U.S. Office of Personnel Management
Division for Human Capital Leadership and Merit System Accountability

Fair Labor Standards Act Program
Center for Merit System Compliance
1900 E Street, NW.
Washington, DC 20415-6000

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

Claimant:	[name]
Agency classification:	Detection Systems Specialist (Airborne) GS-2101-13
Organization:	Surveillance Branch [location] Air and Marine Operations Center Bureau of Immigration and Customs Enforcement Department of Homeland Security [location]
Claim :	Work is nonexempt and compensation for FLSA overtime is due
OPM decision:	Work is exempt and no FLSA compensation is due
OPM decision number:	2101-13-17 (formerly 04-F0036)

//signed//

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Marta Brito Pérez
Associate Director
Human Capital Leadership
and Merit System Accountability

May 20, 2005

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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, 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]

[name]
Chief, Position Management and Classification
U.S. Customs and Border Protection
U.S. Department of Homeland Security
[location]

Introduction

In July 2003, we received a request to file a Fair Labor Standards Act (FLSA) claim from [name], one of a group of employees occupying identical positions, organizational known as Senior Detection System Specialist (SDSS and as SDSS(Airborne) or SDSS(A)), in the [location] offices of the Air and Marine Operations Center. The position is classified as Detection Systems Specialist (Airborne), GS-2101-13. He disagreed with his agency's decision changing the status of his work and the designation of his position from nonexempt to exempt effective May 18, 2003, and the pay actions taken by his agency as a result of that change. The claimant provided additional information is support of his claim in a letter dated August 8, 2003. The claim was misplaced and the package resubmitted to us on March 18, 2004. On March 31, 2004, we docketed the case and requested an agency administrative report which we received on October 15, 2004. Eleven of the claimant's co-workers signed and submitted a joint response to the agency administrative report on October 22, 2004, representing the view of all claimants. We have accepted and decided this 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, including a telephone conference call interview on March 25, 2005, with a co-worker from Surveillance Branch[location], [name], selected by all claimants, and a supervisor, [name]. Other claimants [names] were present at the conference call and several provided additional information on the work that the group performs. [name] and the other claimants state that they all perform the same work functions and that the facts regarding FLSA exemption status are applicable to all of their individual claims.

General issues

The claimant states that the exemption status of his work was changed from nonexempt to exempt when his position was upgraded from Detection Systems Specialist (Airborne), GS-2101-12, to GS-13. Both positions use the organizational title of Senior Detection Systems Specialist (SDSS). He believes that this determination is incorrect because his position meets the first responder criteria for nonexemption based on the U.S. Department of Labor (DOL), Employment Standards Administration, Wage and Hour Division's Fair Pay Fact Sheet #17J: First Responders. He believes that the SDSS qualifies as a first responder under "similar employees" listed in the Fact Sheet since they are classified as law-enforcement under the FLSA, their job is preventing or detecting crime, conducting investigations for violation of law (smuggling and terrorism), performing surveillance, preparing investigative reports, and participating in the rescue of accident victims at sea after natural and chemical disasters.

Because OPM administers the FLSA with respect to employees in the appellant's agency, it is OPM's regulations, rather than DOL's regulations, that govern the application of the FLSA to the claimant. See *Billings v. U.S.*, 322 F. 3d 1328 (Fed. Cir., 2003). The claimant also cites a DOL Fact Sheet containing general explanatory guidance. Assuming, arguendo, that DOL guidance is directly applicable to the appellant's work, the guidance that he cites does not have the force of regulations that are the product of notice-and-comment rulemaking promulgated in the exercise of authority delegated by Congress. *James v. Von Zemenszky*, 301 F.3d 1364, 1365 (Fed.Cir.2002) (*citing United States v. Mead Corp.*, 533 U.S. 218, 230, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)).

In support of his FLSA rationale, the claimant cites section 551.202(c), title 5, Code of Federal Regulations (CFR), which states that nonsupervisory General Schedule (GS) employees in Air Traffic Control Series, GS-2152, positions perform work based on highly specialized technical skills and knowledge typically acquired only through prolonged job training and experience, and are nonexempt unless they are performing predominantly administrative functions rather than the technical work of the occupation. He states SDSS perform comparable work since it is involved in air traffic control, and is classified within the GS-2100 Transportation Group, and because the agency used the Air Traffic Control Series, GS-2152, position classification standard (PCS) to determine the grade level of the SDSS position because it requires the exercise of similar skills and knowledge as that of the GS-2152 occupation.

The position classification process provided for in chapter 51, of 5 U.S.C. is separate and distinct from the FLSA exemption determination process provided for under 29 U.S.C. While classification decisions, and the selection of classification tools used to make those decisions, under the former process assist in understanding the work performed by the claimant, they are not determinative of and do not directly control the exemption determination process conducted under the authority of 29 U.S.C.

Implicit in the claimant's rationale is that he continues to perform the same type of work that he performed in his GS-12 SDSS position which was classified as FLSA nonexempt. FLSA exemption determinations must be based on comparing the claimant's actual duties and responsibilities to criteria in Federal regulations and other Federal guidelines. Since comparison to Federal regulations and guidelines is the proper method for making exemption decisions, we cannot compare the claimant's current work to the work performed in other positions, which may or may not have been categorized properly, as a basis for deciding this claim.

Evaluation

The claimant disagrees with the agency's exemption determination made under the administrative exemption criteria. The agency has determined that the executive and professional and criteria are not applicable to the claimant's work. The claimant does not disagree with these determinations. Based on careful analysis of the record, we concur. Therefore, we with compare his work with the administrative exemption criteria to determine the FLSA exemption.

Position information

During the telephone interview, the claimant's co-workers and the first-level supervisor agreed that the position description (PD) of record accurately reflects the duties and responsibilities that the claimant and his co-workers perform and we incorporate it by reference into this decision. The co-workers stressed and the supervisor concurred that that the SDSSs perform the same technical work as the team which they lead. As quoted the written rationale from information provided by the agency, the GS-13 SDSS work

> involves extremely difficult and complex radar control work…GS-13 controllers like those of the next lower level regularly perform the duties of all radar

> positions of operation. However, the characteristics of the GS-13 level work situation impose on the controller the requirements for a substantially higher level of skill judgment and decision making abilities than those at the GS-12 level. The SDSS performs all of the technical aspects of the job on an equal crew time basis with the GS-12. SDSS are viewed as technical experts and employed in positions requiring the use of their technical expertise.

The claimant and his co-workers stress the technical nature of their work and that this work controls the primary duty test. However, this rationale fails to address other key functions assigned to and performed by the claimant and his co-workers as described in the PD of record (PD #S0947a) and certified by them and their first-level supervisor as accurate. We confirmed the accuracy of the PD of record in our telephone interview of March 25, 2005.

In addition to the technical work performed by team members, the "Major Duties" section of the PD states that the claimant "oversees and provides technical leadership in operation, manipulation, and configuration of complex airborne detection and tracking systems…use[s] this information to evaluate targets of interest, formulate tactical plans of action and select the most effective plan…oversees the calculations, confirms the intercept solutions…provides on scene command of the interdiction operation to include the coordination of the end game. It goes on to say that the SDSS interfaces "with Federal, military, state, local and international authorities and entities operating in foreign countries…as liaison…averting potential problems, enhancing relationships, and intensifying the effectiveness of the SSB's [Surveillance Support Branch's] goals and objectives."

The PD describes additional SDSS leadership duties, including "directing a highly technical workforce providing services to Customs Air and Marine Assets, Office of Investigations, and the Office of Field Operations." The SDSS is "directly responsible for the organization and productivity of the Detection Systems Specialist (Airborne) workforce…bears responsibility for the initial and ongoing qualifications training…monitors, evaluates, and corrects performance during flight or deployed assignments." The claimant "gives direction, advice, and instruction…on matters pertaining to job performance and administrative requirements. Identifies developmental and training needs of DSS(A[Airborne]) personnel, and provides or arranges for required instruction. Insures personnel compliance with DHS laws, regulations, policies, procedures and management directives…[and] performs a variety of operational, administrative, and advisory tasks normally associated with a first line leader position. The SDSS(A) reviews and attempts to resolve complaints from DSS(A) personnel, and refers unresolved issues to supervisory personnel."

In addition to personnel leadership, the PD states that the claimant "participates in the planning and implementation of tactical operations. Coordinates and gathers intelligence…advises the Pilot in Command regarding stationing of the aircraft, safety of flight separation, flight conditions, position and expected arrival of anticipated air assets joining the events." He is expected to provide "expert advice and assistance on all matters relating to future updates and procurement of new equipment" and "develops concepts for, analyzes, and evaluates highly complex, technically oriented surveillance equipment and platforms."

The claimant's leadership functions are described in several factors of the PD. Knowledge required by the position includes "comprehensive knowledge of effective leadership and human

relations techniques and principles to serve as a senior technical authority to provide direction over lower level Detection System Specialists." The PD also states that the claimant's "responsibilities involve a full range of technical leadership processes to include planning, directing, and evaluating command and control structures. The incumbent has direct control over both training and operational work groups and the coordination of complex air and marine interdiction, intelligence, and Homeland Defense issues involving multi-agency, multi-national assets, units, and organizations." His personal "contacts are initiated in the furtherance of planning, coordinating, directing, and advising on actions and activities related to the successful detection and apprehension of individuals engaged in criminal activity…."

Evaluation of FLSA Coverage

Five CFR 551.201 and 551.202 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. There are three exemption categories applied to Federal employees: executive, administrative, and professional.

The agency has determined that the executive and professional exemption criteria are not applicable to the claimant's work. Based on careful evaluation of the record, we concur. The claimant maintains that 5 CFR 551.202(e) applies directly to the work that he performs. He also contests his agency's exemption under the administered exemption criteria. Our analysis of these issues follows.

General Principles Governing Exemption

The claimant asserts that 5 CFR 551.202(e) applies directly to his situation and that his work is nonexempt because it is equivalent to and covered by the same nonexemption rationale as Air Traffic Control Series, GS-2152, work as discussed previously in this decision. However, 5 CFR 551.202(e) contemplates that such work may be exempt when the nonsupervisory employee is "performing predominantly administrative functions rather than the technical work of the occupation." Therefore, we will apply the administrative exemption criteria to his work to make this determination.

Administrative Exemption Criteria

Section 551.206 of the CFR contains the criteria governing 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.

The definition of *primary duty as* 5 CFR 551.104 states that this duty **typically** means the duty that constitutes the major (over 50 percent) of an employee's work. However, work that occupies less than 50 percent may be credited as the primary duty for exemption purposes provided that duty constitutes a substantial, regular part of the position, governs the classification and qualification requirements of the position.

Criterion (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 policies and programs range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that others act on. 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, both 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.

While the claimant may provide input on and/or suggest technical program improvements as described in the PD, these are occasional and infrequent duties and do not meet this criterion. However, the claimant's primary and paramount duties are those of technical and operational leadership, assuring that the operational team that he leads carries out its work within the parameters of established policies and procedures. These decisions are of critical importance in carrying out the basic mission work of the claimant's organization. The fact that the SDSS rotates through and performs the same work as the team members does not negate the fact that the SDSS's primary duty is planning for and overseeing the operations of the mission team. See e.g., *Jones v. Virginia Oil Company*, 2003 WL 21699882, (4th Circuit 2003) (assistant manager who spent 75 to 80 percent of her time performing line-worker tasks was held exempt because she "could simultaneously perform many of her management tasks); *Donovan V. Burger King Corp*., 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that the primary duty is management"). The SDSSs exercise similar planning and oversight responsibility for such SDSS collateral duties as overseeing the work scheduling team of DSSs and staff training planning and administration.

During the interview, the claimant's co-workers stressed that they are not in command of the mission; that responsibility is vested in the mission pilot. The fact that SDSS recommendations are subject to review does not change the function that the SDSSs perform, i.e., representing their technical program component (the "back end" of the aircraft) in the decision making on how to effectively and efficiently accomplish the mission requested by the "customer" agency. In so doing, the claimant functions as management's on-site representative for his agency component. The claimant also is responsible for obtaining compliance with management policies from team members. The fact that the mission supervisor may be contacted when the SDSS cannot resolve issues does not change the fact that the SDSS functions as the on-site

leader of DSS operations and is responsible for dealing with crew member conflicts and ongoing mission issues. For these reasons, criterion (a)(1) is met.

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

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, general management or support services include services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into non-exempt production functions. To warrant exemption from the FLSA, such 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.

The claimant does perform general management or business function or supporting services. The DSS function is a line agency function. Therefore, we find that the claimant's work does not meet criterion (a)(2).

Criterion (a)(3) involves substantial participation in the executive or administrative functions 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 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 this type of work. Therefore, we find that the claimant’s work does not meet criterion (a)(3).

Based on the preceding analysis, the claimant's work meets the primary duty test.

Nonmanual duty test.

The nonmanual work test is met when the employee performs office or 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.

According to the claimant, DSS work is based on standardized procedures or precedents. SDSSs schedule work according to established procedures. The claimant's co-workers stated that, similar to FAA air traffic controllers who look at established alternatives and select air routes for air planes, the SDSSs make similar decisions as they set up mission radar. They stated that they do not make significant decisions in that the tasking agency decides if a potential target, identified by the SDSSs, is to be designated as an actual target.

While agency policies may limit certain work planning and implementation choices, they do not limit the claimant's requirement to analyze mission requirements, including resource needs, and suggest changes in mission plans to meet changes in mission situations. The SDSSs are responsible for developing the tactical plan of action. This is not limited to technical decisions alone, e.g., how to set up the radars monitoring as discussed previously. The claimant's mission planning and oversight decisions and recommendations are based on comparing and evaluating possible courses of action and making decisions and recommendations after considering the various possibilities developed in mission discussions with the tasking agency and others involving in the mission planning and implementation processes. They are not, as the SDSSs assert, equivalent to the technical, tightly controlled air space separations, air space entry, and route selections decisions made by air traffic controllers. Using the SDSSs analogy to air traffic control work, part of their primary duty is to technically supervise such work as the on-site manager of "back end" aircraft operations.

As discussed previously, OPM's FLSA regulations state that decisions made as the result of the exercise of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that decisions are subject to review, e.g., by the pilot, does not mean that the claimant is not exercising independent judgment of the level required for exemption. Although ground liaison duties are limited in frequency, they also reflect making decisions on and arrangements for mission administrative support and technical issues such as aircraft ground support and crew rest issues. The claimant's day-to-day freedom of action in performing the above analytically demanding work reflects sufficient variables as to regularly require the scope of discretion and judgment sufficient to crediting this criterion to the position.

The claimant's work meets 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. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledge characteristically acquired through specialized academic training.

The SDSSs' state that their agency has not shown "beyond a reasonable doubt," that their work meets criterion (b)(2), based on their rationale that their work is comparable to and she be treated as nonexempt like air traffic control technical work. However, the SDSSs agree with

their agency that they are "viewed as technical experts and employed in positions requiring the use of their technical expertise." Unlike the SDSSs' view that this expertise is limited to technical radar work, this expertise is also applied in the mission planning and operations work that the claimant and his co-workers perform. Furthermore, both types of work require considerable on-the-job training as described by the SDSSs and supervisor during the interview, and discussed at length in the PD of record. Accordingly, we find that the 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 SDSS works independently. We agree with the claimant that the actual radar operations work that the SDSS performs is highly skilled work that does not involve or permit the analytical judgment necessary to meet this criterion. However, as previously discussed, SDSS mission planning and operational oversight work does require the exercise of discretion and independent judgment found in this criterion. The primary SDSS function is not limited to merely assuring that each team member performs his or radar operations accurately. SDSS responsibility extends to integrating and analyzing the results of "back end" operations to advise and assist the pilot and the tasking agency in meeting mission goals exercise. This requires the exercise of independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. The fact that the pilot and the tasking agency retain the authority to reject SDSS recommendations does not negate the fact that these recommendations require the exercise of discretion and independent judgment. Therefore, the claimant's work meets 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.

The administrative exemption criteria are met.

Decision on FLSA Coverage

Based on the above analysis, the claimant's position meets the criteria administrative exemption and is, therefore, not covered by the overtime provisions of the FLSA.