

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]

Agency classification: Electronics Technician
GS-856-11

Organization: [Claimant's organization]
Bureau of Land Management
U.S. Department of the Interior

Claim: Willful violation by the agency

OPM decision: Claim denied

OPM decision number: F-0856-11-01

Carlos A. Torrico
FLSA Claims Officer

October 17, 2000
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 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 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.

Decision sent to:

Claimant:

[Claimant's address]

Agency:

[Claimant's servicing personnel office]
Bureau of Land Management
U.S. Department of the Interior

Director of Personnel
U.S. Department of the Interior
Mail Stop 5221
1849 C Street, NW
Washington, DC 20240

Introduction

On July 21, 1998, the San Francisco Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. The claimant believes his agency willfully violated the FLSA in exempting his position from the overtime provisions of the FLSA, and thus did not fully pay him for overtime worked under the FLSA. According to the claim form filed with OPM by [the claimant], the claim period dates from August 1993 to the “present”, i.e., July 16, 1998. During the claim period the claimant worked as an Electronics Technician, GS-856-11, for the [claimant’s organization], Bureau of Land Management (BLM), U.S. Department of the Interior, [claimant’s duty station]. The claimant believes that other similarly situated employees are also due back pay under the provisions of the FLSA. However, he neither represents those employees nor have they filed separate claims with OPM. The claimant initially requested confidentiality. By letter dated March 10, 1999, the claimant waived his confidentiality request. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

General issues

The claimant makes many statements relating to his agency, his agency’s management practices, and his agency’s reports on his FLSA case. In adjudicating this claim, our only concern is to make our own independent decision as to 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 criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimant’s statements only insofar as they are relevant to making that comparison.

As we explained in our acceptance letter to the claimant (dated August 21, 1998), his claim for additional Sunday pay and night differential pay, and questions about per diem pay while on travel are not covered by the FLSA and therefore are not discussed in the following decision. As we explained in our letter, claimants should first attempt to resolve such claims directly with their agency. If the agency denies the claim, the claimant may file it with OPM’s Office of Merit Systems Oversight in Washington D.C. (This is a change from our letter of August 21, 1998. At that time, such claims were filed with OPM’s Office of General Counsel.)

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency.

Background

The following is a brief summary of the circumstances surrounding this claim. The earliest written direct mention of the claimant’s concern about his FLSA exemption status comes in a letter provided to BLM management dated August 1, 1996. In this letter the claimant raises many issues and poses a number of questions. Among them is the suggestion that his FLSA status and that of similarly situated co-workers should properly be nonexempt. It appears that the claimant attempted to informally raise these same issues with management before the August 1, 1996 letter, and continued in both written and informal channels to attempt to have the issues

addressed after August 1, 1996. Sometime in late May or early June 1997 (the claimant and his personnel officer disagree on the precise date), the personnel officer received an inquiry from [name of a work leader and his unit at the installation], questioning the FLSA exempt status of GS-11 electronic technicians like the claimant. After investigating the issue, the personnel officer changed the FLSA designation of the employees in question from exempt to nonexempt. He then reviewed the FLSA designation of similarly situated employees, including the claimant, and changed their exemption designation as appropriate. The personnel officer then asked payroll staff to calculate retroactive FLSA overtime pay for the affected employees. He set the retroactive payment date for the claimant and similarly situated employees as two years retroactive from August 1, 1996, the date of the claimant's first written notification to management that he was unsatisfied with his exemption status. The claimant received payment of \$6,423.49. Twenty similarly situated employees were awarded back pay. On July 16, 1998 the claimant filed his claim with OPM. During an initial telephone call between OPM and the personnel officer, the personnel officer was informed that interest on the retroactive pay had apparently not been paid to the claimant and similarly situated employees. Subsequent to this conversation, the personnel officer arranged for interest on the back overtime pay to be paid to the claimant and similarly situated employees.

The claimant believes that the agency willfully violated the FLSA and therefore his claim and those of similarly situated employees should be retroactive for three years from August 1, 1996 rather than the two allowed by the agency.

The claimant believes that he is due double damages (known in the FLSA as liquidated damages) based on his claim that the agency willfully violated the FLSA.

In addition, the claimant believes that his agency's policy of changing work schedules to avoid paying overtime violates government policy and regulation.

Evaluation

Willful Violation

The first question before us is whether the agency's long delay in recognizing that the claimant's exemption status was incorrect is a willful violation of the FLSA. The term "willful violation" is specifically defined in *5 CFR 551.104* 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 then, 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 continuing the exempt status of the claimant and other similarly situated employees. 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. The determination of the exemption status of high graded technician positions like the claimant's has historically been complex. OPM regulation and policy regarding the exemption of these positions have changed over the years. These changes, combined with the inherent complexity of applying the exemption criteria to high graded technician positions, tend to increase the possibility of error.

Agencies received the first instructions on FLSA exemption criteria as an attachment to Federal Personnel Manual (FPM) Letter 551-7, dated July 1, 1975. FPM letters and bulletins were used to inform Federal agencies of FLSA regulations and guidance until the end of 1993 when the FPM was abolished. After the FPM was abolished, agencies received FLSA regulations directly through the Code of Federal Regulations. Under these early instructions the determination of the exemption status of high graded technician positions like the claimant's was difficult. The exemption of such work turned on a finding that the high graded technician work was equivalent to the work performed by professional engineers. In the years immediately following the issuance of these instructions, it became generally accepted that technician positions at GS-11 and above met the professional exemption criteria of the FLSA. This practice was confirmed and strengthened when FPM Bulletin 551-15 was issued on November 10, 1983. That bulletin transmitted regulations to the agencies stating that all properly classified positions at GS-11 and above were presumed to be exempt from the provisions of the FLSA. However, because of the subsequent actions of Federal courts, OPM was required to withdraw the presumption of exemption at GS-11 and above. The withdrawal was transmitted to the agencies through FPM Bulletin 551-18 dated March 13, 1986. Only the presumption of exemption was withdrawn. Agencies were instructed that the full criteria needed to be applied to GS-11 and above positions to determine their proper FLSA designation. Based on application of the exemption criteria, most agencies continued equating high graded technician positions with professional engineering positions resulting in a finding that high grade technician positions met the professional exemption criteria of the FLSA. However, in light of various court and OPM decisions issued during the late eighties and early nineties, more and more agencies began to find that some of their GS-11 technician positions did not meet the professional exemption criteria and therefore were nonexempt from the overtime provisions of the FLSA. During that time period OPM did not issue definitive guidance concerning the proper exemption status of high graded technicians. OPM case decisions did not receive wide distribution, and training classes were rarely prepared in such detail that they directly addressed the issue of the exemption of high graded technicians.

Given this history, we find that the personnel officer's assertion that it was his understanding through the mid 1990's that GS-11 technicians were exempt from the FLSA, though incorrect, was understandable given the changing regulatory environment surrounding these positions.

We also believe it is instructive to consider how the personnel officer reacted when he turned his attention to the question of the proper FLSA exemption status of GS-11 technician positions in 1997. First, the personnel officer properly extended retroactive pay to all similarly situated

employees including the claimant. Second, he calculated the retroactive entitlement two years back from the claimant's August 1, 1996 letter rather than the date he received the specific inquiry from [name of agency work leader].

Finally, we note that the claimant raised questions about his exemption status informally with management, and mentioned his dissatisfaction with his exemption status as one of many complaints, questions, and issues he brought to management's attention in writing and in meetings. However, according to the record, the claimant never filed a formal grievance, appeal, or complaint with his agency directly concerning his FLSA exemption status.

Based on all of the above, we find that the agency erred in continuing the claimant's exempt status under the overtime provisions of the FLSA. The agency was late in reacting to changes in FLSA exemption criteria. However, we also find that the changing policy and regulation on the exemption status of high graded technician positions during the time period of this complaint supports the agency assertion that they acted in good faith in failing to revisit their long established practice to exempt high graded technician positions. Further, we find that the agency made a full and adequate inquiry once their attention was focused on the issue by [name of agency work leader] specific memorandum in 1997, and took quick and comprehensive action to resolve the matter. In doing so the agency did not recklessly disregard the requirements of the Act. Finally, the agency's use of the claimant's first written questioning of his exemption status dated August 1, 1996 to establish a retroactive entitlement back to August 1, 1994 demonstrates a responsiveness to the claimant not consistent with a willful violation of the FLSA.

In summary, we find that the agency's actions do not meet the criteria for willful violation as this term is defined in *5 CFR 551.104*. The agency's award of two years retroactive pay from August 1, 1996 was proper.

Liquidated damages

Liquidated damages may be awarded for willful violation of the FLSA. Since we find that the agency did not willfully violate the FLSA, no liquidated damages are awarded.

Denial of overtime work

In a related matter, the claimant believes that the agency practice of sending him and similarly situated employees home even when additional work needed to be completed was done solely to avoid paying these employees overtime. He believes this practice violates regulations. The claimant cites in support of his belief BLM Manual Rel.1-1588 dated July 24, 1990, and summaries of two decisions rendered by the Federal Service Impasses Panel of the Federal Labor Relations Authority (95 FSIP 150 and 95 FSIP 38).

The FLSA does not prohibit a Federal agency from sending employees home to avoid paying overtime. The citations provided by the claimant do not apply to our decision. The contents of the BLM Manual insofar as they go beyond the requirements of the FLSA represent the internal policy and procedures of the BLM. Even if the BLM Manual prohibited sending employees home to avoid overtime payment, it would be a matter between the claimant and the BLM. OPM

would not enforce the provision because sending employees home to avoid overtime pay does not violate the FLSA, or any other government-wide regulation. The decisions of the Federal Services Impasses Panel cited by the appellant do not address the legality of sending employees home rather than paying overtime, or the legality of an agency establishing, terminating, or modifying a flextime schedule. Both decisions address bargaining impasses where an agency and an employee union could not reach agreement on a contract issue. In cases where an employee union is present, agency management is constrained from taking unilateral action in regard to a broad range of issues including work schedules. In cases like the claimant's where no union is present, management is free to take any action not prohibited by law, rule, or regulation. As with any management action, employees in those circumstances are free to grieve the action through the agency's administrative grievance procedure.

As previously noted, the FLSA does not prohibit sending employees home to avoid paying them overtime. Therefore, no additional overtime pay is due the claimant.

Decision

The claim is denied. The claimant has received all money due under the provisions of the FLSA.