

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: Special Agent in Charge - Chicago
Office of Enforcement
U.S. Customs Service
U. S. Department of the Treasury
Chicago, Illinois

Claim: Back pay for FLSA overtime
from 1982 through September 18, 1994

OPM decision: Denied; Time barred

OPM decision number: F-1811-13-05

/s/

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

May 17, 2010

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]

Introduction

On April 16, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim dated April 4, 2007, from [name]. Claimant believes that from 1982 through September 18, 1994, he worked overtime (described as 208 pay periods) for which he should have been paid under the FLSA. During the claim period, he states he worked as a Criminal Investigator, GS-1811-12 (1982 through September 26, 1987, and as a Criminal Investigator, GS-1811-13 (September 27, 1987, through September 18, 1994), with the U.S. Customs Service (USCS). 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 his agency.

Background

Claimant states in his April 4, 2007, claim request that “Adams v US (27 Fed. Cl. 5 1992) Settlement of GS-13, 1811, FLSA claims” was settled in favor of the “GS-13, 1811, Senior Special Agents” regarding the “payment of overtime.” Claimant further states that on November 7, 2006, the U.S. Department of Justice gave its approval to settle FLSA claims of GS-1811-13 Criminal Investigators for the years 1988 through 1994 at several Federal agencies, including USCS.

In his April 4, 2007, letter claimant also refers to “the original law suit” which “covered [his] time as a GS-12, 1811,” and requests “back FLSA pay additionally be awarded to me.” Claimant states he sent an email to USCS on May 10, 2001, “explaining that the statute of limitations had been extended” and requested his “GS-12 1811 FLSA pay.” Claimant states he was advised in a May 14, 2001, email response that his request had been forwarded to the lead attorney in the case, but never received a response from the attorney. Claimant also states that on April 3, 1990, he wrote to USCS for a “status determination of [his] FLSA rights through an appeal,” and that on April 24, 1990, USCS acknowledged his request “under the authority delegated to the agencies by the General Accounting Office.” Claimant states that “[i]n accordance with the Adams v US [sic] decision and final approval by the Department of Justice, [he is] requesting [his] back FLSA pay” for the work he performed as a GS-1811-12 and GS-1811-13 Criminal Investigator.

In his June 19, 2007, letter responding to OPM’s May 30, 2007, letter requesting additional information, the claimant refers to “Stephen Adams et al. v. US, No. 90-162C and consolidated cases.” Claimant states he was not a party to this case, but was “instructed by the US Customs Service to initiate an administrative claim as the procedure to initiate a ruling on whether [he] was entitled to back overtime pay as an 1811, in both the GS 12 and 13 pay grade.” Claimant further states:

The last correspondence from OPM was that the statute [sic] for GS 12 was not extended, and therefore, my time in grade fell outside the guidelines. However, the law firm handling the Adams case appealed this decision and the statute [sic] was extended, and therefore I would have been covered as per my GS 12 time. I never received any additional information from OPM at that time, and never received any compensation for the FLSA GS 12 time period.

On page one you requested that claimants must submit relevant information supporting their claim. This information was submitted to US Customs Service, at which time it was referred to your agency to arrive at a finding. Recently, in correspondence with other retired US Customs Agents, they have informed me that OPM has referred their claim back to Homeland Security, Immigration and Customs Enforcement (ICE), and Customs Border Protection (CBP) the new home of the former US Customs Service, for adjudication.

Therefore, is it possible to clarify who in fact will be handling this claim? It is my understanding that the Justice Department after their ruling in favor of the agents and awarding back pay sent this issue back to Homeland Security (ICE & CBP), for payout. I appreciate your time in this matter, determining what agency has the responsibility to appropriate and distribute the FLSA back overtime pay.

By letter dated July 17, 2007, OPM advised the claimant OPM had no records of the correspondence regarding the statute of limitations. This letter stated OPM had no records of USCS having referred his case to OPM “to arrive at a finding” and was “unaware of any referral by OPM staff of retired USCS criminal investigators...to the Department of Homeland Security [DHS] for adjudication of FLSA claims previously filed with and denied by USCS....” OPM also requested the claimant submit any and all information, including copies of information previously provided to USCS in support of his claim, within 25 days of the date of the letter.

OPM did not receive the information requested in its July 17, 2007, letter. Based on OPM’s request for a copy of any information on this matter, CBP staff submitted a copy of a “packet” claimant conveyed with his May 30, 2007, letter to CBP regarding his “administrative claim as part of the Adams case,” asking he be advised if he needed “to supply additional information regarding the claim, and an indication as to whether or not the DHS will be honoring this claim.”

Jurisdiction

The record contains a copy of an April 24, 1990, USCS memorandum to the claimant acknowledging receipt on April 22, 1990, of his “FLSA status determination appeal for all of the time [he] spent as a non-supervisory Criminal Investigator, GS-9 and above” with USCS. The memorandum states: “Under authority delegated to the agencies by the General Accounting Office [GAO, now the Government Accountability Office], effective June 15, 1989, receipt of your claim stops the running of the 6 years statute [sic] of limitations with regards to FLSA status determinations.”

The record also contains a copy of claimant’s April 12, 1995, letter to GAO, date stamped as received by GAO on April 24, 1995, stating:

This letter will serve to document an appeal of the ruling of my FLSA status determination which was handed down on February 1, 1995. The decision limits the retroactive period to two years prior to receipt of my claim.

As a result of the law firm of Bernstein and Lipsett, Washington, D.C., appealing this civil decision regarding both the GS-1811-13 FLSA exempt status and the statute of

limitations. I wish to continue my appeal of this case administratively, until such time as a final decision is rendered by the court. It is requested that you acknowledge receipt of this appeal.

GAO's May 16, 1995, letter to the claimant acknowledged receipt of the claimant's memorandum on April 24, 1995, and stated: "The issue of the statute of limitations for FLSA claims is being considered by our Office, and we will send you a copy of any decisions which our Office may issue on that matter." The letter did not address the claimant's request to challenge his FLSA exemption status.

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 April 12, 1995, 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).

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).

Therefore, contrary to USCS's guidance to the claimant, claimant's filing with USCS regarding his FLSA exemption status did not preserve his exemption status claim.¹

¹ 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

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 Regulation (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). The regulations do not require agencies to notify employees of their right to file a claim with OPM.

The claimant's apparent attempt to revive his April 3, 1990, claim on April 4, 2007, with OPM under 5 CFR 551.702(a) (December 23, 1997, regulations in effect on April 4, 2007) is misplaced. Under the administrative claims procedures in place during the period of this claim, filing a claim with the employing agency on April 3, 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).

Therefore, since OPM did not receive this claim until April 16, 2007, any claim for FLSA overtime pay expired on April 16, 2005, based on application of the two-year statute of limitations in effect for FLSA claims filed after June 30, 1994 (April 16, 2004, if willful violation had occurred). Therefore, any claim for FLSA overtime pay for work performed during the period of the claim as alleged by the claimant (1982-1994) is time barred.

Thus, the claim is barred from our consideration and may not be allowed. The FLSA does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order to be considered on its merits. OPM does not have any authority to disregard the provisions of the FLSA, make exceptions to its provisions, or waive the limitations it imposes.

Decision

The claim is denied since it is time barred.