

U.S. Office of Personnel Management
Division for Human Capital Leadership and Merit Systems Accountability
Fair Labor Standards Act Program
Center For Merit Systems Compliance
1900 E Street, NW.
Washington, DC 20415-6000

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

Appellant: [name]

Agency classification: Aviation Safety Inspector
FG-1825-13

Organization: Unit 3
Anchorage FSDO-03
Flight Standards Division
[location]
Federal Aviation Administration
U.S. Department of Transportation
[location]

Claim: Compensation for time traveled
on a holiday and a non-workday.

OPM decision: Claimant is not due compensation.

OPM decision number: F-1825-13-01 (originally issued
as F-1825-13)

//signed//

Deborah Y. McKissick
FLSA Claims Officer

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 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 5 CFR 551.708. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

Decision sent to:

[name and address]

Human Resource Management Division
[location]
Federal Aviation Administration
U.S. Department of Transportation
[location]

Director, Office of Personnel
Federal Aviation Administration
U.S. Department of Transportation
[location]

Introduction

On December 21, 2001, the San Francisco Oversight Division, now the San Francisco Field Services Group, of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name]. Because of program changes within OPM, the claim was sent to OPM's claims office in Washington, DC, for processing. We have accepted and decided his claim under section 4(f) of title 29 (FLSA), United States Code (U.S.C.). In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency.

Background information

The claimant occupies an Aviation Safety Inspector, FG-1825-13, position which is designated as FLSA nonexempt. He believes that he should be compensated in accordance with FLSA provisions for time spent traveling to and from assigned training. The claim is retroactive from November 26, 2001, the date that he filed his claim with his agency.

The U.S. Court of Appeals for the Federal Circuit has determined that if a person filing an FLSA claim was a bargaining unit member during any part of the complaint period, the unit was covered by a collective bargaining agreement (CBA), and the agreement did not explicitly exclude FLSA matters from its negotiated grievance procedure (NGP), then the person's administrative avenue of redress is limited to the NGP. Congress intended that such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (Fed. Cir. 1990) (en banc), *cert. denied*, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121(a)(1) of Title 5 mandates that the grievance procedures in negotiated collective bargaining agreements be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

Based on the information provided by the claimant and the agency, the claimant was covered by the CBA between the Professional Airways Systems Specialists Division (PASS), District No. 1 – MEBA/NMU (AFL-CIO), Flight Standards Branch and the Federal Aviation Administration, U.S. Department of Transportation, dated March 3, 1993. Section 3 of Article 5 of the CBA specifically excludes matters concerning overtime under the FLSA, as amended. Therefore, OPM has jurisdiction to adjudicate this claim for FLSA overtime.

FAA and PASS executed a Memorandum of Agreement (MOA), effective May 23, 2001, in response to a bench ruling issued by the United States Court of Federal Claims which held that certain employees in the 2101 and other series were nonexempt from the overtime provisions of the FLSA. See *Davidson v. United States*, No. 98-553C (Ct. Cl. April 14, 2000). Under the terms of the bargaining unit agreement (BUA), the OPM "complaint and compliance system" must be used for matters relating to overtime pay entitlement under the FLSA, as amended. They are excluded from the scope of the negotiated grievance

procedures. *See* BUA Article 34, Section 6, and Article 5, Section 6. By entering into the MOA, FAA and PASS have not modified or nullified the terms of the BUA. The BUA, Article 79, Section 2, provides: “Upon implementation of this Agreement, any pertinent provisions of any written local, regional, or national agreements, understandings or like documents which increases or diminishes entitlements as expressly contained within or otherwise conflict with the express provisions of the Agreement are invalid.” Therefore, the terms of the MOA which conflict with or diminish entitlements within the BUA are invalid.

The MOA is not, nor does it purport to be, an amendment of the BUA. *See* BUA, Article 80. OPM retains the authority to review PASS employees’ claims as provided for in the BUA. The language of the MOA supports this conclusion since it directs the parties to resort to an “applicable statute or regulation” to resolve the FLSA overtime back pay issues unresolved by the parties through the ADR process (MOA, Section 2). In this situation, the applicable statute (section 204(f) of title 29, United States Code) and regulation (part 551 of title 5, Code of Federal Regulations) authorize OPM to administer the FLSA for FAA employees. Therefore, the terms of the MOA prohibiting the advancement of additional claims in any forum are invalid, and OPM retains jurisdiction over FLSA overtime pay claims filed by PASS bargaining unit members.

General issues

The essential facts surrounding this claim that are not in dispute:

- On Monday, November 12, 2001, the claimant left his home at 6:00 a.m. Pacific Standard Time (PST) to arrive at the airport at 6:15 a.m. to comply with the airport’s mandatory two hours’ security timeline. The claimant departed from Alaska at 8:00 a.m. PST and arrived in Atlanta, Georgia, at 10:30 p.m. Eastern Standard Time (EST). Driving a rental car, the claimant arrived at his hotel at 11:30 p.m. EST.
- On Saturday, November 17, 2001, the claimant left his hotel at 5:30 a.m. EST, and arrived at the airport at 6:00 a.m. EST, approximately 35 minutes before scheduled departure. The claimant departed from Atlanta, Georgia, at 8:15 a.m. EST and arrived in Alaska at 2:45 p.m. PST. The claimant arrived home at 3:00 p.m. PST.
- In Pay Period 25, the agency awarded the claimant 8 hours of holiday premium pay and 5 hours of compensatory time for November 12, 2001, and 8 hours of FLSA overtime pay and 9.5 hours of compensatory time for November 17, 2001.

The claimant’s scheduled workday is from 7:30 a.m. to 4:00 pm. Monday through Friday. The claimant traveled to and from assigned training on two non-workdays: November 12, 2001, and November 17, 2001. The agency paid the claimant 8 hours of holiday premium pay and 5 hours of compensatory time for November 12, 2001. The agency also paid the claimant 8 hours of FLSA overtime pay for November 17, 2001. The agency stated that the claimant was eligible for and received 9.5 hours of compensatory time for the hours traveled

outside of his regularly scheduled duty hours on November 17, 2001, in accordance with an agreement between PASS and the U.S. Department of Transportation, dated August 22, 1995.

Evaluation

The agency administrative report stated that, “The travel that [the claimant] performed outside of regular duty hours, November 12, or outside of corresponding hours on a non-workday, November 17, did not meet the criteria for payment of overtime under FLSA or Title 5 (e.g., the travel was within the administrative control of the agency, the employee wasn’t working, etc.). As a result, [the claimant] was not entitled to additional overtime pay for time spent traveling beyond his corresponding hours on Saturday, November 17, 2001. However, he was eligible for the 9.5 hours of compensatory time he received for time spent traveling outside normal duty hours as a result of a labor-management agreement.”

Section 40122(g) of title 49, United States Code (U.S.C.), establishes an independent personnel system within the FAA and, except for a few personnel management provisions, removes the FAA from coverage under title 5, United States Code. According to section 40122(g), the FAA no longer is subject to the pay provisions of 5 U.S.C. chapter 55 (Pay Administration) or the provisions of 5 U.S.C. chapter 61 (Hours of Work). OPM based its FLSA regulations (5 CFR Part 551) in part upon title 5 pay provisions and entitlements.

5 U.S.C. § 5541(2) defines the term “employee” for the purpose of determining coverage under title 5 premium pay provisions, and 5 CFR 551.401(b) provides:

For an employee, *as defined in 5 U.S.C. 5541(2)*, hours in a paid nonwork status (e.g., paid leave, holidays, compensatory time off, or excused absences) are “hours of work” under this part. [Emphasis added.]

Although 49 U.S.C. § 40122(g) authorizes the FAA to establish an independent personnel management system, it does not exempt the FAA from coverage under 29 U.S.C. § 204(f), the statutory provision authorizing OPM to administer the FLSA with respect to the majority of Federal employees.¹ Documents received from the FAA about this claim also show that, following the establishment of its independent personnel system, the FAA voluntarily adopted the majority of the pay provisions in 5 U.S.C. chapter 55. Therefore, OPM retains authority to consider FLSA claims from FAA employees and may treat the claimant as an employee under 5 CFR 551.401(b) which incorporates a definition that otherwise would apply to title 5 pay provisions and entitlements. OPM also may treat the claimant as if he were covered under title 5 pay provisions in considering questions relating to those title 5 pay provisions that the FAA adopted in establishing its personnel management system.

¹Section 204(f) of title 29, United States Code, provides, in relevant part, that “the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter [chapter 8, Fair Labor Standards] with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority).”

5 CFR 551.422 (a) is applicable to FLSA nonexempt employees, and prescribes that time spent traveling is considered hours of work if an employee is required to (1) travel during regular working hours; (2) drive a vehicle or perform other work while traveling; (3) travel as a passenger on a one-day assignment away from the official duty station; or (4) travel as a passenger on an overnight assignment away from the official duty station during hours on non-workdays that correspond to the employee's regular working hours. An agency may not adjust an employee's normal regularly scheduled administrative workweek solely to include travel hours that would not otherwise be considered hours of work.

After reviewing this claim, the agency decided that the claimant was overpaid because he was paid holiday premium pay for 8 hours for the time spent traveling on November 12, 2001. The agency based its decision on the belief that "the circumstances under which the travel was performed on the holiday are not considered 'work' under 5 CFR Part 550. The agency asserts that overpayment of the holiday premium pay also erroneously inflated the overtime rate used to calculate the FLSA overtime for hours worked on November 17, 2001."

The claimant's entitlement to holiday premium pay would be determined according to the criteria in section 5542(b)(2)(B), of title 5, United States Code, which is separate and distinct from and may not be considered as part of this FLSA claim. OPM also does not have jurisdiction to address the accumulation of the 9.5 compensatory hours discussed previously because this issue is covered by a labor-management agreement.

On November 12, 2001, the claimant traveled during his regular working hours between 7:30 a.m. (PST) to 7:30 p.m. (EST), on an overnight assignment away from his official duty station. In accordance with 5 CFR 551.422 (a)(1) and 5 CFR 551.401(b), the claimant's travel on November 12 was travel in lieu of work for which he was entitled to straight time pay. Because the FLSA does not require pay for time in a non-work status, e.g., holidays and vacation days, the FLSA does not provide for additional pay for travel on a holiday. Time spent traveling in excess of his regular working hours on November 12 does not meet any of the other provisions of 5 CFR 551.422(a), and therefore, does not constitute overtime hours compensable under the FLSA.

Time spent by the claimant traveling on Saturday, November 17, during corresponding work hours is compensable hours of work under 5 CFR 551.422(a)(4). Because they constitute hours in excess of 40 hours in the administrative workweek, they are compensable as FLSA overtime.

Decision

Based on the above analysis, the claimant is entitled to FLSA overtime for 8 hours travel time on November 17, 2001, for which he has already been paid.