

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

Claimant: [name]

Agency classification: Law Enforcement Officer
GS-1802-9

Organization: [location] Zone
Rocky Mountain Special Agent
in Charge (Region 2)
Field Operations
Law Enforcement and Investigations
U.S. Forest Service
U.S. Department of Agriculture
[location]

Claim: Willful violation

OPM decision: Denied

OPM decision number: F-1802-09-02 (originally issued as
F-1802-09-01)

/s/

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

_12/19/07_____
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 (FLSA). 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.

Decision sent to:

[name and address]

Ms. Kathleen D. Burgers
Director of Human Capital Management
USDA
Forest Service
1400 Independence Avenue
Washington, DC 20205

Introduction

On September 21, 2005, the OPM received an FLSA claim from [name]. In his initial claim request, he asserted that when the Forest Service placed all law enforcement officers (LEOs) on Administratively Uncontrollable Overtime (AUO) pay the agency should have converted him from coverage under section 7(a) to section 7(k) of the FLSA. He states that under section 7(k) the agency would have been required to pay him basic pay while working through his meal break. On October 17, 2006, we received a follow-up to the original claim request in which the claimant stated the agency realized it owed him for a half hour meal break each day and generated a payment for back pay due him for the two-year period prior to the date he preserved his claim. However, he asserted the agency displayed “willful misconduct” in dealing with the issue. The claimant occupies a Law Enforcement Officer, GS-1802-9, position in the [name] Zone, Rocky Mountain Special Agent in Charge (Region 2), Field Operations, Law Enforcement and Investigations, U.S. Forest Service, U.S. Department of Agriculture, [location]. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

For the purpose of this claim, we are assuming the claimant is placed appropriately on Administrative Uncontrollable Overtime (AUO) pay and the agency is properly reviewing AUO based on the requirements of 5 CFR 550.161(d). The agency has determined the claimant is properly classified as FLSA nonexempt. The claimant agrees with this determination and we concur. Therefore, the sole remaining issue in this claim is whether the agency willfully violated the FLSA. In reaching our FLSA decision, we have carefully considered all information of record, including information furnished by the claimant and his agency.

General issues

The claimant makes various statements about his agency in his FLSA claim. In adjudicating this claim, our responsibility is to make our own independent decision if willful violation occurred. 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 performing that analysis.

The claimant also challenges the agency’s decision in a September 28, 2006, policy letter to establish an eight hour work day for LEOs effective October 1, 2006, consisting of seven and one-half hours work time and a half-hour paid meal break. However, agency management has statutory authority to establish employee work schedules (see section 6101 of title 5, United States Code (U.S.C.) and 5 CFR 610.121), and such decisions are not subject to review through the FLSA claims adjudication process.

Background

Following is a brief summary of the circumstances surrounding this claim based on the record. In 1994, the U.S. Forest Service converted GS-462 Forestry Technicians with some law enforcement duties to full time LEO positions. The GS-1802 LEO positions were classified as nonexempt under the FLSA and as of November 1994, LEOs were covered under AUO. At this time, the agency believed it had the decision to choose to cover their LEO positions under either section 7(a) or section 7(k). Section 7(a) states:

“(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or.....for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

Section 7(k) states:

“No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities....if...

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours, ... compensation at a rate not less than one and one-half times the regular rate at which he is employed.”

The agency decided to consider its nonexempt LEO's as “regular” employees who work a 40 hour workweek/80 hours in a pay period, and cover them under the section 7(a).

It was the agency's belief switching from section 7(a) to section 7(k) would have had an unfavorable effect on LEO's, because LEOs would have to work a basic work schedule of 42.75 hours per week or 85 hours per pay period, including a meal period before they were entitled to receive any AUO. The agency decided it would be more economical to pay the LEOs an additional 10 to 25 percent on an annual basis for performing AUO.

During this period, OPM issued CPM 97-5 (June 13, 1997), providing guidance on AUO to assist Federal agencies in complying with Section 650 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of Public Law 104-208, the Omnibus Consolidated Appropriations Act of 1997. CPM 97-5 states:

“If an employee who is engaged in law enforcement activities (including security personnel in correctional institutions) receives AUO pay and is nonexempt from (covered by) the overtime pay provisions of the Fair Labor Standards Act (FLSA) of 1938, as amended, he or she is entitled to additional overtime pay equal to 0.5 times the employee's hourly regular rate of pay for all hours of work in excess of 42.75 hours in a week, including meal periods.”

The claimant has continuously occupied an LEO position since 1994 with the agency in which his meal periods were not included within his normal work schedule. In his claim, he explained that he was told by his supervisor that he must document meal breaks whether he took them or not and was not paid for meal breaks.

In a faxed July 13, 2006, letter sent by the agency to OPM as a result of fact finding for the claim, the agency determined the claimant was entitled to be paid for his half-hour lunch breaks each day and was coordinating with the payroll provider to generate back pay for the claimant for the period beginning November 3, 2003. The agency stated that it realized meal periods were to be included as hours of work in the case of any LEO who is required to be on duty for 24 hours or less under the provisions contained

in section 7(k).¹ A follow-up letter from the agency to OPM advised the claimant was paid for meal periods beginning on September 21, 2003 to September 30, 2006, changing the beginning date of back pay from November 3, 2003.

After this determination, the agency issued a policy letter, subject meal periods, dated September 28, 2006, to the Law Enforcement and Investigations Leadership Team informing them effective October 1, 2006 lunch or other meal periods for non-exempt LEOs who receive AUO will not be considered breaks in the workday and will be counted as hours of duty.

Evaluation

Period of the Claim

The claimant believes the date to which he should be compensated for back pay would be at least two years prior to OPM's June 13, 1997, memorandum. He asserts statements made by other coworkers to an agency human resources (HR) specialist questioning whether the agency LEOs were being properly compensated for meal time on February 18, 2001, should also be a basis for establishing the potential back pay period for his own claim because the HR specialist failed to recommend to agency management that all LEOs be paid for meal time.

The FLSA claims process in part 551 of title 5, Code of Federal Regulations (CFR), includes the adjudication and settlement of claims for unpaid overtime. Any FLSA claim filed by a Federal employee on or after June 30, 1994, is subject to a two-year statute of limitations (three years for willful violations) contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, U.S.C.). In order to preserve the claim period, a claimant or a claimant's designated representative must submit a written claim either to the agency employing the claimant during the claim period or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is responsible for proving when the claim was received by the agency or OPM.

The claim in this case accrued on September 21, 2005, the date OPM received a written and signed claim from the claimant. The claimant has not provided documentation showing he filed a **written** claim with his agency at any time or preserved such a claim as required by regulation prior to when he filed his claim with OPM. Therefore, based on the record, we find the claimant preserved his claim no earlier than September 21, 2005.

Willful Violation

¹ For the record, OPM regulations in effect since 2002 do not require that employees covered by section 7(k) be paid for all meal periods that interrupt the workday. See current regulations at 5 CFR 551.411© and 551.541(b), which provide that bona fide meal periods are not considered hours of work, except for "on-duty" meal periods for section 7(k) employees engaged in fire protection or law enforcement activities who receive certain special forms of premium pay, including AUO pay. If as section 7(k) employee is completely relieved from duty for a meal period, the employee would not be "on duty," and such meal period would not constitute hours of work. This is consistent with the FLSA regulations prescribed by the Department of Labor. See 29 CFR 553.223(b). We presume that the Forest Service was not completely relieving the employees in question from duty during the period prior to October 1, 2006; thus, it would have been appropriate for the Forest Service to take the described course of action. (As noted in this decision, since October 1, 2006, the agency has made meal periods part of these employees' basic workday; thus, the meal periods are now always on-duty periods, but do not generate overtime compensation.)

The claimant believes the agency willfully violated the FLSA. The claimant stated, "I believe the agency displayed willful misconduct in dealing with this issue and if it hadn't been for my persistence in dealing with the issue, I would still not be compensated according to the FLSA law."

In order for the claimant to receive back pay for three years in accordance with 5 CFR 551.702 (a and b), we must determine the agency knew its conduct was either prohibited or showed reckless disregard of the requirements of the Act. Willfulness presupposes a violation of the Act has actually occurred. The regulation instructs that the full circumstances surrounding the violation must be taken into account. Information provided by the agency shows confusion and a lack of understanding on the part of the HR staff regarding the payment of meal times under the AUO policy, and there is no question the agency erred in its interpretation of the regulation and significant time passed before they retroactively processed payment due to the claimant. However, error and untimely processing of the correction in the instant case does not reach the level of willful violation as defined in 5 CFR 551.104. We find that, although the agency acted erroneously in interpreting the regulation, they did not knowingly or recklessly disregard the Act in applying this interpretation. Information provided by the agency indicates that the agency was acting in good faith based on a lack of understanding of the appropriate calculation methodology. Further, the agency acted in good faith by retroactively paying all LEOs affected by its determination once it was determined that the previous calculations were in error. Since the agency did not knowingly or recklessly disregard the requirements of the Act, we find that the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

Decision

The record shows the agency did not willfully violate the FLSA. We note the claimant continued to correspond with the agency regarding calculations of his back pay as recently as July 6, 2007. Since the agency has assumed jurisdiction over this process, we will not intervene at this point in time. If the claimant disagrees with the final calculations of his agency, he may file another claim with OPM.