

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

Claimant: [claimant's name]

Agency classification: Engineering Technician
GS-802-11

Organization: Engineering Branch
Engineering Construction Division
Directorate of Installation Operations
U.S. Army Garrison
Department of the Army
[city and state]

Claim: Due back pay for overtime; willful violation by the agency.

OPM decision: Nonexempt. Due the difference between FLSA and title 5 overtime payment, if any. Willful violation denied.

OPM decision number: F-0802-11-06

/s/ Kevin E. Mahoney

Kevin E. Mahoney
Deputy Associate Director
Center for Merit System Accountability

4/19/06

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, to ensure that they are treated in a manner consistent with this decision. 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.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, and then pay the claimant the amount owed her. If the claimant believes the agency has incorrectly computed the amount owed her, she may file a new FLSA claim with this office.

Decision sent to:

[claimant's name and address]

[servicing HR office and address]

[servicing HR office and address]

Chief, Position Management and Classification Branch
Office of the Assistant Secretary
Manpower and Reserve Affairs
Department of the Army
Attn: SAMR-CPP-MP
Hoffman Building II
200 Stovall Street, Suite 5N35
Alexandria, VA 22332-0340

Introduction

On November 14, 2003, we received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. The claimant believes her agency willfully violated the Act by failing to appropriately correct the FLSA designation of her position. The claimant is assigned as an Engineering Technician, GS-802-11, in the Engineering Branch, Engineering Construction Division, Directorate of Installation Operations, U.S. Army Garrison, Department of the Army, at the [city and state]. Another claim was submitted by a second employee assigned to an identical position within the same Branch. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and her agency, including information from telephone interviews with the claimant and her second-level supervisor on November 9, 2005, and information submitted by the second employee.

General issues

The claimant makes statements concerning the inequity in how her situation was handled in comparison to that of other Division employees. In adjudicating this claim, our only concern is to make our own independent decision as to the exemption status and whether the violation was willful and how much FLSA overtime pay the claimant is owed, if any. We must make that decision by comparing the facts in the case to the criteria in Federal regulations and guidelines. As a result, we have considered the claimant's statements only insofar as they are relevant to making that comparison.

Background

The following is a brief summary of the circumstances surrounding this claim based on the record. The claimant's position was previously determined to be exempt from the FLSA. The Army's Civilian Personnel Operations Center Management Agency, CPOCMA, (now the Civilian Human Resources Agency, CHRA), completed an Army-wide review of FLSA determinations of GS-7 to GS-12 positions. These findings were reported to the major commands by memorandum dated December 26, 2000. Implementation guidelines were issued to installation and activity commanders, February 12, 2001. The Garrison Commander at [installation] requested that the CPOC conduct its own review of the numerous positions, series, and grades within the activity, including co-located activities. By letter dated December 12, 2002, the Commander provided a list of 26 positions for which the FLSA status was to be changed to nonexempt plus instructions for processing a Standard Form (SF) 50 for each employee. This list included the claimant's position. The Commander proposed an effective date for implementation of not later than January 1, 2003. Due to an administrative delay, the actions were not effective until February 9, 2003.

The record also includes copies of e-mails between the claimants and the HR specialist. These include a notification on February 27, 2003, that the claimants' PD has been found to be nonexempt and that the CPOC is in the process of effecting the changes. There is a March 24, 2003, request as to "when this will actually change on our pay voucher" and a June 4, 2003, e-mail from the HR specialist. Briefly, this states that the agency has no back pay claims

procedure in place and that OPM should accept the claim. It states they are waiting CPOCMA's guidance and that there is nothing that would prohibit the claimant from sending in the claim to OPM while they wait for the CPOCMA/OPM resolution. On July 1, 2003, the second claimant asks "why should we have to file a claim to be compensated for what's obviously owed to us?" This claimant indicated she understood that others had already received back pay. The HR specialist indicated that she did not understand how others were already compensated and asked if they filed back pay claims or whether their exemption status been changed differently. She again indicated that Army has no agency policy on filing back pay claims and the claimant will need to file directly to OPM. The record does not show any clear indication of any claim filed with the agency as discussed in 5 CFR 551.705. The claimants subsequently filed claims for three years back pay with our office.

The October 21, 2004, agency CPAC report to OPM on the claim indicates that Army does not have a procedure in place on how to process back pay requests. They found the CPOC review of the work being performed by the claimant confirmed the original CPOCMA finding of nonexempt. They state that in keeping with previous review of FLSA and guidance to process changes effective the next pay period, and having no authority to process FLSA changes as corrections with past effective dates, they must find the claimant is not entitled to back pay. They stated the agency did not willfully withhold information regarding a decision on the exemption status and that all actions were processed concurrently, based on the Garrison Commander's request.

Position Information

As stated in 5 CFR 551.202, the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. The following is a description of the duties performed by the claimant based on our interviews with her and the supervisor, as well as other information provided by the claimant and the agency.

The Engineering Branch provides engineering assistance and instruction for construction projects for the [installation] and sites located in [city and state]. The Engineering Branch currently includes six engineering technicians, ten engineers and two architects. According to the supervisor, there are similarities in the work performed by the technicians and that performed by the professional staff. Limited by the relatively small size of the Branch, each employee is assigned responsibility for completing a scope of work, developing cost estimates and project management. Though the steps each employee takes are similar, what varies between the technicians and the professional staff is the complexity of the projects assigned and the number of steps that can be executed independently. Less complex projects are assigned to technicians, and their work is typically supplemented by that of the professional staff. The claimant, for example, goes to the electrical engineer with any electrical issues. On the other hand, the engineers and architects may complete scopes of work that are regularly more complex.

Specifically, the claimant is responsible for providing engineering services in the planning, layout, development, and completion of construction projects estimated at no more than \$750,000. Duties include preparing scopes of work, cost estimates, drawings, timetables, and justifications involving proposed construction projects. In addition, she ensures the work performed by contractors is carried out in accordance with established plans and specifications. During the construction phase, the claimant prepares necessary reports, checks specifications

and, when needed, makes modifications. She reports directly to the Supervisory General Engineer who occupies a GS-801-13, position.

Evaluation of FLSA Coverage

Sections 551.201 and 551.202 of title 5, Code of Federal Regulations (CFR) require that an employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles. Each employee is presumed to be FLSA nonexempt. Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption. The burden of proof rests with the agency that asserts the exemption. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. The designation of a position's FLSA status ultimately rests on the duties actually performed by the employee. There are three exemption categories applied to Federal employees: executive, administrative, and professional.

Executive Exemption Criteria

Under the executive exemption criteria contained in 5 CFR 551.204, an executive is a supervisor, foreman, 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.

The claimant's position does not meet the definition of executive as it does not involve management or supervision of employees. The executive exemption criteria were not met.

Administrative Exemption Criteria

The administrative exemption criteria in 5 CFR 551.206 governs whether the claimant's position should be exempt from the FLSA under the administrative exemption criteria. The work is exempt if it meets administrative exemption criteria (a)(1), (2), or (3), known as the primary duty test, and (b) through (d).

Primary duty test

Criteria (a)(1) deals with work that significantly affects the formulation or execution of management policies or programs.

Work that affects the formulation or execution of management programs and policies recognizes that management programs and policies 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 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, within or outside the Federal Government, or making significant determinations 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. She does not obtain compliance with program policies or determine the accomplishment of program objectives. In contrast, she provides technical engineering assistance as it relates to the Engineering Branch. The work performed is comparable to that of a production worker, meaning she performs work that is the primary mission of their organization; i.e., to provide engineering services for projects at the [installation] and sites located in [city and state]. For these reasons, criterion (a)(1) is not met.

Criterion (a)(2) involves general management or business functions or supporting services of substantial importance to the organization services.

Work involving general management, business, or supporting services, as distinguished from production functions, means the work of employees who provide support to line managers. This includes a wide variety of specialists who provide support 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 human resources 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 organizational location does not change service functions into nonexempt production functions. To warrant exemption from the FLSA, the work must involve 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.

As indicated earlier, the claimant is responsible for providing engineering technical services in the planning, layout, development, and completion of assigned construction projects. During the construction phase, the claimant prepares necessary reports, checks specifications and, when needed, makes modifications. In performing these duties, the claimant's work supports the Branch's mission of planning, coordinating, and managing [installation] construction projects. The functions performed are part of the core mission of the engineering program and are essential to meeting a broad range of management goals, e.g., in assisting with designs for construction projects to meet cost efficiency, as well as functional and aesthetic requirements. However, the claimant does not represent management or have the authority to make decisions at the level typical of the criterion (a)(2). The claimant's work does not meet criterion (a)(2).

Criterion (a)(3) involves substantial participation in the executive of administrative function of a management official.

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 responsibilities 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 position does not operate in this manner. The claimant's work does not meet criterion (a)(3).

Nonmanual duty test

The nonmanual work test is met when the employee performs office of other predominantly nonmanual work which meets either criterion (b)(1) or (b)(2).

Criterion (b)(1) covers work that is intellectual and varied in nature.

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.

Although developing a scope of work involves numerous steps, each decision does not typically require the claimant to choose from a broad range of possible actions. Decisions are guided by a number of variables including, but not limited to, requests by the tenant organization for which the project is being built, statutory requirements, building codes, precedents, maintenance requirements and existing building materials. The claimant does not have to utilize innovative techniques since most assigned construction projects are fairly routine. The tenant organization may occasionally request new and innovative features, e.g., high speed doors, but the claimant will approach a request from the standpoint of whether it can be done and within the projected cost estimate. The claimant's work does not meet criterion (b)(1).

Criterion (b)(2) covers work of a specialized or technical nature that requires considerable specialized training.

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. These knowledges are characteristically acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledges characteristically acquired through specialized academic training.

The claimant is required to have an extensive practical knowledge of engineering principles and techniques in order to produce documents and drawings, typically in the form of scopes of work, budget estimates, and scheduling plans. Work must adhere to various established procedures, precedents, and guidelines, including national building codes, Americans with Disabilities Act requirements, and statutory regulations. The in-depth practical knowledge required to complete such work would typically come from several years of on-the-job training and experience. The claimant's work meets criterion (b)(2).

Discretion and independent judgment test

Work meeting this test (criterion (c)) requires the employee to frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day

work. 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. Decisions made as the result of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion and independent judgment of the level required for exemption.

The claimant works independently, in that she is typically responsible for the scopes of work assigned to her. According to the supervisor, she is assigned those projects appropriate to her position and are, therefore, less complex than those assigned to the professional staff. She 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. Instead, she applies approved procedures and has limited discretion within those approved procedures. Scopes of work and cost estimates are approved by the tenant organization and the supervisor to ensure adherence to accepted procedures and requirements. 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. The claimant's work does not meet criterion (c).

Criterion (d)

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. Because the claimant's position is classified above these grade levels, this criterion does not apply to the claimant's work.

Since the claimant meets only criterion (b)(2) of the administrative exemption criteria, she cannot be considered exempt using those criteria.

Professional Exemption Criteria

5 CFR 551.207 contains the criteria governing whether the claimant's work should be exempt from the FLSA under the professional exemption criteria. The work is exempt if it meets professional exemption criteria (a)(1), (2), or (3), known as the primary duty test and (b) through (d) in section 551.207.

The primary duty test is met if the work meets professional exemption criteria (a)(1), (2), or (3).

Criterion (a)(1) deals with 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.

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. The record does not show that the claimant applies theoretical knowledge. Instead, she applies an in-depth practical knowledge of the requirements and techniques of engineering principles. Our interviews with the claimant and the supervisor disclosed that the engineering technical work 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 employees. Instead of requiring the level of theoretical knowledge comparable to that applied by professional engineers gained through a bachelor's degree in engineering, the knowledge required of the claimant's position is a reflection of experience in applying basic principles and in-depth practical knowledge in the engineering field. Her practical knowledge was gained through many years of on-the-job training and supplemented through training courses offered by the agency, e.g., the Contracting Officer Representative, cost estimating, and project management courses. The claimant's work does not meet criterion (a)(1).

Criterion (a)(2) concerns 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. The claimant's work is not in a field of artistic endeavor. Therefore, the claimant's work does not meet criterion (a)(2).

Criterion (a)(3) deals with 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). The claimant's work is not in the computer software field. The work does not meet criterion (a)(3).

Based on the preceding analysis, the claimant's work does not meet the primary duty test. Because the primary duty test is not met, the claimant's work does not meet the professional exemption criteria of the FLSA. Therefore, we will deal with the remaining criteria in a more abbreviated fashion.

Criterion (b) deals with work that is predominantly intellectual and varied in nature. Such work requires creative, analytical, evaluative, or interpretative thought processes for satisfactory performance. 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 supervisor, the claimant performs work based on standardized procedures or precedents. She is required to apply specific criteria, follow standard procedures, and select from among prescribed solutions when problems are encountered. She provides input and recommendations based on her findings, but she does not have the authority to deviate from prescribed procedures and guidelines without supervisory approval. Consequently, there is

limited discretion within those prescribed procedures to adapt techniques or be innovative. Although developing a scope of work involves numerous steps, each decision does not typically require the claimant to choose from a broad range of possible actions. Decisions are guided by a number of variables including, but not limited to, requests by the tenant organization for which the project is being built, statutory requirements, building codes, precedents, maintenance requirements and existing building materials. The claimant does not have to utilize innovative techniques since most assigned construction projects are fairly routine. The tenant organization may occasionally request new and innovative features, e.g., high-speed doors, but the claimant will approach a request from the standpoint of whether it can be done and within the projected cost estimate. The claimant's work does not meet criterion (b).

Criterion (c) is the discretion and independent judgment test. The claimant's position does not meet criterion (c) as discussed under criterion (c) under our Administrative Exemption analysis.

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

Decision on FLSA Coverage

Based on the above analysis, the claimant's position did not meet the criteria for the executive, administrative, or professional exemption criteria, and is nonexempt and properly covered by the overtime provisions of the FLSA.

The claimant is due compensation for the difference in overtime payment due under the FLSA and any overtime payment she received under title 5.

Willful Violation

The claimant believes the agency willfully violated the FLSA, but the agency disagrees. Accordingly, the next issue is whether the claim period should be extended to three years based on the claimant's belief that her agency willfully violated the FLSA. The claimant's request stated, "We are requesting two years back pay for overtime worked and an additional year of back pay because it is felt that our Agency was aware of the FLSA changes and didn't follow up on them. Even when other personnel in our Division filed a claim, no effort was made to notify everyone in the affected series. We were never notified until we contacted our personnel office and requested information." 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. There is no question that the agency erred in the exempt status of the claimant. 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 evaluating the circumstances surrounding the violation, it is important to consider the complex history of the exemption status of high-graded Federal technicians like the claimant under the FLSA. OPM regulations and policy regarding the exemption of these positions have changed over the years. In the initial period after extension of the FLSA to Federal employees in 1974, it was generally accepted that technician positions at GS-11 and above met the professional exemption criteria of the FLSA. The presumption of exemption at GS-11 and above was later withdrawn (See *AFGE v. OPM*, 821 F. 2d 761 (D.C. Cir. 1987)) and agencies were required to apply the full criteria to determine FLSA status. These changes, combined with the inherent complexity of applying the exemption criteria to high-graded technician positions tend to increase the possibility of error.

It is also important to consider the origin of the claim. As indicated earlier, Army was reviewing the FLSA determinations of GS-7 to GS-12 positions throughout the agency. Locally, during this same time period, a Construction Representative, GS-809-11, from the Engineering Division's Construction Branch inquired about his position's FLSA designation. The agency then conducted a review of the inquirer's position description and discovered a discrepancy caused by a miscoding in the agency's automated classification system, which incorrectly exempted the inquirer's position from the FLSA. The inquirer's position, along with those assigned to the same PD, were changed to nonexempt FLSA designations.

It is instructive to consider how the agency reacted when they discovered the erroneous FLSA designations. A nationwide review was conducted and findings reported through the major commands to each installation. [Installation] officials requested that the CPOC conduct its own review of the specified positions in question. The CPOC completed a review and identified 26 positions with erroneous exemptions. The December 12, 2002, memorandum from [installation] Commanding Officer to the CPOC requested immediate correction of those designations. The memorandum, in itself, is evidence that the agency was making an honest attempt to correct all erroneous FLSA exemptions. To prove willful violation, there must be evidence that the agency showed reckless disregard of the requirements of the Act. Instead, we find that proactive steps were being taken to correct actions in accordance with the FLSA. For example, the memorandum specifically directed the [geographic area] Region's CPOC to correct the erroneous FLSA designations and to provide each affected employee with an SF-50 to serve as notification of the actions taken.

We concur with the claimant in that it would have been more appropriate for the agency to have notified her directly instead of learning about the change in the FLSA status of her position from a coworker. Although an exact date could not be pinpointed, the claimant said she initially found out about the position's erroneous FLSA designation and shortly afterwards contacted the CPAC in December 2002. There is no record in the file of contact at that time. Copies of e-mails dated August 1 and September 12, 2002, discuss the FLSA status of a Construction Representative GS-809-11, positions in another branch of the organization. However, in response to a February 24, 2003, e-mail inquiry as to the status of the FLSA decision, the claimant was advised that the position had been found nonexempt and that the commander had signed the memo requesting the CPOC to effect the changes. This reply was made on February 27. As to the claimant's charge that the agency did not follow up on the FLSA changes, the one- to two-week time span between the issuance of the memorandum to the CPOC and the claimant's initial contact with the CPAC suggests that the agency may simply not have had the opportunity to

notify the claimant and other affected employees. The delay in acting exposes the agency to charges of negligence, but it does not meet the willful intent bar.

Based on all of the above, we find the agency erred in the claimant's exempt status under the overtime provisions of the FLSA. However, we also find that the agency acted in good faith by making a full and adequate inquiry once their attention was focused on the issue, and they took action to resolve the matter. In doing so, the agency did not recklessly disregard the requirements of the Act. In summary, we find the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

Decision

The claimant's work is nonexempt; i.e., covered by the overtime provisions of the FLSA. Therefore, the claimant is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on November 14, 2003, and the claimant can receive back pay only for two years prior to that date. 5 CFR 550.806 also states that the claimant is owed interest on the back pay.

The claimant did not provide specific information on overtime hours worked with the claim. She should provide the agency with the amount of overtime hours to which she believes she is entitled. The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid. If she believes the agency has computed the amount incorrectly, she may file a new FLSA claim with this office.