

**Fair Labor Standards Act Decision**  
**Under section 204(f) of title 29, United States Code**

**Claimant:** [name]

**Agency classification:** Criminal Investigator  
GS-1811-13

**Organization:** U.S. Secret Service  
U. S. Department of the Treasury

**Claim:** Back pay for FLSA overtime  
when employed as a nonsupervisory  
Criminal Investigator, GS-1811-9  
through GS-13

**OPM decision:** Denied

**OPM decision number:** F-1811-13-10

/s/

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Merit System Audit and Compliance

May 17, 2010

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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 (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. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

**Decision sent to:**

[name and address]

Chief, Personnel Division  
U.S. Secret Service  
U.S. Department of Homeland Security  
Washington, DC 20223

## Introduction

On October 28, 2007, the U.S. Office of Personnel Management's (OPM) then Center for Merit System Accountability received correspondence from [name] seeking to:

resolve my FLSA claim with OPM regarding the period of my employment with USSS [U.S. Secret Service] subsequent to my December 1984 FLSA payment until my 1988 promotion to GS-13. This is the period of time for which I have not received a [sic] FLSA benefit from the USSS even though I have documented to the USSS my FLSA eligibility and the USSS has made or has signed an agreement with me regarding FLSA payments to me before 1984 and after 1988.

We have accepted and decided his claim under section 4(f) of the FLSA as amended.

To help decide the claim, we requested clarifying information from the agency and the claimant. In reaching our FLSA decision, we have reviewed all material of record furnished by the claimant and the agency.

## Background

In his October 18, 2007, letter to OPM received on October 28, 2007, the claimant requests action on a claim he "made with OPM in 1990." He states that past correspondence he received from OPM advised a decision on his FLSA claim would not be made until the resolution of litigation regarding "certain USSS SA's who had filed suit against the USSS for failure to pay FLSA claims." The claimant states he "was not and [has] never been a litigant in any law suit regarding the FLSA." The claimant further states:

I have been informed that the referenced litigation has been settled in favor of the USSS SA's at all eligible grade levels. I myself have signed an agreement with the USSS regarding my employment at the GS-13 level, but have not received a payment.

The USSS believes I am not eligible to receive any FLSA benefit for my employment at the GS-9 through GS-13 level and has not responded to a written inquiry I made regarding this issue over one year ago.

Please review and resolve my FLSA claim with OPM regarding the period of my employment with the USSS subsequent to my December 1984 FLSA payment until my 1988 promotion to GS-13.

In our May 4, 2009, letter to the claimant responding to a series of letters sent by him, we stated we had delayed responding to him until we were able to locate and retrieve our file on the matter. This letter stated:

Due to this conflicting information [whether the claimant was a party to *Stephen S. Adams, et al. v. United States*] and your subsequent letters to OPM indicating you were also pursuing this matter with USSS, we requested a copy of your FLSA claim file from the USSS so that we may determine how to respond to you.

On August 19, 2009, we received USSS' August 18, 2009, response to our April 9, 2009, letter requesting the case file, and subsequently received the claimant's August 25, 2009, response to the USSS submission.

### **Jurisdiction**

The record contains a copy of a May 29, 1990, memorandum from the claimant to USSS asking the agency to review his FLSA exemption status: "I was previously designated as "NON EXEMPT" and believe based on a review of the FLSA and the Secret Service Manual that my present designation of "EXEMPT" was made in error and that my present designation should be NON EXEMPT." The June 7, 1990, USSS memorandum to the claimant responding to this request stated:

Due to pending litigation on the issue of the FLSA exemption of criminal investigators, the Secret Service is not in a position to respond to your request at this time.

You may request a further review of this matter from the Office of Personnel Management.

The record also contains a copy of a May 29, 1990, letter from the claimant to the U.S. General Accounting Office (GAO, now known as the Government Accountability Office) citing Federal Personnel Manual (FPM) Letter 551-18, dated July 1, 1982, Statute of Limitations on Fair Labor Standards Act Claims. This FPM letter advised that filing an FLSA claim with OPM did not toll the statute of limitations, which had to be tolled with GAO: "Any employee who wishes to pursue an FLSA claim with his or her agency, or with OPM, and also wishes to stop the running of the statute of limitations should transmit his or her claim to GAO." With regard to claims handled by the employing agency, FPM Letter 551-18 stated:

Agencies are authorized, in the case of non-doubtful claims, to pay retroactive wages, as appropriate, for a six-year period back from the date the claim is paid. Once a claim is recorded at GAO, appropriate payments may be made for a period of up to six years back from the date of the recording of the claim.

Pursuant to the above, the claimant's May 29, 1990, letter to GAO states:

This correspondence is intended to serve as my FLSA claim challenging OPM's designation of my employment position, as a Special Agent with the U.S. Secret Service, as being exempt from the provisions of the Fair Labor Standards Act.

Please record my claim for the purpose of tolling the statute of limitations applicable under 31 U.S.C., Sections 71a and 237.

My claim is being submitted to the U.S. Secret Service for adjudication. This correspondence is being transmitted solely for the purpose of tolling the statute of limitations.

The record includes a copy of the claimant's January 25, 1992, letter to GAO referring to the claimant's May 29, 1990, letter, stating: "As of 1/21/92, I have received no correspondence

from your office pertaining to my request, which was received by your office on 6/4/90, a photocopy of the U.S. Postal form PS 3811, pertaining to that correspondence is attached.” The record also contains a copy of the claimant’s January 21, 1992, letter to OPM’s former Chicago Region which states:

I have attempted to have my agency return my designation to “NON EXEMPT”, which was my status upon beginning government service. On 6/7/90, my agency declined to respond to my request citing pending litigation.

I have attempted to institute an administrative claim through the Claims Group of the General Accounting Office and have received no reply.

Please contact me or forward to me the appropriate [sic] information pertaining to filing a claim and changing my status.

The January 31, 1992, OPM Chicago Region letter to the claimant accepted his claim, but suspended action pending resolution of the previously cited court suit. In his February 10, 1993, letter to the OPM Chicago Region, the claimant states he believed the court suit referred to by OPM “was settled on behalf of the plaintiffs, in support of the “Non Exempt” status, on 10/30/92” and asks about the status of his “complaint and request.” The responding February 19, 1993, OPM Chicago Region letter states:

We understand from the Secret Service that you are one of the plaintiffs in the case of Stephen S. Adams, *et al.* v. The United States. As such, the Court will decide your exemption status. This decision will supersede any decision we might make on your complaint. For this reason, there is no purpose for us to decide your complaint and we will not do so.

The claimant’s April 12, 1994, letter to the OPM Chicago Region reiterates his view that as a result of the previously cited settlement: “I believe, according to your 2/19, correspondence, your Agency may proceed to make a determination pertaining to my claim.” In its May 12, 1994, response, OPM’s Chicago Personnel Programs and Oversight Division states:

With respect to the status of the claim you filed with this office, our February 19, 1993, letter informed you that the Court would decide your FLSA status and we would take no action in that regard. Page B-3 of the Settlement Agreement indicates that the Court ruled that GS-9 and GS-11 Criminal Investigators with the USSS are nonexempt. The Court also ruled that GS-12 and GS-13 USSS Criminal Investigators are FLSA exempt. The Court decision is final.

In his July 3, 1994, response to the above, the claimant states: “...I believe that you were led to believe by my Agency, that I was a litigant in the Adams V.[sic] United States law suit. I am not and have never been, therefore I must make claim on my own for payment as I will not be paid from the court settlement.” The next written communication between the claimant and OPM is the claimant’s October 28, 2007, letter described previously.

The record includes a copy of the claimant’s February 10, 1993, letter to GAO referencing his January 25, 1992, letter to GAO and a February 3, 1992:

...conversation [with GAO] pertaining to the Fair Labor Standards Act and my claim that I had been improperly placed in an "Exempt" status by my agency.

During our conversation you advised me that the Claim Group had received my claim and that the group was in the process of corresponding with the Secret Service to receive a reply to the inquiry being made about my complaint. You further advised me that the claim, along with the agency reply would be given to "adjudication" who would make a decision in the matter.

As a year has passed since our last conversation, please review my file in your office pertaining to this matter and advise me of the status of my claim. As I have never received a written acknowledgment from the GAO pertaining to this matter or an acknowledgement of the receipt of my original claim, please furnish me with this information by official agency letter.

GAO's subsequent July 20, 1994, letter to the claimant states:

We are returning your correspondence. As I said in our telephone conversation this morning, GAO has no authority to consider whether your position is properly classified as "exempt" from FLSA. However, we have authority to consider backpay claims.

Please submit your claim to your agency for consideration. If you are not satisfied with their adjudication of your claim, you may request that they forward the matter to GAO along with their administrative report.

The claimant's December 14, 2005, memorandum to the USSS's Chief, Personnel Division, articulates the claimant's underlying claim rationale:

As I had filed an initial FLSA claim in 1983, regarding a non-payment issue and a subsequent claim in 1990, regarding the same issue, my FLSA claim period using the 6 year statute of limitations would go back to 5/29/84.

I believe an error has been made in the review of my file and in the application of what is referred to as the "two-year statute of limitations" to the FLSA claim of an administrative filer.

Please review my administrative claim with the following points in mind:

- 1.) I filed administrative claims regarding unpaid FLSA payments with the Secret Service on two occasions, once on 12/14/83 and again on 5/29/90. The filing of each of these claims tolled the statute of limitations according to the Secret Service, the Office of Personnel Management (OPM) and General Accounting Office (GAO).
- 2.) The purpose of my initial filing in 1983, [sic] was to correct my FLSA status with the Secret Service so that I could begin to receive the FLSA pay I was entitled to. The Secret Service corrected my FLSA status in 1984 and I received back pay benefits for FLSA hours worked 1981 thru 1984. FLSA pay should have continued after the initial 1984

payment but did not do so. Because of this, I filed a subsequent FLSA claim on 5/29/90, to continue the FLSA payments I was entitled to since the original 1984 FLSA back payment.

3.) At the time of each [of] my FLSA filings, the statute of limitations in effect was 6 years according to Title 4, Code of Federal Regulations, Part 31.5 and 31 U.S.C. 3703(b); which are cited in a letter I have from the General Accounting Office dated 7/6/94 [copy not provided], regarding this matter. The Secret Service adhered to that rule in calculating back payments made to me subsequent to my initial FLSA filing in 1983.

4.) After the filing of my FLSA claim in 1990, the Secret Service notified me in an Official Memorandum dated 6/7/90, "Due to pending litigation on the issue of the FLSA exemption of criminal investigators, the Secret Service is not in a position to respond to your request at this time." This choice by the Secret Service, [sic] suspended the processing of my administrative claim with [sic] the rules, laws and guidelines in effect at the time of the Secret Service's decision not to respond at that time.

In the absence of any of these court ordered rules or restrictions [concerning the litigants and the Secret Service in *Adams*] regarding administrative filers, the Secret Service is left with having to follow the guidelines, rules and law in effect in 1990, at the time the Secret Service elected to suspend processing of my administrative FLSA claim, which means using the six year statute of limitations in addressing the claims of administrative filers.

The record shows the claimant's December 14, 1983, FLSA claim request to GAO was limited to a compensation issue which the claimant described as "employee entitlements incurred under the Fair Labor Standards Act Amendments of 1974 in accordance with the recent court order reducing the minimum number of hours from 93 to 85.5." This contradicts the claimant's assertion in his May 7, 2009, letter to OPM that his: "original FLSA claim in 1983 was submitted to address two (2) issues....The first issue was to address the USSS having improperly classified me as FLSA Exempt upon my appointment in 1981." The claimant has failed to produce a copy of any documentation showing he challenged his FLSA exemption status in 1983. The USSS December 6, 1983, memorandum concerning "Overtime Payments under the Fair Labor Standards Act (FLSA)," which generated the claimant's December 14, 1983, FLSA claim request to GAO, advised "FLSA covered [i.e., nonexempt] law enforcement" employees to submit their claims to GAO to "toll the statute of limitations" so as not to lose any potential benefits and identified "GS Grade 5 & 7 Special Agents" as "law enforcement employees covered under the FLSA." Furthermore, the claimant's December 9, 2008, letter to USSS, when read in conjunction with these documents, makes clear the claimant was classified as FLSA nonexempt in 1981: "In your letter of 6/11/08, your statement that I had been paid for both my claims is only partially correct. In 1984, the USSS made a FLSA back payment to me for the period of time I was a GS-5 to a portion of the time I was a GS-9." Thus, the claimant has failed to establish that he formally challenged his FLSA exemption status in writing until May 29, 1990, with USSS and GAO.

The claimant's assertion in his May 7, 2009, and August 25, 2009, letters to OPM that he had an FLSA claim on file with OPM since 1990 is contradicted by the claimant's January 21, 1992,

letter to OPM discussed previously in this decision, wherein he requests “information pertaining to filing a claim.”

A review of guidance issued by GAO, the agency formerly charged with settling compensation and leave claims under 31 U.S.C. § 3702, and which was responsible for settling such claims at the time claimant submitted his May 29, 1990, letter is instructive. GAO decisions make clear GAO did not view its claims settlement authority as encompassing FLSA exemption status determinations. As provided in a decision issued by GAO:

We consider that the role granted to the Commission [now OPM] to administer the FLSA with respect to Federal employees, [sic] necessarily carries with it the authority to make final determinations as to whether employees are covered by the various provisions of the [FLSA]. Accordingly, this Office will not review the Commission’s determinations as to an employee’s exemption status.

However, we would point out that once a determination has been made that an employee is covered by the FLSA’s overtime provisions, this Office will consider questions, as it has in the past, concerning the propriety of making payments to employees under the FLSA.

B-51325 (October 7, 1976).

Therefore, contrary to the claimant’s assertions, claimant’s filing with USSS and subsequently with GAO regarding his FLSA exemption status did not preserve his exemption status claim. The record shows the claimant was advised by USSS in its June 7, 1990, memorandum that further review of his exemption status should be addressed to OPM, and was advised of the same by GAO on July 20, 1994.<sup>1</sup>

Under the provisions of section 204(f) of title 29, United States Code (U.S.C.), OPM established an administrative claims process by issuance of Federal Personnel Manual (FPM) Letter No. 551-9, on March 30, 1976. FPM Letter 551-9 stated:

[A]n employee alleging an FLSA violation has a right to file a complaint directly with the Civil Service Commission [the former CSC, now OPM]. The law itself also establishes the right for an employee to bring action in a U.S. district court either directly or after having received the CSC decision on his/her FLSA complaint.

FPM Letter 551-9 did not require agencies to notify employees of their right to file a complaint with the Civil Service Commission (or with OPM effective January 1, 1979).

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<sup>1</sup>GAO’s earlier correspondence on this matter is unclear as to whether the claimant was led to believe it would settle his FLSA exemption status dispute. However, it is also well established that a claim may not be granted based solely on misinformation that may have been provided by federal employees. The United States cannot be estopped from denying benefits that are not permitted by law, even where claimant relied on the mistaken advice of a government official or agency. See *OPM v. Richmond*, 496 U.S. 414 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed. Cir. 1997); and 60 Comp. Gen. 417 (1981).



Thus, the claimant's assertion that he preserved his FLSA exemption status claim by filing with USSS and GAO is misplaced. Under the administrative claims procedures in place during the period of this claim, filing a claim with the employing agency on May 29, 1990, did not preserve the claim as discussed previously in this decision. (See, e.g., OPM decision number F-0025-07-01, December 9, 2008).

OPM did not receive this claim until on or about January 21, 1992, and we will use this date as the date the claim was preserved.

*Period of the claim*

As discussed previously in this decision, the claimant seeks to rely upon the six-year statute of limitations for FLSA administrative claims in effect at the time he filed his claim, which we have established as January 21, 1992.

Effective December 23, 1997, OPM promulgated regulations codifying the FLSA administrative claims process. In relevant part, section 551.702(c) of title 5, Code of Federal Regulations (CFR), provided that:

A claimant ...may preserve the claim period by submitting 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.

Prior to June 30, 1994, FLSA pay claims were subject to a six-year statute of limitations. However, all FLSA pay claims filed on or after June 30, 1994, are subject to a two-year statute of limitations (three-years for willful violations). 5 CFR 551.702(a), (b). A claimant who receives an unfavorable decision from the agency may file with OPM, and a claimant may request his or her agency to forward the claim to OPM on the claimant's behalf. 5 CFR 551.705(a), (b).

These regulations implement Section 640 of the Treasury Appropriations Act of 1994, amended in 1995, which states:

the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 for claims filed before June 30, 1994. This section shall not apply to any claim where the employee has received compensation for overtime hours worked during the period covered by the claim under any provision of law, including, but not limited to 5 USC 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.<sup>2</sup>

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<sup>2</sup> See *Adams v. Bowsher*, 946 F. Supp. 37 (D.D.C. 1996); *Adams v Hinchman*, 154 F.3d 420 (D.C. Cir. 1998); and *Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004).

We may not ignore this statutory provision, as the claimant appears to request in his claim rationale, which supercedes the FLSA “rules, regulations and laws in existence at the time of [the claimant’s filing.” In responding to the claimant’s request for review of his claim from six years prior to his claim date, the agency report shows the claimant received premium pay (commonly referred to as administratively uncontrollable overtime (AUO)) under the provisions of 5 U.S.C. § 5545(c) from June 1, 1984, through October 29, 1984, and Law Enforcement Availability Pay (LEAP) from October 30, 1984, through March 17, 2007.<sup>3</sup> As a result, this claim is subject to the two-year statute of limitations provided for in § 640. Therefore, the entire period of this claim (December 1984 until the claimant’s promotion to GS-13 on April 10, 1988) for back pay under the FLSA is time barred since it occurred prior to January 21, 1990, based on application of the two-year statute of limitations in effect for FLSA claims filed before June 30, 1994 (January 21, 1989, if willful violation had occurred) as stipulated in §640.

#### *Settlement with USSS*

The record shows that on November 6, 2007, a check in the amount of \$144,534.40 was issued to the claimant by USSS for back pay (\$48,943.74) and interest (\$108,536.28) reduced by withholdings for Federal (\$12,235.94) and Medicare (\$709.68) taxes. This check constituted payment for FLSA back pay and interest during the period of time the claimant was employed as a Criminal Investigator, GS-13 (May 22, 1988, through October 29, 1994) prior to his receiving LEAP (October 30, 1994).

This check was issued as a result of a settlement signed by the claimant on September 27, 2007, and the duly authorized USSS official on October 25, 2007:

In consideration of the amounts paid pursuant to this Agreement to Claimant, Claimant releases and forever discharges the Secret Service and the United States, their agents, employees, representatives or persons who are liable or might be claimed to be liable from any and all claims or demands of every kind Claimant has or ever had against the Secret Service and the United States with respect to unpaid FLSA entitlement covered by this Agreement.<sup>4</sup>

The agreement covered the entire period of claimant’s employment which would not have been time barred (January 21, 1990, through October 29, 1994) which further renders any claim before OPM moot.<sup>5</sup>

#### **Decision**

The claim is denied.

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<sup>3</sup> Under 29 U.S.C. § 213(a)(16), criminal investigators receiving LEAP under 5 CFR 550.181(a) are exempt from the hours of work and overtime provisions of the FLSA (5 CFR 551.213)

<sup>4</sup> Since claimant was not a party to *Adams*, the basis for and period covered by the settlement is unclear given the findings in this decision.

<sup>5</sup> Non-covered issues included “driving time” which, having been decided repeatedly by courts of competent jurisdiction, will not be addressed in this decision. *Easter v. United States*, 575 F.3d 1332 (2009)