

**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 - San Francisco  
Office of Enforcement  
U.S. Customs Service  
U. S. Department of the Treasury  
San Francisco, California

**Claim:** Back pay for FLSA overtime  
from July 11, 1983, through  
March 24, 1990

**OPM decision:** Denied; Time barred

**OPM decision number:** F-1811-13-09

/s/

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

May 17, 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. 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 September 20, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim dated September 8, 2007, from [name]. Claimant believes that from July 11, 1983, through March 24, 1990, he should have been classified as FLSA nonexempt and received FLSA overtime pay. During the claim period, he states he worked as a Criminal Investigator, GS-1811-9 (July 11, 1983, to July 21, 1984), as a Criminal Investigator, GS-1811-11 (July 22, 1984, to August 3, 1985), as a Criminal Investigator, GS-1811-12 (August 4, 1985, to January 17, 1987), and as a Criminal Investigator, GS-1811-13 (January 18, 1987 to March 24, 1990) 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 September 8, 2007, claim request that the Program Manager for OPM's (former) Center for Merit System Compliance was the contact point for the FLSA "status determination appeal that has recently been concluded." He states:

Enclosed is a copy of a letter I have sent to the Director of Human Resources [of the former USCS] dated June 05, 1990, requesting an appeal of my status, and the response I received dated June 18, 1990, acknowledging receipt of my appeal. I have received no other information concerning this matter.

Would you please advise me of what the next step is in this process.

On September 26, 2007, we sent the claimant a letter acknowledging receipt of his claim request and a sent a letter to U.S. Customs and Border Protection (CBP) asking CBP to investigate the claim and send us a thorough report on its findings within 30 days of receipt of the letter.

On May 7, 2009, we advised the claimant that despite several attempts, CBP had been unable to locate his USCS claim file, and we requested the claimant submit any and all information he wished OPM to consider in support of his request. We received claimant's October 12, 2009, response to our request on October 20, 2009.

## **Jurisdiction**

The record contains a copy of a June 18, 1990, USCS memorandum to the claimant acknowledging receipt on June 15, 1990, of his June 5, 1990, "FLSA status determination appeal for all 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-year statute of limitations with regards to FLSA status determinations."

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 June 5, 1990 letter to USCS, 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.<sup>1</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

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<sup>1</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).

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 June 5, 1990, claim on September 8, 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 June 5, 1990, did not preserve the claim. (See, e.g., OPM decision number F-0025-07-01, December 9, 2008).

Therefore, since OPM did not receive this claim until September 20, 2007, any claim for FLSA overtime pay expired on September 20, 2005, based on application of the two-year statute of limitations in effect for FLSA claims filed after June 30, 1994 (September 20, 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 (1983-1990) 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.