

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

**Claimant:** [claimant]

**Position:** Clinical Nurse  
GS-610-9

**Organization:** Fort Belknap Service Unit  
Billings Area Office  
Indian Health Service  
U.S. Department of Health and  
Human Services  
Harlem, Montana

**Claim:** Position should be nonexempt, thus  
due FLSA overtime pay

**OPM decision:** Exempt; no FLSA overtime pay due

**OPM decision number:** F-0610-09-01

    //s//    

Robert D. Hendler  
Program Manager  
Classification Appeals and Pay Claims

    July 1, 2009    

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:**

[claimant]

Mr. Carlisle Mahto  
Chief, Human Resources Office  
Indian Health Service  
Billings Area  
2900 4<sup>th</sup> Avenue North  
Billings, MT 59101

## **Introduction**

On March 8, 2005, OPM's Center for Merit System Accountability received a Fair Labor Standards Act (FLSA) claim from [claimant]. He was formerly employed at the Fort Belknap Service Unit, Billings Area, Indian Health Service, U.S. Department of Health and Human Services, as a Clinical Nurse, GS-610-9, from his appointment in 1997 to October 30, 2005, when he was reassigned to the position of Supervisory Clinical Nurse, GS-610-12. He believes his work in the GS-9 position should have been FLSA nonexempt (i.e., covered by the minimum wage and overtime pay provisions of the FLSA). The claimant seeks FLSA overtime pay for "non-relieved lunch time" for two years prior to OPM's receipt of his claim and future overtime pay. We have accepted and decided this claim 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 administrative report (AAR) which we received on March 26, 2008, and conducted a telephone interview with the claimant on May 14, 2009. We initially cancelled this claim on jurisdictional grounds based on an erroneous understanding of the claimant's bargaining unit status during the claim period. We were previously informed in the agency's March 26, 2008, email transmitting the AAR that the claimant was covered by the negotiated grievance procedure (NGP) in the collective bargaining agreement (CBA) between his agency and the labor union, in which case the claimant would have been required to use the NGP as his exclusive administrative remedy as FLSA claims were not specifically excluded from the scope of the NGP. However, the claimant subsequently provided clarifying information that the CBA was not in effect during the claim period. Thus, we have reopened the claim and are rendering this decision.

## **Position Information**

The agency designated the claimant's position as exempt (i.e., not covered) from the overtime pay provisions of the FLSA under its professional exemption criteria. The claimant asserts his position should have been nonexempt because he had no management or supervisory responsibilities and 50 percent of his duty time was spent on non-professional duties. The claimant worked the night shift from 7:00 p.m. to 7:30 a.m., providing nursing coverage to the emergency room and the in-patient care unit. During this shift, the hospital was staffed only by two clinical nurses and an on-call physician, with no support or administrative staff. As one of the two on-duty nurses, the claimant maintains he was required to perform all of the administrative tasks normally performed by a ward clerk, such as answering and transferring telephone calls, registering patients, completing Medicare and private insurance forms, and retrieving and auditing medical records. In addition, he maintains he was required to perform a variety of other duties normally performed by non-professional staff in other hospital settings, such as making beds, heating and serving meals, light housekeeping, and dispatching ambulances. The claimant asserts he was required to eat his meal on-site and to respond to in-patient needs and provide emergency room coverage during mealtime.

## Evaluation of FLSA coverage

Sections 551.201 and 551.202 of 5 CFR (1998)<sup>1</sup>, the regulations in effect during the period of the claim, require an employing agency to designate an employee FLSA exempt only when the agency correctly determines the employee's work meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles: (1) each employee is presumed to be FLSA nonexempt; (2) exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption; (3) the burden of proof rests with the agency that asserts the exemption; and (4) if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. 5 CFR 551.202. The designation of a position's FLSA status ultimately rests on the duties actually performed by the employee.

There are three primary 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 executive or administrative exemptions and, based on review of the record, we agree. Therefore, our analysis is limited to the professional exemption criteria.

### Professional Exemption Criteria

Under the applicable professional exemption criteria in 5 CFR 551.207, a professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment:

(a) *Primary duty test.* The primary duty test is met if the employee's work consists of -

- (1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with a major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or
- (2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or

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<sup>1</sup> OPM's FLSA regulations have since been revised, effective October 2007. See 72 FR 52762. The current regulations went into effect after the claimant had been reassigned to the GS-12 supervisory position, and thus do not apply to this claim.

(3) Work that requires theoretical and practical application of highly specialized knowledge in computer system analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the following:

- (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or
- (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- (iii) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (iv) A combination of the duties described in paragraphs (a)(3)(i), (a)(3)(ii), and (a)(3)(iii) of this section, the performance of which requires the same level of skills.

(b) *Intellectual and varied work test.* The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

(c) *Discretion and independent judgment test.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the work time in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

#### The primary duty test is met

Under 5 CFR 551.104, "primary duty" typically means the duty which constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of the position;
- (2) Governs the classification and qualification requirements of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

The claimant's position meets (a)(1) because he was performing professional nursing work, which requires knowledge customarily and characteristically acquired through education that meets the requirements for a bachelor's or higher degree in the specialized field of nursing. The

claimant acknowledges that, as one of the two clinical nurses on duty during the night shift, he was responsible for performing a comprehensive range of nursing duties to support the in-patient care unit and emergency room, such as treating minor illnesses and injuries, stabilizing patients with major illnesses or injuries for transport to larger facilities, monitoring patient condition and vital signs, initiating intravenous therapy, administering prescribed and emergency medications, and assisting with suturing, casting, and splinting.

The claimant reported performing this work for about 50 percent of his duty time. However, regardless of the exact percentage of his time spent on professional nursing duties, this work constituted a substantial and regular part of the position; governed its classification as Clinical Nurse, GS-610, with the associated qualification requirements; and was clearly exempt work as addressed below in terms of the basic nature of the work, the exercise of discretion and independent judgment, and the significance of the decisions made.

The claimant's work does not meet criteria (a) (2) or (3) of the primary duty test as he neither worked in a recognized field of artistic endeavor, nor did his work require theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, or similar work in the computer software field.

#### The intellectual and varied work test is met

Section 551.104 of 5 CFR defines "work of an intellectual nature" as work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established 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.

The claimant's work was intellectual and varied to the degree described in this test. Nursing work by necessity requires the application of substantial perceptiveness, judgment, and analytical reasoning to select, adapt, or apply principles to numerous variables encompassing a broad range of possible actions, e.g., to evaluate patient symptoms, both observed and reported, and the circumstances surrounding the medical incident to determine the appropriate action to be taken and the possible outcomes. Nurses cannot rely on "standardized application of established procedures or precedents" since nursing protocols and guidelines cannot provide specific instructions for every possible medical situation. Nurses must recognize the interplay of physical, mental, emotional, cultural, and social factors unique to each patient, and assess a wide range of factors that may influence treatment options, such as age or other relevant physical characteristics, medical history, pre-existing conditions, or current medications.

The discretion and independent judgment test is met

As defined in 5 CFR 551.104, *discretion and independent judgment* means work which 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 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 on occasion the decisions are revised or reversed after review, does not mean 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.
- (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 claimant exercised the level of discretion and independent judgment required to meet this test. The claimant worked independently in performing his daily activities, routinely exercising independent judgment in responding to in-patient needs and screening emergency room cases for proper disposition. The claimant would observe the patient, make a judgment concerning those observations, and take or recommend action based on that judgment. For example, if the claimant observed significant changes in a patient’s condition, he would immediately decide the proper course of action, such as continuing intensive observation, calling a physician, or initiating emergency treatment. The decisions he made within the context of his job are considered significant within the meaning of the regulation because they had a direct impact on the physical and/or mental well-being of patients.

The 80-percent test is not applicable

Because the claimant’s position was classified above the GS-5 or GS-6 grade level, this criterion does not apply to the claimant’s work.

Conclusion

The claimant's work met the professional exemption criteria and was therefore not covered by the overtime provisions of the FLSA.

**Decision**

The claimant's work was exempt and he is thus not covered by the overtime pay provisions of the FLSA.