

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

**Claimant:** [name]

**Organization:** Defense Industrial Security  
Clearance Office  
Personnel Security Clearance Office  
Defense Security Service  
Department of Defense  
Columbus, Ohio

**Claim:** Additional monies for FLSA overtime  
pay

**Agency decision:** N/A

**OPM decision:** Denied

**OPM decision number:** F-0080-12-05

/s/

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

May 5, 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 (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

**Decision sent to:**

[name and address]

Director  
Human Resources  
Defense Security Service  
1340 Braddock Place  
Alexandria, VA 22314-1651

## **Introduction**

On September 11, 2008, the U.S. Office of Personnel Management's (OPM) Center for Merit System Oversight, now Merit System Audit and Compliance, received a Fair Labor Standards Act (FLSA) claim from [name]. The claimant is currently employed in a Personnel Security Specialist, GS-0080-12, position in the Defense Industrial Security Clearance Office (DISCO), Personnel Security Clearance Office, Defense Security Service, (DSS), Department of Defense, in Columbus, Ohio. The claimant states DSS determined it had erroneously identified him as FLSA exempt rather than nonexempt, and: "will pay retroactive overtime earnings to Pay [sic] period ending August 2, 2008. They have instructed me to submit this claim to OPM for the remainder of the retroactive earnings." The claimant seeks "retroactive earnings due for the period July 9, 2006 thru September 30, 2006 and from January 7, 2007 thru January 5, 2008" at the FLSA nonexempt rate when he was in a nonsupervisory GS-11 position. The claimant states: "I feel that this was an agency problem and should have been taken care of previously. Please do not penalize me for the agency not taking the action to correct this problem."

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and her agency, including the agency administrative report (AAR) which we received on January 27, 2009, and additional information we received subsequently to clarify the record.

## **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 did not indicate or provide documentation showing she had filed a claim with DSS. OPM received the claimant's request on September 11, 2008, and this date is appropriate for preserving the claim period.

### *Applicability of the FLSA*

To determine whether the claimant is owed overtime pay under the FLSA, the normal process is to first determine whether the work performed is exempt or nonexempt from the overtime pay provisions of the FLSA. Based on careful review of the record, we concur with the agency's determination the claimant's work in both the GG-0080-11 and GG-0080-12 positions was FLSA nonexempt. The claimant is requesting compensation for work performed between July 9, 2006, and September 30, 2006, and between January 7, 2007, and January 5, 2008, when the record shows he was properly classified as FLSA nonexempt. Therefore, the agency would have been required to compensate the claimant under the overtime pay provisions of Subpart E of Part 551 of 5 CFR for work performed within the statute of limitations.

*Willful violation*

Under 5 CFR 551.104, “willful violation” is specifically defined as follows:

*Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.*

Clearly, not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that the agency erred in the exempt status of the claimant. However, error alone does not reach the level of willful violation as defined in the regulations. A finding of willful violation requires that either the agency knew that its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. The regulation further instructs that the full circumstances surrounding the violation must be taken into account.

It is instructive to consider how the agency reacted when it discovered it had erroneously exempted the claimant from the overtime pay provisions of the FLSA. The agency reviewed the FLSA exemption status as part of an October 2007 agency-initiated classification and career ladder review of GG-0080 personnel security positions. At the time, the agency was aware of the result of an exemption determination decision issued by OPM on an unrelated DSS position (OPM decision number F-1810-12-02, October 16, 2006). As a result of the review, DSS initiated action on its own to make affected employees whole. As stated in a September 30, 2008, memorandum to nonsupervisory DISCO personnel security specialists provided in the AAR: “DSS has recognized the prior erroneous FLSA exemption status of nonsupervisory GG (formerly GS) 0080-9/11/12 employees, and acting in good faith, has determined that corrective action should take place”. DSS stated it would pay back pay “in line with the provisions of 5 CFR 551.702” back two years for GG-0080-9 and GG-0800-11 employees at DISCO from January 6, 2006, the effective date of the change in their exemption status, and back two years for GG-0080-12 employees from August 4, 2006, the effective date of the change in their FLSA exemption status. DSS stated:

DSS will pay the difference between the amount of overtime actually paid, which was based on the overtime rate for FLSA exempt positions, and the overtime rate for FLSA nonexempt positions (which is normally higher), plus interest calculated by the Defense Finance and Accounting Service, based on payroll records, for overtime worked during each of these 2-year periods of time.

The record indicates DSS implemented these previously discussed FLSA exemption determination changes as administrative determinations under 5 U.S.C. § 5596(b)(4), thereby providing for back pay and interest for affected employees more generous than that available to employees preserving claims under 5 CFR 5 CFR 551.702(c); i.e., “back from the date the claim was received.” The memorandum, in itself, is evidence that the agency was making an honest attempt to correct erroneous overtime pay calculations.

Based on all of the above, we find the agency erred in not properly determining the claimant's FLSA exemption status. However, we also find that the agency acted in good faith by making a full and adequate inquiry once their attention was focused on the issue, and they took action to resolve the matter. In doing so, the agency did not recklessly disregard the requirements of the FLSA. In its administrative report, the agency acknowledged that it erred in not determining the claimant's exemption status correctly. However, this technical error does not rise to the level of willful violation. Therefore, we find the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

*Part of the claim is time barred*

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.*"

The claimant's request concerns the overtime rate of pay dating back to July 9, 2006. The record shows the claimant preserved his claim with OPM on September 11, 2008. Since we find the agency did not willfully violate the FLSA, the claimant would have been eligible for back pay two years prior to that date; i.e., September 11, 2006. The agency has made the claimant whole as described previously for this two year period of time. Since willful violation does not attach to this claim, the period of the claim at issue in this decision (from July 9, 2006, through September 10, 2006) is time barred and must be denied.