

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

**Claimant:** [name]

**Agency Classification:** Supervisory Park Ranger  
GS-025-12

**Organization:** Branch of Emergency Services  
Division of Visitor and Resource  
Protection  
[name] National Park  
Intermountain Region  
National Park Service  
U.S. Department of the Interior  
[location]

**Claim:** Overtime for Emergencies Should  
Have Been Paid at Time and a Half

**OPM decision:** Claim Denied

**OPM file number:** F-0025-12-01

/S/ Robert D. Hendler

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

February 8, 2007

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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 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]

Chief of Human Resources  
[name] National Park  
National Park Service  
Department of the Interior  
Post Office Box [number]  
[location]

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

## Introduction

The U.S. Office of Personnel Management (OPM), Division for Human Capital Leadership and Merit System Accountability, Center for Merit System Accountability, received a Fair Labor Standards Act (FLSA) claim from [name], dated February 7, 2005. The claimant states he mailed the claim to OPM that same day via registered mail, although he can provide no supporting documentation. The record includes a copy of the claim which is signed, acknowledging receipt, but not dated by a former OPM employee who left our employ in April of 2005. In consideration of these facts, we find it reasonable to reconstruct the date OPM received the claim as February 10, 2005.

The claimant occupied a non-supervisory Park Ranger, GS-025-11, position from May 24, 1998, until February 8, 2003, and has been in a Supervisory Park Ranger, GS-025-12, position since February 9, 2003, with the Branch of Emergency Services, Division of Visitor and Resource Protection, [name] National Park ([xx]NP), Intermountain Field Area, National Park Service (NPS), U.S. Department of Interior. He requests reconsideration of his agency's decision to pay him overtime (OT) at the capped rate of 1.5 times the GS-10, step 1, rate of pay for his work responding to emergency situations between December 16, 2002, and November 13, 2004. We received the agency administrative report on May 22, 2006.

In reaching our FLSA decision in this matter, we have carefully reviewed all information furnished by the claimant and his employing agency. For the reasons discussed herein, the claim is denied.

## General Issues

The claimant states:

Within existing federal regulations there is an established legal provision to consider (*exempt*) employees as nonexempt during initial attack emergencies. This provision is contained in **NWCG (National Wildland Coordinating Group) Amendment 04-1 Chapter 10- section 12.11(a)- item 4**. I pointed this out to my employing agency during March 2004 and have subsequently failed to receive any formal response. Since I provided my employing agency with the specific information relating to this provision one year ago, and the agency failed to take any action after being informed of the situation, this is a willful omission and therefore I am making a back-pay claim for three years.

He further states:

...it is written (*i.e., the NWCG Amendment 04-1*) to provide coverage of all federal employees during "all-risk" emergencies. Additionally, although 5 CFR Section 551.208 is frequently referred to as a guide to determine status of exempt versus nonexempt employees during emergencies, this NWCG Amendment appears to provide clearer instruction on this issue (*emergency work*). Based upon this information I appear to be entitled to full overtime (time and a half) pay for overtime hours worked.

The claimant requests payment of the difference between the capped OT rate, which he has already received, and the OT payments he would have received had he been paid at 1.5 times his regular basic rate of pay during the claim period, plus interest. He does not dispute the agency's FLSA exempt classification of either position he held during the period of the claim or the duties contained on the position descriptions of record. Rather, he asserts his OT callouts, responding to emergency situations, should have been paid on an exception basis as nonexempt OT work in accordance with the NWCG, Interagency Incident Business Management Handbook (IIBMH) amendment 04-1.

The agency finds the claimant's OT work did not meet the requirements for coverage under NWCG, IIBMH amendment 04-1 because he was not fighting wild-land fires. The agency also states this OT work was not associated with an official, agency declared emergency as required by 5 CFR 551.208(d), emergency situation criteria. Therefore, it is the agency's position that his OT during the claim period were properly paid at the capped, GS-10/step1, exempt rate of pay.

The record shows the claimant served as the [xx]NP and NPS Search and Rescue (SAR) Coordinator between December 16, 2002, and February 8, 2003, and as Chief of Emergency Services since February 9, 2003. The claimant states his OT work involved park ranger, paramedic, SAR and law enforcement duties. The agency states his OT work during the claim period, with the exception of 2.5 hours for the arrest of a suicidal subject, involved either SAR or paramedic duties.

The agency states the claimant worked 103 hours OT on detail to the Olympics held in Salt Lake City in 2002. This OT was paid at 1.5 times his basic rate of pay (uncapped) because the GCNP, Deputy Chief Ranger had obtained approval from NPS Headquarters.

### **Position Information**

The agency classified the claimant as exempt in both his Supervisory Park Ranger, GS-025-12, and Park Ranger, GS-025-11, positions based on application of the executive exemption criteria. Based on a careful review of the record, we agree the claimant's work was appropriately classified as exempt based on the duties performed by the claimant. However, we find the work he performed in his nonsupervisory Park Ranger position was properly classified exempt based on administrative exemption criteria provided under 5 CFR 551.206.

The claimant's non-supervisory Park Ranger, GS-025-11, position description shows 35 percent of the position's time spent on resource management and law enforcement duties, 5 percent on radio system/communications duties and the remaining 60 percent of his time on GCNP and NPS SAR program duties and responsibilities. The SAR coordinator plans and develops budget projections/proposals for the GCNP SAR program; trains and provides expert SAR guidance to [xx]NP and NPS personnel; performs periodic assessments of park SAR capabilities and requirements; determines necessary resources and equipment and ensures they were available and in acceptable working condition; coordinates with others within and outside the park regarding SAR issues and responsibilities; serves as incident commander or designated section chief during large scale emergency operations such as rescue operations, searches for lost individuals, and emergency medical operations;

prepares articles for publication on related subjects; maintains training and employee certification records; represents the [xx]NP and NPS during contacts with other Federal and State agencies/activities; develops and/or participates in developing SAR plans, policies and procedures; collects, analyzes and reports SAR statistical data; and identifies and develops improvements to SAR administrative and operational practices.

### **Evaluation of FLSA Coverage**

Sections 551.201 and 551.202 of title 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; and if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. There are three exemption categories applicable to Federal employees: executive, administrative, and professional.

In order to classify an employee's work exempt under 5 CFR 551.205 executive exemption criteria, the employee must be a manager or supervisor at any level within an agency, including the lowest level recognized organizational unit with a continuing function, and customarily and regularly direct the work of subordinate employees. In addition to programmatic responsibilities (e.g., planning, organizing, directing and reviewing work), such employees either decide or make recommendations that are typically accepted by higher level supervisors/managers to select, remove, promote, advance in pay, or discipline, subordinate employees.

As a Park Ranger and SAR program coordinator between December 16, 2002, and February 8, 2003, the claimant was not a supervisor, nor did he exercise authority to recommend or decide the selection, removal, promotion, advancement in pay, or disciplinary actions for subordinate employees. Therefore, his work did not meet the executive exemption criteria of 5 CFR 551.205.

### Administrative Exemption Criteria

Section 551.206 of 5 CFR contains the criteria governing whether an employee should be exempt from the FLSA under the administrative exemption criteria. The employee's work is exempt if it meets administrative exemption criteria (a)(1), (2), or (3), known as the primary duty test, and (b) through (d).

#### *Primary duty test*

The primary duty test is met if the work meets criterion (a)(1), (2), or (3). Criterion (a)(1) deals with work that significantly affects the formulation or execution of management policies or programs.

Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that others act on. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or organizations, both within or outside the Federal Government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of program management; i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs.

The administrative exemption applies to work directly related to assisting with the running or servicing of the agency or its customers. As [xx]NP and NPS SAR coordinator, the claimant spent 60 percent of his time engaged in formulation and execution of the agency SAR program, developing policies and procedures and evaluating program operations. He assessed program accomplishments, readiness and needs and developed/recommended program improvements including budgetary considerations. Therefore, we find the claimant's SAR coordinator work met criterion (a)(1).

Criterion (a)(2) involves general management or business functions or supporting services of substantial importance to the organization serviced.

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, general management or support services include services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject-matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into non-exempt production functions. To warrant exemption from the FLSA, such work must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

As described above, the SAR coordinator for [xx]NP and NPS SAR provides expert advice in a specialized subject-matter field and exercises designated responsibility for essential SAR programs/functions, including program evaluation, analysis, improvement and resource/budget planning and recommendations. This work assisted management in making financial and resource allocation decisions. The claimant performed support work of substantial importance to the organizations serviced as envisioned in the FLSA. Therefore, we find that the claimant's SAR work met criterion (a)(2).

Criterion (a)(3) involves substantial participation in the executive or administrative functions of a management official, such as that associated with the work of secretaries and/or administrative assistants. The claimant did not perform this type of work. Therefore, we find that the claimant's work did not meet criterion (a)(3).

Based on the preceding analysis, the claimant's SAR coordinator work meets the primary duty test.

*Nonmanual duty test*

The nonmanual work test is met when the employee performs office or other predominantly nonmanual work which meets either criterion (b)(1) or (b)(2).

Criterion (b)(1) covers work that is intellectual and varied in nature.

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject-matter fields, or work involving mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized procedures, or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

Operational SAR work inherently involves significant physical effort and requires the capability to perform strenuous functions. However, as SAR coordinator, the main focus of the claimant's work was to plan, evaluate, analyze, fund, equip, improve, provide training and represent the SAR program. As SAR coordinator, the claimant reviewed and revised program plans and procedural guidelines, compiled data and analyzed statistical trends, oversaw fund accounts for SAR operations, and determined program requirements and how best to allocate resources. The work involved exercising discretion and judgment to select, adapt, and apply principles and consider a number of variables in making decisions and/or recommendations. The claimant's SAR coordinator work met criterion (b)(1).

Criterion (b)(2) covers work of a specialized or technical nature that requires considerable specialized training, experience, and knowledge.

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledge characteristically acquired through specialized academic training.

The claimant's SAR coordinator work, as described above, met criterion (b)(2).

*Discretion and independent judgment test*

Work meeting this test (criterion (c)) requires the employee to frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. Discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support

exemption. The “decisions” made as a result of the exercise of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption.

Work reflective of discretion and independent judgment must meet the three following criteria: (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action; (2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently; and (3) The decisions made independently must be significant. The term “significant” is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria. The exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Decisions made as the result of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion.

As [xx]NP and NPS SAR coordinator, the claimant was considered the subject-matter expert for the agency in this area. He worked independently using resourcefulness and initiative to select, apply and/or adapt guidelines in making day to day decisions. The claimant analyzed and interpreted a variety of situations/issues, considered a number of possibilities, and decided/recommended what should be done. His decisions were significant within the meaning of the regulation in that they affected the SAR program at [xx]NP and NPS. The claimant's SAR coordinator work met criterion (c).

*Criterion (d)*

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. Because the claimant's position was classified above these grade levels, this criterion does not apply to the claimant's work.

## Decision on FLSA Coverage

Based on the above analysis, the claimant's nonsupervisory Park Ranger, GS-025-11, work met the administrative exemption criteria and, therefore, was not covered by the overtime pay provisions of the FLSA.

## Evaluation of Claim

### *5 CFR 551.208 - Effect of Performing Temporary Work or Duties on FLSA Exemption Status*

The claimant refers to 5 CFR 551.208(d) as “frequently referred to as a **guide** (*emphasis added*) to determine status of exempt versus nonexempt employees during emergencies.” In fact, 5 CFR part 551, Pay Administration Under the FLSA, which includes 5 CFR 551.208, is the regulation issued by OPM, as authorized by section 4(f) of the Act, to interpret and apply this law for covered Federal positions, and has the force of law.

Emergency situation criteria provided by 5 CFR 551.208 (d) states

...the **agency may determine** (*emphasis added*) that an emergency situation exists that directly threatens human life or safety, serious damage to property, or serious disruption to the operations of an activity, and there is no other recourse other than to assign qualified employees to temporarily perform work or duties in connection with the emergency.

The claimant does not assert, nor does the record show that any of his OT work during the claim period was in response to an official, agency declared emergency. The declaration of an emergency as provided in the cited portion of the regulation is permissive. The agency **may**, at its discretion, declare an emergency situation exists. The “emergency situation” criteria of 5 CFR 551.208 (d) provides flexibility to agencies to effectively deal with immediate emergency requirements associated with major disasters, weather related catastrophes, etc. affecting substantial numbers of people, threatening major disruptions in essential services, serious property damage and/or significantly impeding agency operations. Without a declared emergency, 5 CFR 551.208 is not operative, and the claimant’s coverage under its provisions is precluded.

### *National Wildfire Coordinating Group, Amendment 04-1*

Although the claimant filed his claim under the provisions of the FLSA, the rationale of his claim rests upon section 5542(a)(5) of title 5, United States Code (U.S.C.) which authorizes payment of overtime for certain wildland firefighters at one and a half times their hourly rate of basic pay. This premium payment authority is separate and distinct from FLSA overtime pay authorized and codified under a different statute, i.e., 29 U.S.C. OPM’s non-FLSA compensation and leave claims authority under 31 U.S.C. 3702 covers claims relying on 5 U.S.C. 5542(a)(5) and we will address these issues under that authority.

The mission statement provided on the official NWCG web-site states: “The National **Wildfire** (*emphasis added*) Coordinating Group is made up of the USDA Forest Service;

four Department of the Interior Agencies: Bureau of Land Management (BLM), National Park Service (NPS), Bureau of Indian Affairs (BIA), the Fish and Wildlife Service (FWS); **and State forestry agencies through the National Association of State Foresters** (*emphasis added*). The purpose of the NWCG is to coordinate programs of the participating wildfire management agencies so as to avoid wasteful duplication and provide a means of constructively working together. Its goal is to provide more effective execution of each agency's fire management program. The group provides a formalized system to agree upon standards of training, equipment, qualifications and other operational functions."

The NWCG Amendment, cited by the claimant as "an established legal provision within existing Federal regulations" is, in fact, guidance agreed upon, and published by the NWCG member agencies, both State and Federal. Although it may contain interpretive guidance, policy and/or procedure to standardize how member agencies apply certain regulations or statutes, it is not in and of itself, either a regulation or law. As stipulated in 5 U.S.C. 5548(a) OPM alone is provided the authority to prescribe regulations necessary for administration of subchapter V, chapter 55 of 5 U.S.C., including 5 U.S.C. 5542(a)(5). Therefore, the claimant's rationale in this regard is barred by statute.

The claimant asserts all his OT work responding to emergencies during the claim period is covered by the NWCG, IIBMH, Amendment 04-1. In particular, item 12.11(a)(4) which includes the statement: "All positions on Type 4 incidents are considered nonexempt during initial attack." From this, the claimant concludes the amendment makes no distinction between wildland firefighting and other kinds of emergencies. He does not claim any of his OT work was to fight wildland fires. Instead he believes his OT is covered by the cited NWCG amendment, regardless of the nature of the emergencies, or work he performed.

The NWCG Fireline Handbook describes initial attack as:

... the action taken by resources that first arrive at an incident. **All wildland fires** (*emphasis added*) that are controlled by suppression forces undergo initial attack. The kind and number of resources responding to an initial attack varies depending upon fire danger, fuel type, values to be protected and other factors.

Public Law (PL) 106-558, including Section 2 - Overtime Pay for Certain Firefighters, was enacted by the 106<sup>th</sup> Congress of the United States of America on December 21, 2000. Section 2 of this law serves as the basis for NWCG handbook amendment 04-1. Section 12.11 of the amendment, which includes subsection 12.11(a) cited by the claimant, states:

PL 106-558 provides for employees of the Forest Service and Department of the Interior, who have their overtime hourly rate capped at GS-10, Step 1, now be paid at an overtime rate equal to one and a half times their hourly rate of basic pay when engaged in emergency wildland fire suppression activities; and

In order to qualify for the pay provision, an employee's overtime work must be charged to a wildland fire, ESR, severity, or wildland fire suppression funds tied to the support of suppression operations and that overtime must be recorded on a timesheet approved by an appropriate supervisor. The new overtime pay provision does not apply to personnel involved in prescribed fire, other fuels management activities, implementation of fire rehabilitation plans, or to overtime incurred in conjunction with any other activity not specified above (e.g., hurricanes, floods, non-fire FEMA incidents).

PL 107-20, passed the following year, set December 21, 2000, as the effective date of PL 106-558. PL 106-558 amended section 5542(a) of title 5, United States Code (U.S.C.) by adding a new paragraph (5) which authorized payment of overtime for certain wildland firefighters at one and a half times their hourly rate of basic pay. The claimant's OT work is not covered by NWCG Amendment 04-1 because it does not entail wildland firefighting as clearly and unambiguously required by statute.

#### *Willful Violation*

The claimant states his uncompensated OT should extend back three years because he informed his agency of the NWCG amendment in March 2004, but they failed to respond. He considers this a "willful omission" on the part of his agency.

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 question of willfulness is mute because we find no FLSA violation regarding the claimant's OT compensation during the claim period.

#### **Decision**

The claimant's work is exempt, i.e., not covered by the overtime pay provisions of the FLSA. His OT work, during the claim period, is not covered by 5 CFR 551.208(d) or 5 U.S.C. 5542(a)(5). Therefore, the claimant is not entitled to OT compensation at the rate of one and a half times his rate of basic pay for the period of the claim.