

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

Claimant: [name]

Agency classification: Airway Transportation Systems
Specialist
FV-2101-H

Organization: [location] Support Service Center
[location] Systems Maintenance
Office
Airway Facilities Division
Federal Aviation Administration
U.S. Department of Transportation
[location]

Claim : Compensation for FLSA overtime
for time spent traveling

OPM decision: Claim denied.

OPM decision number: F-2101-H-02

//signed//

Kevin E. Mahoney
Deputy Associate Director
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

May 9, 2006

Date

OPM decision number F-2101-H-02

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]

[name]

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

Assistant Administrator for Human
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Introduction

On November 1, 2004, the Center for Merit System Accountability of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim for 4.5 hours of FLSA overtime from [name]. During the claim period, the claimant occupied an Airway Traffic Systems Specialist, FV-2101-H, position in the Bering Sea Support Service Center, [location] Office, Airway Facilities Division, Federal Aviation Administration (FAA), U.S. Department of Transportation, in [location]. He believes that he was entitled to compensation for time spent in travel status in two separate instances. We have accepted and decided his claim under section 4(f) of title 29, United States Code (U.S.C.).

In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency. We received the agency administrative report on January 10, 2006. We also reviewed additional information gained from telephonic interviews with agency human resources staff and the claimant's supervisor.

General Issues

The claimant's agency determined that his position is nonexempt from the overtime provisions of the FLSA and after careful review of the record, we concur. The claimant believes that he was denied 4.5 hours of overtime due to unscheduled duties that were administratively uncontrollable. He states that his travel was performed in conjunction with unscheduled and scheduled work during two occasions in March and October 2004. This work required overnight travel on workdays and nonworkdays, outside of regular duty hours.

The claimant makes various statements relating to his agency and its report on his FLSA claim. In adjudicating this claim our only concern is to make our own independent decision about how much FLSA overtime pay he 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.

Background

March 2004

The claimant left Anchorage on March 17, 2004, to restore to service the glide slope system equipment located on St. George Island, one of the Pribilof Islands in Alaska. According to statements by the supervisor, St. George Island is approximately 800 miles from Anchorage. The type of aircraft flown to the islands is a Fairchild Metroliner by Pen-Air Airlines. This aircraft is small and accommodates up to 19 passengers. The claimant's supervisor stated that there are 29 airports to maintain and that his technicians travel to those airports on a regular basis.

Once the claimant restored operation of the equipment, he proceeded to St. Paul Island, which is about 49 miles from St. George Island, to perform scheduled maintenance. He claims that because he made a stop to perform regularly scheduled maintenance, this negated his entitlements to overtime pay for the hours that were outside his normally scheduled shift.

However, he does claim 1.5 hours spent in travel outside his normal work hours during this trip. According to travel authorization records provided, the claimant departed Anchorage and arrived at St. George Island on March 17, 2004 (Wednesday). He completed the unscheduled work on the glide slope and departed St. George Island, arriving at St. Paul Island on March 19, 2004 (Friday). A report of the repair provided by the claimant further substantiates that he was on the repair site March 18, 2004, identified the problem in the antenna system, and completed the repair on March 19, 2004, and then traveled to St. Paul. After performing scheduled maintenance on equipment at St Paul, he returned to Anchorage on March 20, 2004 (Saturday).

October 2004

The claimant left Anchorage on October 12, 2004 (Tuesday), to perform scheduled maintenance at St. George Island. The next available flight back to Anchorage from St. George Island was not until October 23. He found an earlier flight to Anchorage on October 17 from St. Paul Island. He took the flight from St. George Island to St. Paul Island on October 14 (Thursday) and found that there was an open seat to return to Anchorage that same day. The claimant asserts that due to an “open ticket in the Event Manager,” he gave up his seat on the October 14 flight to “close the open Event ticket” and performed the work assigned on the St. Paul Radar Security System. The claimant considered this to be travel due to an unscheduled event and he claimed the hours outside his shift from 5:30 p.m. to 8:30 p.m. as overtime. Analysis of the report on the “open ticket” shows that the event, a disarmed security system, was established on September 27. The claimant was requested to make the repair on October 14 and he completed the repair on October 17, 2004 (Sunday).

Evaluation

Jurisdiction

The claimant states that he filed a grievance as a bargaining unit member of the Professional Airway System Specialist Union (PASS) in March 2004 regarding his overtime issues. He stated that the grievance was denied and that he was unaware that he could file a complaint with OPM at the time.

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. Federal Courts have found that 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 CBAs 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), (AFL-CIO) and the Federal Aviation Administration, U.S. Department of Transportation.

The agency states that the BUA does not explicitly exclude grievances being filed for overtime for travel issues from its NGP. The agency cites Article 34, Section 6, of the CBA and states that it is intended to address the exempt or non-exempt status of employees and not the overtime entitlement under FLSA as stated. This information was verified with the agency and although the agency states the CBA is under revision for more clear verbiage, the CBA in effect now and at the time of the FLSA claim (effective date July 2, 2000) specifically states in Article 34 (FLSA Amendments), Section 6, "In matters relating to overtime entitlement under the FLSA, as amended, the compliance and complaint system of the OPM shall be the procedure followed. Complaints under this Article are not subject to the negotiated grievance procedure."

The 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). 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 (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, (29 U.S.C. § 204(f)), and regulation, (5 CFR part 551) 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. (Emphasis added).

Evaluation of Overtime Claim

The claimant believes that he is entitled to 4.5 hours of overtime pay for two instances of travel on nonwork days outside his corresponding hours of duty (on a Saturday and Sunday). The claimant's regular administrative work week is four ten-hour days, from 7:00 a.m. to 5:30 p.m., Monday through Thursday. Both overtime travel instances involved trips outside of his duty station to two of the Pribilof Islands. This area has minimal available flights to and from the islands and his duty station in Anchorage. On the first trip, on March 17, 2004, he traveled to restore equipment in response to an outage. Once restoration was complete, he stopped at another island location to perform scheduled equipment maintenance and returned to his duty station on March 20, 2004. On the second occasion, on October 12, 2004, the trip was to perform scheduled maintenance. On October 14, 2004, he traveled to a nearby island to catch a flight that same day for an earlier departure to his duty station. Once on the second island, he was asked to perform work at this location, thereby delaying his departure to October 17, 2004. He requests the following additional compensation for a total of 4.5 hours as time spent traveling:

- Saturday, March 20, 2004, from 5:30 p.m. to 7:00 p.m. (1.5 hours)
- Sunday, October 17, 2004, from 5:30 p.m. to 8:30 p.m. (3 hours)

The claimant writes “Naturally, I considered this to now be travel due to an unscheduled event. I claimed the hours outside my shift, from 1730 to 2030, as overtime but subsequently denied by my supervisor [sic].” The claimant believes that he should be paid for the additional 4.5 hours referenced above which are outside of his normal working hours and outside of his corresponding working hours on nonwork days, because they were administratively uncontrollable due to unscheduled events.

The claimant also writes “I would also like a determination on whether the travel is considered arduous since the one-way trip (flight) is three hours long, in cramped conditions, and without a restroom aboard.”

Compensation for time spent traveling is described in both 5 CFR 551.422(a) and 5 CFR 550.112(g). Federal employees in FLSA nonexempt positions fall under the provisions of section 551.422(a), which states 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.

Based on 5 CFR 551.422(a), the requested overtime hours described by the claimant cannot be considered hours of work since they do not meet any of the stipulated regulatory criteria. Section 551.422(a)(1) is not applicable because the claimant requests payment only for hours beyond those of his regular working hours. Section 551.422(a)(2) is not applicable because the claimant used commercial air travel and did not perform other work while traveling. Section 551.422(a)(3) is not applicable based on statements by the claimant and information in the record that these were not one-day assignments away from his official duty station. Section 551.422(a)(4) is not applicable because the requested overtime is for hours on non-workdays that do not correspond to his regular working hours.

Both FLSA nonexempt and exempt employees covered by chapter 55, subchapter V, of title 5, U.S.C. fall under the provisions of 5 CFR 550.112(g). This section provides that time in a travel status away from the official duty station is hours of work if the travel: (1) is within an employee's regularly scheduled administrative workweek; or (2) the travel (i) involves the performance of work while traveling; (ii) is incident to travel that involves the performance of work while traveling; (iii) is carried out under arduous and unusual conditions; or (iv) results from an event that could not be scheduled or controlled administratively.

Section 550.112(g)(1) is not applicable because the claimant requests payment only for hours beyond those of his regular work week. Section 550.112(g)(2)(i) is not applicable because the claimant traveled as a passenger and did not perform work while he was traveling. Section 550.112(g)(2)(ii) is not applicable because the repair work was performed at the temporary duty site and was not incident to the travel.

The claimant asks for a definition of travel under arduous conditions, describing his air travel conditions as three hours long, cramped, and without a restroom onboard. Information regarding airline travel conditions was confirmed with the claimant's supervisor. Section 550.122(g)(2)(iii) is not applicable because the travel as described by the claimant is not considered arduous and or under unusual conditions. Arduous conditions generally must be determined upon the facts in each individual case. Travel by commercial airliner or other commercial carrier is not travel under arduous conditions even for extended periods. See Hickey, B-207795, February 6, 1985. Additionally, delay in travel due to severe weather conditions is not travel under arduous conditions. See Davis, B-231800, February 3, 1989. The airline carriers in that area are familiar with Alaskan weather conditions such that delays or rescheduling of flights are common.

The claimant states that both travel occurrences in March and October of 2004 involved unscheduled work. Section 550.112(g)(2)(iv) is not applicable because the evidence submitted for this claim indicates the work described by the claimant was scheduled and controlled administratively. The phrase "could not be scheduled or controlled administratively" refers to the ability of an executive agency, as defined in 5 U.S.C. § 105, to control the event that necessitates an employee's travel. The control is assumed to be the agency's where the agency has control in scheduling a non-emergency, such as a required repair to gun port shields of a ship that had deteriorated due to exposure to the sun so that the ship could meet a sailing deadline. The required repair to the gun mounts was not due to a sudden emergency catastrophe and the damage having occurred gradually over a period of time; scheduling the repair was within administrative control and, therefore, the travel time is not compensable overtime under 5 U.S.C. § 5544(a)(iv). 49 Comp. Gen. 209 (1969). The claimant's travel to these remote areas is recurring and a regular part of his normal responsibilities to perform maintenance at outlying areas. Repetitive assignments requiring travel constitute regular duties. Such travel is not regarded as an imposition, and the travel is subject to control (scheduling) even though it results from an event which is not controllable. Therefore, such travel time does not constitute overtime hours of work within the meaning of 5 U.S.C. § 5542 (b)(2). See 52 Comp. Gen. 446 (1973) and 50 Comp. Gen. 674 (1971). Analysis of the report for the repair regarding the March 20, 2004, claim shows that the need for unscheduled maintenance was identified on March 8, 2004, indicating the scheduling for the repair was within administrative control. The need for repair regarding the October 17, 2004, claim was identified September 27, 2004, showing that scheduling the repair was within administrative control.

Decision on Overtime Claim

March 20, 2004

His claim for 1.5 hours of overtime, incurred from 5:30 p.m. to 7:00 p.m., spent in travel outside his normal work hours does not meet the applicable provisions of 5 CFR 551.422(a) or 5 CFR 550.112(g) as compensable hours of work. Therefore, he is not entitled to the 1.5 hours overtime.

October 17, 2004

His claim for 3 hours overtime, incurred from 5:30 p.m. to 8:30 p.m., spent in travel outside his normal work hours does not meet the applicable provisions of 5 CFR 551.422(a) or 5 CFR

550.112(g) as compensable hours of work. Therefore, he is not entitled to the 3 hours of overtime.

Neither instance of the claimant's travel meets the applicable provisions of regulation as compensable hours of work. Therefore, the claim for 4.5 of overtime is denied.