

Fair Labor Standards Act Decision
Under section 4(f) of title 29, United States Code

Claimant: [name]

Agency classification: Air Conditioning Equipment Mechanic
WG-5306-11

Organization: Facilities Division
The John F. Kennedy Center for the
Performing Arts
Washington, DC

Claim: Back pay, penalty and interest

OPM decision: Denied; Lack of jurisdiction

OPM decision number: F-5306-11-01

/s/

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

8/1/08

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. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

Decision sent to:

[name and address]

Ms. Arlene Schneider
Director of Human Resources
Human Resources Department
The John F. Kennedy Center for the
Performing Arts
Washington, DC 20566-0001

Charles E. Graham
Business Manager
International Brotherhood of
Electrical Workers
Local 26
4371 Parliament Place
Lanham, MD 20706

Federal Labor Relations Authority
Washington Regional Office
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

Introduction

On March 28, 2008, OPM's Division for Human Capital Leadership and Merit System Accountability, Center for Merit System Accountability, received an FLSA claim from [name]. He currently occupies an Air Conditioning Equipment Mechanic, WG-5309-11, job in the Facilities Division at The John F. Kennedy Center for the Performing Arts (Center) in Washington, DC. The claimant seeks "32 hrs of due overtime with penalty and interest (just like the I.R.S.)." In seeking redress from OPM, the claimant stated "I'm not a member of any bargaining union [sic]." We received the agency administrative report (AAR) on May 21, 2008.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency, including information developed during telephone conversations with a member of the Center human resources staff.

Jurisdiction

OPM has authority to adjudicate FLSA claims for Federal employees under the provisions of section 204(f) of title 29, United States Code (U.S.C.). However, OPM cannot take jurisdiction over the FLSA claims of Federal employees who are or were subject to a negotiated grievance procedure (NGP) under a collective bargaining agreement (CBA) between the employee's agency and labor union for any time during the claim period, unless that matter is or was specifically excluded from the agreement's NGP. The Federal courts have found Congress intended such a grievance procedure to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (Fed. Cir. 1990) (en banc), cert. denied, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121(a)(1) of title 5, U.S.C., mandates that the grievance procedures in negotiated CBAs be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B-260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992).

The claimant states he was not a bargaining unit member. However, the fact he occupied a bargaining unit position during the period of the claim is determinative. Information provided by the claimant's servicing HR office at our request shows the claimant was in a bargaining unit position during the period of his claim. The CBA between the Center and the International Brotherhood of Electrical Workers (IBEW), Local 26, in effect during the period of the claim, does not specifically exclude FLSA issues from the NGP (Article XV) covering the claimant.

The AAR includes a copy of an April 30, 2007, letter from the Business Manager, IBEW Local 26, to the Center's Director of Human Resources which states:

IBEW Local 26 presently represents a small unit composed of all general schedule and wage grade employees at the Kennedy Center. The purpose of this letter is to notify you that effective May 31, 2007, IBEW Local 26 disclaims and waives interest in further representation of this unit of employees. This disclaimer is unequivocal and extends to all matters and for all purposes. We understand that the effect of this disclaimer is to abrogate the existing contract as of May 31, 2007.

Under the provisions of section 2422.32(b) of title 5, Code of Federal Regulations, an exclusive representative remains such until recognition and certification are revoked by the Federal Labor

Relations Authority. The April 30, 2007, letter does not indicate the FLRA was informed of this action; FLRA is not listed as receiving a copy of the letter. We were advised by a member of the Center's human resources staff the Center did not feel obligated to notify FLRA, presumably since the letter was originated by IBEW Local 26. The Center has not been notified by the FLRA of any change in IBEW Local 26's status as the bargaining unit's exclusive representative. Absent evidence of such revocation by the FLRA, the claimant's FLSA claim must be construed as covered by the NGP to which the claimant was subject during the claim period and remains subject to at the present time. Accordingly, OPM has no jurisdiction to adjudicate the claimant's FLSA claim.

Decision

The claim is denied due to lack of jurisdiction.