responsible for data entry of the roads in the Forest's Infra database, reviews surface replacement projects in the field, and performs reconstruction inventories on the roads to determine needed work and to prepare the plans and contracts. He works with the adjacent land owners with National Road Cooperative agreements to determine the percent shares in road maintenance, repair, and construction.

The claimant is the designated Contracting Officer Representative (COR), which occupies approximately 5% of his time. As COR he is responsible for ensuring that the work performed by the contractor is carried out in accordance with the terms and conditions of the contract. He ensures that the engineering plans and specifications are fully complied with and that the work is accomplished in accordance with accepted engineering standards and practices.

The claimant's work involves verifying that engineering standards are met, but he does not develop the standards. In providing technical advice and assistance, he refers to manuals and guidelines. He exercises some judgment in locating and selecting appropriate guidelines and in making minor deviations to adapt the guidelines in specific cases. Situations where existing guidelines are inadequate or where significant deviations are necessary are referred to the supervisor.

The position description, other information furnished by the claimant and his agency, and information gathered through interviews provide additional details about the claimant's actual duties.

## **Evaluation**

The agency finds the claimant is exempt under the Professional and Administrative Exemption Criteria. Our application of the criteria follows. In addition we have applied the Executive Exemption Criteria to the position.

### Professional Exemption Criteria

Under the professional exemption criteria contained in 5 CFR Section 551.207, a professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of --

- (1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or
  - (2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or
  - (3) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the items listed under 5 CFR 551.207 (a)(3).
- (b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.
  - (c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
  - (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at the GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

The claimant does not meet (a)(1).

To meet (a)(1), the claimant must perform work comparable to that performed by professional employees on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

Our interviews with the claimant and the claimant's supervisor disclosed that the engineering technician work that [the claimant] performs is not like that done by professional employees, and does not require the level of theoretical knowledge comparable to that applied by professional engineers gained through a bachelor's degree in engineering. Rather, the claimant's supervisor indicated that the claimant's knowledge is a reflection of the many years of experience applying basic principles and in-depth practical knowledge in the field. His practical knowledge was gained through many years of on-the-job training and through training courses offered by the agency such as Road Design, INFRA data, and Contract Officer Representative courses. As

further indicated by the claimant and his supervisor, theoretical knowledge and that of related disciplines and new developments in the field is applied by engineering professionals involved in structural changes and designs.

The claimant does not meet (a)(2).

The claimant's work is not in a field of artistic endeavor.

The claimant does not meet (a)(3).

The claimant's work is not in the computer software field.

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

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 involve 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.

According to the claimant's supervisor approximately 90% of the work [the claimant] performs is based on standardized procedures or precedents. He is required to apply very specific criteria, follow standard procedures, and select from among prescribed solutions when problems are encountered. He is able to provide input based on his findings, but does not have the authority to deviate from prescribed procedures and guidelines without supervisory approval. He has very little discretion within those prescribed procedures to adapt techniques or be innovative.

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 works independently. However, he does not have the opportunity to exercise independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. He applies approved procedures. He has very little discretion within those approved procedures. The work performed by the claimant

involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment.

Criterion (d) is not applicable to the claimant's position.

### Conclusion

Since the claimant does not meet any of the professional exemption criteria, he cannot be considered exempt using that criteria.

### Administrative Exemption Criteria

Under the administrative exemption criteria, contained in 5 CRF Section 551.206, an administrative employee is 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 criteria:

- (a) The employee's 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.
- (c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

The claimant does not meet (a)(1).

OPM defines the formulation or execution of management programs and policies as work that involves management programs and policies which range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing proposals that are acted on by others. Employees significantly affect the execution of management policies or programs typically when the work involves obtaining compliance with such policies by individuals or organizations, 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 is not engaged in formulation or execution of management policies or programs, e.g., evaluating operating programs of the organization. He is not obtaining compliance with program policies or determining the accomplishment of program objectives. In contrast, the claimant is performing technical work in the field gathering road data for improving or repairing roads. He provides field engineering and technical advice and assistance as it relates to road management.

The claimant does not meet (a)(2).

Work that involves general management, business, or supporting services includes a wide variety of specialists who provide support to line managers by providing expert advice in specialized fields, such as that provided by management consultants or systems analysts; by assuming facets of the overall management function, such as personnel management or financial management; by representing management in business functions, such as negotiating contracts; or by providing support services, such as procurement and distribution of supplies. The claimant does not perform such services.

The claimant 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 does not meet (b)(1).

Refer to the discussion under Professional Exemption (b).



The claimant meets (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. That knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject matter field.

The claimant is required to have an extensive knowledge of road management activities. He must review the environmental assessment report for project development and determine the appropriate methods of location, survey, design, contract preparation and administration. In reviewing the report he has to consider a number of variables such as slope, land stability, existing transportation and planned transportation system use, economics, maintenance, and land use to design and implement projects to meet specified objectives. Projects require applying existing policies, guidelines, and procedures. The in-depth practical knowledge required to conduct road inventories such as those just mentioned would typically come from several years of on-the-job training and experience.

The claimant does not meet (c).

Refer to the discussion under Professional Exemption (c).

Criterion (d) is not applicable to the claimants' position.

Conclusion

Since the claimant meets only (b)(2) of the administrative criteria, he cannot be considered exempt using that criteria.

Executive Exemption Criteria

Under the executive exemption criteria, contained in 5 CFR Section 551.205, an "executive" is a supervisor, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees.

Conclusion

The claimant's position does not meet the definition of "executive" since it does not involve management or supervision of employees; therefore, it does not meet the executive exemption criteria and there is no need to examine the additional criteria in this section.

**Decision**

Based on the above analysis, the claimant does not meet the professional, administrative, or executive exemption criteria; therefore, the claimant is nonexempt, i.e., covered by the provisions of the Fair Labor Standards Act.

**Compliance instructions**

The claimant can receive back pay for only two years back from the date his claim was received by OPM which was October 13, 2000. Therefore, he can receive pay for the claim back to October 13, 1998. He is due compensation for the difference between the overtime payment he received under title 5 and the overtime payment due under the FLSA, if any. In the future, the agency is required to record all hours the claimant is required to work and suffered or permitted to work and to properly compensate him for that work under the FLSA.

FPM Letter 551-24 (copy enclosed) contains guidance for computing pay when FLSA overtime is due. The claimant's overtime pay must be calculated on a workweek basis. Therefore, for each workweek in the claim period, the agency is to compute the claimant's pay entitlement using the guidance in the FPM letter. The claimant is due this amount minus whatever he has already been paid for the week.

5 United States Code (USC) 5596, Subpart H of title 5 CRF 550, and the enclosed FPM Letter 550-78 show that the claimant is also owed interest on the back pay discussed above. Therefore, the agency is to compute the interest as described in the regulation and the FPM letter. To help with this, the agency may refer to OPM's web site - <http://www.opm.gov/oca/PAY/backpay/backpay.htm>.

The agency should pay the claimant the total owed him, if any. If the claimant believes that the agency has computed the amount incorrectly, he may file a new FLSA claim with OPM.

Enclosures