

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

Claimant: [claimant]

Positions: Supervisory Detention Enforcement
Officer, GS-1802-10
Supervisory Immigration Enforcement
Agent, GS-1801-12

Organization: [city name] Resident Office
Office of the Field Director
Detention and Removal Operations
Immigration and Customs
Enforcement
Department of Homeland Security
[city and state]

Claim: Nonexempt status

OPM decision: Nonexempt. FLSA payment due for
overtime worked.

OPM decision number: F-1802-10- 01

/s/

Jeffrey E. Sumberg
Deputy Associate Director
Center for Merit System Accountability

July 15, 2008

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, 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 (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision and then pay the claimant the amount owed him. If the claimant believes the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

Decision sent to:

[claimant's name and address]

[name]

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Introduction

On January 6, 2005, the U.S. Office of Personnel Management (OPM) received an FLSA claim from [claimant]. He is claiming FLSA overtime pay he believes is due to him dating back to 1996. The claimant currently occupies a Deportation Officer, GS-1801-11, position assigned to the [name] Transitional Center, in [city and state]. This facility is a contract facility used by the [city name] District, Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS). We have accepted and decided this claim (originally docketed as #05-F006) under section 4(f) of the FLSA, as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and his agency, including the agency's initial administrative report which we received on June 6, 2007, with additional information received on June 25, 2007. To help decide this claim, we conducted a telephone interview with the claimant on April 22, 2008. We also conducted a telephone interview on April 29, 2008, with the current Officer-in-Charge of the [city name] Resident Office, Detention and Removal Operations, located in [a second city and state] for whom the claimant worked during the claim period as discussed later in this decision, and an interview with administrative staff members of that office on June 4, 2008.

Background and General Issues

The claimant provided the following information concerning the times and places of his employment for consideration. From August 1996 to August 1998, he was employed as a Supervisory Detention Enforcement Officer (SDEO) at the [city in] Texas Service Processing Center. From August 1998 to August 1999, he served as a Detention Operations Supervisor (DOS) at the [name] Federal Detention Facility Service Processing Center in [city in] New York. He was promoted to DOS, GS-11, at that facility where he served until October 2001. He then took a position as DOS, GS-10, at the [city in] Pennsylvania, facility in the [city name] District. The last period of employment he cites is Supervisory Immigration Enforcement Agent (SIEA), GS-12, beginning in August 2003 at the [city name] District Office in [city in] Texas.

Briefly, the claimant asserts: his claim is based on a United States Court of Federal Claims decision to award supervisors back pay; the remedy he seeks is fair; and the Service (his former employing agency, the U.S. Immigration and Naturalization Service, portions of which are now part of ICE) should pay him back pay like the rest of the 8,600 plus employees. He believes that, because he did not get into the lawsuit in time, he should not be penalized for something in which the Service was found to have acted negligently, and he should receive back pay with interest and doubled pay like the employees who have received awards under the lawsuit. He believes that decision should apply to all employees. He states that, since the decision was issued, not one of the supervisory duties or conditions of duty has changed. He states: "If there is a statute of limitations on pay back, I would like to see that in writing."

The case the claimant cites is that of Aaron Angelo, Jr. v. United States, 57 Fed. Cl. 100 (2003). The plaintiffs included approximately 90 SDEOs, GS-1802-9 and GS-10, and DOSs, GS-1802-11. The claimant was not one of the plaintiffs. The claimant's synopsis of the *Angelo* case outcome is not accurate. The parties reached a settlement agreement which was signed by the

Department of Justice attorney on February 23, 2004. Briefly, the agreement indicated the defendant previously conceded liability with respect to overtime compensation for the SDEOs, and the Court awarded the SDEOs liquidated damages by its order of June 27, 2003. The Court further held that the defendant's actions were not willful, and a two-year statute of limitations would apply to all plaintiffs. By agreement, the DOSs were to be paid eighty percent of the difference between what each received in overtime compensation under section 5545(c)(2) of title 5, United States Code (U.S.C.), and what they would have received under the FLSA. The DOSs waived any claim for liquidated damages, attorney's fees, or costs. The recovery period was to begin two years prior to the date each plaintiff's claim was filed with the courts and would run until August 10, 2003, at which time the plaintiffs were promoted to SIEAs. It further stated that DHS has or will provide additional training to the plaintiffs and has changed or will change the duties, pay grade, and title for both SDEOs and DOSs. The DOSs have been or will be promoted upon completion of training to the GS-12 pay grade. The Court did not address the question of FLSA status of the SIEA positions, which the agency has determined to be exempt. The agency has not paid the SIEAs FLSA overtime compensation, and does not intend to pay such overtime in the future.

In 2005, another complaint was filed with the Court of Federal Claims concerning the SIEAs, in which plaintiffs asserted claims for overtime compensation, liquidated damages, and attorney fees and costs based on their belief the position should be nonexempt from the provisions of the FLSA. *See* Al-Ali v. United States, No. 1:05-CV-01227-EJD (filed Nov. 21, 2005). This case was initially filed November 21, 2005, and amended on January 13, 2006, to add additional plaintiffs. The claimant was a party to the initial filing of this case. The case arose out of the plaintiffs' claims that while employed as SIEAs at various locations within ICE, the agency failed to pay overtime compensation to which they believe they are entitled pursuant to the FLSA.

The parties entered into negotiations and reached a settlement agreement, signed by the Department of Justice attorney on November 7, 2006. This settlement was for the purpose of disposing of the plaintiffs' claims without there being any trial on the merits or further adjudication of any issue of fact or law, and without constituting an admission of liability on the part of either party, and for no other purpose. The plaintiffs settled the case in exchange for payment of back pay for two years prior to the filing of their complaint until such time as their agency converts their FLSA status to nonexempt, and \$45,000 in attorney's fees. The plaintiffs waived liquidated damages and interest, and each party was to otherwise bear their own costs and expenses.

Analysis

Period of the Claim

5 CFR 551.702 provides that all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (three years for willful violations). A claimant must submit a written claim to either the employing agency or to OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date that determines the period of possible back pay entitlement. The claimant indicated he did not file a claim with his agency. The claimant's

request was received by OPM on January 6, 2005, and this date is appropriate for preserving the claim period.

The claimant's reliance on *Angelo* as covering his claim is both misplaced and contrary to statute. In relevant part, 29 U.S.C. 216(b) of the FLSA, as codified, makes clear that an aggrieved employee must be party to a suit for damages under the FLSA in order to be covered by the court's judgment:

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Since he was not a party to *Angelo*, the claim period established by the participants of that case for purposes of judicial review cannot apply to the claimant. Furthermore, tolling the statute for judicial review is separate and distinct from preserving the claim for administrative review by either the agency employing the claimant during the claim period or OPM.

The question of the FLSA status of the SIEA position was not addressed in the *Angelo* court decision or the settlement agreement. The plaintiffs were made aware the agency "has classified the SIEA positions as FLSA exempt, has not paid SIEAs FLSA overtime compensation, and does not intend to pay them FLSA overtime in the future." The FLSA status of the SIEA positions was the issue in the *Al-Ali* case. As indicated above, this case was settled without trial on the merits and without constituting any admission of liability on the part of either side. The plaintiffs agreed to settle for back pay for two years prior to the filing of the complaint in the Court of Federal Claims until such time as the agency converted their status to FLSA nonexempt. As one of the initial plaintiffs in the *Al-Ali* case, it would appear the claimant is entitled, under the settlement agreement, to a period of back pay from November 21, 2003.

As discussed later in this decision under *Willful Violation*, we find the claim is subject to a two-year statute of limitations. Therefore, the time period of the OPM claim begins January 6, 2003, and continues to the beginning of the claim period established by the *Al-Ali* agreement; i.e., November 21, 2003. During that time period, the claimant held two positions:

1. January 6, 2003, to August 9, 2003 - - Supervisory Detention Enforcement Officer (SDEO), GS-1802-10.
2. August 10, 2003, to November 20, 2003 - - Supervisory Immigration Enforcement Agent (SIEA), GS-1801-12.

The agency, in its interim response to the request by OPM for information to adjudicate the FLSA claim, stated:

Based on our review of Mr. Arman's eligibility period and the positions he held during that time, we will compensate Mr. Arman FLSA back pay with interest for the period January 6, 2003, through August 9, 2003.

This letter will serve as an official request to the servicing payroll office to calculate and pay Mr. Arman in accordance with the time period established in this letter.

Therefore, this decision will address the time period from August 10, 2003, to November 20, 2003.

Position information

As of August 10, 2003, the claimant transferred from his position in [city in] Pennsylvania, to the [city name] Resident Office, Office of Detention and Removal Operations Field Office, ICE, DHS, in [city in] Texas. Upon his transfer, he was promoted to a position of SIEA, GS-1801-12, assigned to a standardized position description [number], used throughout ICE for internal placement. The PD Introduction defines duties as a third-level supervisor or manager, planning and evaluating the activities and operations of a variety of enforcement functions associated with the identification, investigation, apprehension, prosecution, detention and deportation of aliens and criminal aliens, and the apprehension of absconders from removal proceedings.

The current Officer-in-Charge of the [city name] Resident Office indicated the claimant's position was assigned responsibility for the detention section of the organization's operations. The section was responsible for transporting and housing detainees, moving them from the detention facilities to Immigration Court appearances and preparing them for removal and deportation. The organization was authorized a GS-12 SIEA, two GS-11 SIEAs, and nonsupervisory agents. According to available records, at that time, there were approximately 18 authorized positions with approximately 16 on board. Work operations were conducted Monday through Friday on a 7:00 am to 3:30 pm schedule. The claimant stated in correspondence received by OPM in June 2005 he no longer had first-level supervisors under his command (i.e., one retired and the other quit), he never had any second-level supervisors, and there was no budget to hire other supervisors. Thus he was doing what a first-line supervisor does.

Evaluation of FLSA Coverage

Sections 551.201 and 551.202 of 5 CFR 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. The designation of a FLSA status ultimately rests on the duties actually performed by the employee. There are three exemption categories applied to Federal employees: executive, administrative, and professional. Neither the claimant nor the agency assert the claimant's work is covered by the professional or

administrative exemptions; and, based on careful review of the record, we concur. Therefore, our analysis is limited to the executive exemption.

Executive Exemption Criteria

Under the executive exemption criteria contained in 5 CFR 551.205, in effect at the time of the claim, an executive employee is a supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets both of the following criteria: (a) the primary duty test and (b) the 80 percent test.

(a) The primary duty test is met if the employee:

(1) has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluations; and other aspects of management of subordinates, including personnel administration.

The primary duty test is not met.

The SIEA PD includes two major duties described as: supervising a medium- to large-sized staff through subordinate supervisors and performing a full range of supervisor and managerial functions, and advising on a variety of the more complex technical and administrative duties of the operation. More specific personnel responsibilities include discussion of interviewing supervisory candidates for vacancies and reviewing recommendations for appointments of new employees; reviewing performance appraisals and award recommendations; recommending promotions and within-grade increases; hearing and resolving complaints; referring group grievances and more serious complaints to higher levels; and taking or recommending disciplinary action.

Interviews with the claimant and the supervisor indicate general work assignment and scheduling was done by the Officer-in-Charge. As SIEA, the claimant indicated he had no input into hiring, firing, promotion, etc., as those responsibilities were carried out at higher levels within the organization, e.g., the Field Office Director had final authority. In dealing with a problem employee, he could make a recommendation to higher-level supervisors. He was responsible for employee performance appraisals, could recommend disciplinary action, approve leave, and could recommend training with the concurrence of higher-level management.

The agency report presented no substantive argument for the exemption status and, in fact, deferred to the agreement in the *Angelo* case, indicating that the claimant will receive compensation for the period of January 6, 2003, through August 10, 2003, for the period when he

held the position of SDEO GS-1802-10. The record also contains a March 25, 2007, memorandum from the ICE Assistant Director for Management communicating a discretionary decision that all currently employed SIEAs (*Al-Ali* case), who were not a party to any settlement agreement regarding back pay for SIEAs, would receive back pay and interest for the period of eligibility but no earlier than pay period 6 of calendar year 2005.

The issues raised by the Court regarding the primary duty test in the *Angelo* case; i.e., did the employee have authority to make personnel changes, and did the employee customarily and regularly exercise discretion and independent judgment in certain work-related activities, were not resolved by trial. The court found no willful violation occurred and required the Government to show a demonstration of authority regarding hiring or firing, but this process was overcome by the settlement agreement. Similar circumstances are true in the *Al-Ali* settlement agreement.

Based on careful review of the complete record, we are unable to clearly establish that the human resources management authorities delegated to the claimant were sufficient to fully meet the primary duty test of the executive exemption. The time period of the OPM claim is short, and the SDEO position occupied at the beginning of the claim period was conceded by the agency to be nonexempt. Given the size and nature of the organization, the transition and training required for the new SIEA position, and the little more than three-month period he occupied the position, it is unlikely the work situation provided an opportunity for the claimant to participate in exercising a higher level of supervisory responsibility in human resources management with regard to selection, removal, and promotion. The same is true for exercising discretion and independent judgment on matters of significance as defined in 5 CFR 551.104 in work planning and assignment, as well as other aspects of management of subordinates, including personnel administration.

(b) The 80 percent test makes special provisions for employees in positions properly classified as GS-5 or GS-6; firefighting or law enforcement employees in positions properly classified at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29 U.S.C.; and supervisors in Federal Wage System (FWS) positions classified below situation 3 of Factor 1 of the FWS Job Grading Standard for Supervisors. These employees must spend 80 percent or more of the work time in a representative workweek on supervisory and closely related work.

The 80 percent test is not applicable to the claimant's position.

Decision on FLSA Coverage

Based on the above analysis and the principles articulated in 5 CFR 551.202, the claimant's work did not clearly meet the criteria for executive, administrative, or professional exemption during the period of the claim and is, therefore, properly covered by the overtime pay provisions of the FLSA.

Therefore, the claimant is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on January 6, 2005, and the claimant can receive back pay only for two years prior to that date, January 6, 2003. The claim period continues,

modified as discussed previously under *Period of the Claim* in this decision, until the date of the claim period established by the *Al-Ali* settlement agreement, dated November 21, 2003.

The make-whole remedy sought by the claimant; i.e., liquidated damages, is not within OPM's authority to award. Under 29 U.S.C. § 216, Federal courts have substantial discretion in fashioning remedies for violations of the FLSA, including liquidated damages. Unlike the courts, OPM's administrative claims process derives its remedial authority from the Back Pay Act, codified as 5 U.S.C. § 5596. Under the Back Pay Act, a claimant can receive back pay and interest for FLSA overtime performed within the claim period. (See also 5 CFR part 550, subpart H). There is no provision in the Back Pay Act for liquidated damages. The regulations governing the filing of an administrative claim (5 CFR § 551.702(c)) also state in pertinent part: "If a claim for *back pay* (emphasis added) is established, the claimant will be entitled to pay for a period of up to 2 years (3 years for a willful violation) *back from the date the claim was received.*" Therefore, we conclude the claimant's rationale with regard to liquidated damages is misplaced in that the FLSA administrative claims process does not provide for the awarding of liquidated damages.

Willful Violation

We agree with and adopt the court's determination that the agency's actions with regard to the claimant's similarly situated coworkers did not constitute a willful violation, and we extend this determination to the claimant's situation for the same reasons expressed by the court. Therefore, the appropriate time period for the claim filed with OPM would begin January 6, 2003.

The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid. If the claimant believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.