

**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 Internal Affairs  
U.S. Customs Service  
U. S. Department of the Treasury  
Washington, DC

**Claim:** Back pay for FLSA overtime  
from June 4 through August 13, 1988

**OPM decision:** Denied; Time barred

**OPM decision number:** F-1811-13-08  
Reconsiders and replaces F-1811-13-01

/s/

\_\_\_\_\_  
Ana A. Mazzi  
Deputy Associate Director  
Merit System Audit and Compliance

May 17, 2010

\_\_\_\_\_  
Date

This decision is issued pursuant to a request for discretionary review under conditions and time limits specified in 5 CFR 551.708(a). 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 January 26, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim reconsideration request from [name]. Claimant seeks FLSA overtime pay from June 4, 1988, through August 13, 1988. During the claim period, he states he worked as a Criminal Investigator, GS-1811-13, 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 January 22, 2007, claim request that on May 30, 1990, he “requested an appeal of [his] overtime eligibility.” He states the request culminated in a February 24, 1997, letter from OPM denying his appeal:

This denial was based on the court decision (*Stephen Adams v. The [sic] United States*, Fed. Cl. 90-162C) that GS[-]1811-13 [sic] were FLASA [sic] exempt.

It is now public record that former Customs Service 1811-13 Special Agents were subsequently included in the Federal Judicial [sic] decision which determined them to be non-exempt from FLSA regulations.

\*\*\*\*\*

I formally request that OPM, under the authority conveyed to OMB and re-delegated to OPM, reconsider this denial and grant me proper compensation for the period of the claim established by the federal ruling for GS-1811-13's under *Adams v. U.S.*

In his April 23, 2007, letter responding to OPM's March 23, 2007, letter requesting additional information, the claimant states he submitted his FLSA claim to USCS on May 30, 1990, which was denied by USCS on July 8, 1994, and appealed to the General Accounting Office (GAO, now the Government Accountability Office) on May 17, 1995. Claimant states he was advised by USCS his May 30, 1990, claim had been received on June 4, 1990. Claimant states:

I respectfully request that OPM reconsider my original claim with the USCS, in accordance with 5 CFR 551.708 based on the recent developments in the *Adams v United States*. On or about November 27, 2006 the Department of Justice agreed to a settlement of claims and affirmed that GS-1811-13's in the USCS were erroneously classified as FLSA exempt and are entitled to reimbursement for additional overtime. I ask that OPM use the *Adams v US* decision when reconsidering my FLSA Claim [sic] for my period of eligibility as a GS-13.

## Jurisdiction

The record contains a copy of a June 11, 1990, USCS memorandum to the claimant acknowledging receipt on June 4, 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, effective June 15, 1989, receipt of your claim stops the running of the 6-year statute of limitations with regards to FLSA status determinations.”

The record contains a copy of USCS’s July 8, 1994, claim denial stating “the Court ruled that Customs Criminal Investigators at the GM/GS-13 level were properly classified as FLSA exempt,” and cited GAO Decision B-250051, May 23, 1994, as limiting “the retroactive time for claims against the government under the FLSA to two years.”

The record also contains a copy of the claimant’s May 17, 1995, letter to GAO stating:

This letter will serve to document my appeal of a ruling of my FLSA status determination which was handed down by the United States Customs Service on July 8, 1994. The decision limited the retroactive period to two years prior to receipt of my FLSA claim (June 4, 1990) and ruled that Customs Criminal Investigators at the GS/GM-13 level were properly classified as FLSA exempt.

I wish to appeal the decision regarding the GS-1811-13 FLSA exempt status and the statute of limitations....

It is requested that you acknowledge receipt of this appeal.<sup>1</sup>

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 17, 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).

---

<sup>1</sup> The record does not contain a date stamped copy of the letter establishing whether or when GAO received the May 17, 1995, claim request. However, a November 12, 1996, letter to the claimant from OPM’s Dallas Oversight Division indicates his claim to GAO was transferred to OPM on July 1, 1996, pursuant to Public Law No. 104-53.

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.<sup>2</sup>

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.

Therefore, OPM's Dallas Oversight Division erred in its February 24, 1997, claim decision in concluding the claimant's June 4, 1990, attempt (dated May 30, 1990) to file a claim with USCS preserved his claim for FLSA exemption status determination. Under the administrative claims procedures in place during the period of this claim, filing a claim with the employing agency on May 30, 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 July 1, 1996, when it was transferred from GAO, any claim for FLSA overtime pay expired on July 1, 1994, based on application of the

---

<sup>2</sup> 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).

two-year statute of limitations in effect for FLSA claims filed after June 30, 1994 (July 1, 1993, 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 (June 4-August 13, 1988) 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.