

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

Claimant: [claimant's name]

Agency classification: Tool and Parts Attendant
WG-6904-06

Organization: Equipment Maintenance Branch
Maintenance Division
Directorate of Public Works
U.S. Army Garrison
Department of the Army
[city and state]

Claim: Received no overtime pay for suffered
and permitted work.

OPM decision: Nonexempt. Due back pay for overtime
plus interest on back pay

OPM decision number: F-6904-06-01

/s/ Kevin E. Mahoney

Kevin E. Mahoney
Deputy Associate Director
Center for Merit System Accountability
Human Capital Leadership
and Merit System Accountability

5/17/06

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. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure they are treated in a manner consistent with this decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision, but 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.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, and then pay the claimant the amount owed him. If the claimant believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.

Decision sent to:

[claimant's name and address]

[servicing HR office and address]

Chief, Position Management and Classification Branch
Office of the Assistant Secretary
Manpower and Reserve Affairs
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Attn: SAMR-CPP-MP
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Deputy Assistant Secretary
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Introduction

On October 20, 2005, the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. He claims to have regularly worked during his scheduled lunch break from April 1, 2004, to August 11, 2005. During the claim period, he was detailed to an unclassified job in the Equipment Maintenance Branch, Maintenance Division, Directorate of Public Works, U.S. Army Garrison, Department of the Army, at [city and state]. The claimant officially occupied a Tools and Parts Attendant, WG-6904-6, job but was detailed following the decision to contract the work out to the private sector. We accepted and decided this claim under section 4(f) of the FLSA as amended.

OPM received the agency's administrative report on February 3, 2006, which included several Standard Form (SF) 52s regarding the claimant's detail. An SF-52 shows the claimant was not officially detailed to the job until April 22, 2004, but he claims to have started the detail on April 1, 2004. The supervisor indicated that the claimant began his duties "a couple weeks" before the SF-52 was processed. The claimant was not assigned to an official job description (JD), but a brief list of duties was attached to each SF-52. The SF-52s also indicate the claimant's detail was coded at the same series and grade as his previous job; i.e., WG-6904-6, and appropriately identified as nonexempt under the FLSA. On November 13, 2005, the claimant was officially assigned to a JD number [number], Tools and Parts Attendant (Motor Vehicle Operator), WG-6904-6. This JD includes his duties of weighing trucks in and out of the landfill, ensuring trucks are authorized to use the facility, ensuring only nonhazardous materials are carried, keeping computerized records of facility activity and preparing reports, and answering the telephone and providing general information. He is also responsible for preparing procurement requests and maintaining storage and inventory of shop equipment and tools, and operating a forklift, water truck, salt truck, tractor, and pickup truck as needed for moving equipment and supplies, mowing grass, controlling dust around the facility, and other uses.

To help decide this claim, we conducted telephone interviews with the claimant on March 21 and April 12, 2006, and a telephone interview with his work leader on March 28. We conducted telephone interviews with the immediate supervisor on March 28 and April 12. On April 12, we also contacted current and former landfill employees familiar with the claimant's lunchtime activities. In reaching our FLSA decision, we reviewed information gained from these conversations and all other material of record furnished by the claimant and his agency.

Background

The Tools and Parts Attendant, WG-6904-6, job previously occupied by the claimant was one of five positions eliminated following the decision to privatize the work performed by the lawn mower repair shop. Management and union officials worked to avoid removing affected employees by placing each individual in a position within the Maintenance Division. The claimant was detailed to the [location] Landfill, which operates continuously from 7:30 a.m. to 3:15 p.m. on Monday through Thursday and from 7:30 a.m. to 12:00 p.m. on Friday. In addition to the claimant, the landfill is currently staffed with a work leader; i.e., an Engineering Equipment Operator, WL-5716-11; and four Engineering Equipment Operators, one WG-10 and

three WG-8s. The Equipment Maintenance Branch Chief, who is the immediate supervisor for all landfill employees, maintains an office approximately 12 miles away from the landfill.

The claimant's duties include verifying users are authorized to use the landfill, ensuring the waste does not include unacceptable materials, and weighing trucks in and out using a computerized scale. The claimant said it takes three minutes or less to weigh in a truck, but several trucks may arrive at the landfill during a lunch break. A quick visual inspection of the load may suffice for known contractors, but unfamiliar trucks require verifying their authority to use the facility and performing a visual check of the load material. The claimant said he regularly weighed trucks during the lunch period which is scheduled for all landfill employees from 11:30 a.m. to 12:00 p.m. Lunchtime activity varies depending on the total number of contractors authorized to use the landfill and the types of projects currently underway.

In a September 27, 2005, memorandum the claimant officially requested back pay for overtime from the Maintenance Division Chief, his second-level supervisor. The Division Chief denied the request; and his October 11, 2005, response stated, "As I verbally conveyed to you in our meeting on 27 September 2005, all overtime must be requested and approved in advance by the supervisor. As this requirement was not met, I am not authorized to provide for back pay."

Evaluation

The agency determined the claimant is nonexempt from the FLSA under 5 CFR 551.204 which states that nonsupervisory Federal Wage System employees are nonexempt; i.e., covered by the minimum wage and overtime pay provisions of the FLSA. The claimant did not dispute this determination, and we concur.

We now explore whether the claimant performed overtime work for which he should be paid under the FLSA. The supervisor's staff completes timecards for all landfill employees. They initial cards on behalf of the employee, by direction of the supervisor, and the cards are certified as accurate by the supervisor. The work leader notifies the supervisor when the landfill employees use annual, sick, or other approved leave. The claimant's timecards do not show whether he performed work during his scheduled lunch breaks from April 1, 2004, to August 11, 2005. Comptroller General decisions, including one concerning Christine Taliaferro (B-199783, March 9, 1981), show that in this situation, the claimant is due FLSA overtime pay if the following two criteria are met: he shows he performed overtime work under the FLSA for which he was not paid, and he produces enough evidence to show the amount and extent of the work as a matter of reasonable inference. Our discussion of each criterion follows.

1. Did the claimant show he performed unpaid FLSA overtime work?

According to 5 CFR 551.104, the claimant can show he performed such work if the following three conditions are met: (a) he performed work, whether requested or not, during his scheduled lunch break; (b) his supervisor knew or had reason to believe the work was being performed; and (c) the supervisor had the opportunity to prevent it from being performed. We discuss these conditions below.

a. Did the claimant perform work during his scheduled lunch break?

It is established OPM policy that work is considered to have been performed if the tasks extend beyond responding to rare and infrequent emergency calls. The employee must be completely relieved from duty for the purpose of eating regular meals. If a meal period is frequently interrupted by calls to duty, the employee would not be considered relieved of all duties and all the meal period must be counted as “hours worked.”

The landfill employees are scheduled to eat lunch from 11:30 a.m. to 12:00 p.m., which is the lunch period observed by most of the garrison employees. However, the landfill facility remains open. The claimant stated:

The nature of the position is such that it was expected but not ordered for me to take care of the scales. Comments such as, “Mike, you got a truck” or “There’s a truck on the scale” were taken by me to mean take care of it now. I quickly learned it was better to just stay on the scale desk during lunch.

The equipment operators ate lunch in the break room, which is fairly small, while the claimant continued sitting at his desk for lunch. According to the claimant, the former work leader interrupted him during breaks and lunch to tell him when a truck needed to be weighed. The work leader was later reassigned, but the claimant continued weighing trucks during his lunch break. The present work leader, as well as the current and former landfill employees we interviewed, corroborated this information.

The supervisor stated that landfill customers oftentimes eat lunch from 11:30 a.m. to 12:00 p.m., so the claimant can generally take an uninterrupted lunch break. In contrast, the claimant and work leader said, while impossible to predict the number of incoming trucks, it typically ranges from zero to eight during the 30-minute lunch break. Since the supervisor is located at a different site and typically visits the landfill three times a month, he would not be as well aware of lunchtime activities than the work leader or claimant. Furthermore, the number of landfill customers, as well as the frequency in which they change, makes it impossible to accurately determine whether the customers eat lunch at the same time as the landfill employees.

The claimant provided OPM with a chronological transaction log from November 1 – 15, 2004, which recorded information including contractor name, truck weight, and the date and time of each visit. We noted eight different contractors arrived at the landfill during lunch, which undermines the supervisor’s statement that customers eat lunch at the same time as landfill employees. Winter is the landfill’s least busy time, so these figures do not adequately portray the volume of activity for the other seasons. A number of transactions were recorded during lunch for seven of the 10 days in which the landfill was open. On two days; three trucks arrived at the landfill during lunch. On the remaining days, there were one or two. The claimant is also responsible for answering the landfill’s main telephone. Therefore, although we noted three days where no trucks arrived from 11:30 a.m. to 12:00 p.m., his lunch may have been interrupted by incoming phone calls. The claimant did not track the number of calls, but he said the telephone rings regularly at lunchtime with questions from contractors relating to facility hours, acceptability of materials, and receiving calls for other employees.

The claimant also provided a second log of transactions covering the entire claim period. This listing, while not as detailed as the first, does break down on an hourly basis the number and net weight of loads received daily. While it can not clearly show the loads during the 30-minute lunch hour, it does show the number of loads between 11:00 and 12:00 which does reflect a fairly constant rate throughout the day. A sample for the six-month period beginning April through September 2004, shows that 396 of a total 2895 loads, were received during the 11:00 to 12:00 hours of operation. The number of loads range from 0 to a high of 12, with an average of 3.2 loads per work day during the one-hour period. A comparison with the more detailed transaction log for the period covered shows that 14 of the total of 27 loads occurred during the 11:30 to 12:00 lunch period.

Given all these points, we find the claimant performed tasks, whether requested or not, beyond answering rare and infrequent emergency calls during his lunch period. Therefore, we conclude he performed work during his lunch periods.

b. Did the claimant's supervisor know or have reason to believe the work was being performed?

It is established OPM policy that a supervisor has reason to believe work is being performed if a responsible person in the supervisor's position would find reason to believe this was the case. This is met if the supervisor has direct evidence (e.g. through observation) or indirect evidence (e.g. through the employee's work products or information from other employees).

Our phone conversations show the claimant and supervisor are not visible to each other as they work at different sites. However, there is evidence the supervisor had reason to believe the claimant was performing work while at lunch. During the telephone interview, the supervisor said the claimant's duties were fairly limited, so he would often sit at his desk for hours while waiting for a truck. Consequently, the supervisor did not think it was a problem if the claimant worked a couple minutes during lunch if necessary. The supervisor was made aware the claimant considered working through lunch a problem on August 11, 2005, when he was directed by the Maintenance Division Chief to ensure the claimant's lunch was uninterrupted, but the supervisor's statement suggests acceptance, at a minimum, and awareness of the claimant working during lunch.

The claimant said he asked the current work leader on approximately three occasions to request the supervisor close the landfill during lunch or allow the claimant to work an eight-hour shift without lunch. The work leader claimed to not remember these requests, but he said he previously broached the subject of closing the landfill at lunch with his supervisor since all of the landfill employees' lunches, including the claimant's, were interrupted when busy.

Given these considerations and the points in the preceding section, we conclude the claimant's supervisor knew or had reason to believe he was performing tasks during his lunch period, whether requested or not, beyond answering rare and infrequent emergency calls. Therefore, the supervisor had reason to believe the claimant was performing work during lunch periods for the period of the claim.

c. Did the claimant's supervisors have opportunity to prevent the work from being performed?

It is established OPM policy that the claimant's supervisors had opportunity to prevent the work from being performed unless:

- (1) they did not know or have reason to believe the work was being performed;
- (2) the work occurred so seldom it was impossible to prevent; or
- (3) they tried by every reasonable means to prevent the work from being performed, such as directing the employee not to perform the work, counseling the employee about adverse consequences that might result from performing such work, controlling work hours more strictly, or taking other appropriate management actions.

As discussed previously, the claimant's supervisor knew or had reason to believe the work was being performed. As indicated, the claimant's work during lunch did not occur so seldom that it was impossible to prevent. With respect to criterion (3), the record shows neither the work leader nor the supervisor tried to prevent the work from being performed. For example, they did not counsel the claimant about adverse consequences possibly resulting from working during his lunch period. Consequently, none of the above three criteria are met. The claimant's supervisor had opportunity to prevent him from working during his lunch periods.

Based on the preceding discussion, conditions a, b, and c we listed earlier are met. That is, the claimant performed work, whether requested or not, during his lunch period; his supervisor knew or had reason to believe the work was being performed; and the supervisor had opportunity to prevent it from being performed. As a result, the claimant performed work during his lunch break that was suffered or permitted under the FLSA.

According to 5 CFR 551.401, all time spent by the claimant performing suffered or permitted work was "hours of work" under the FLSA. Thus, the claimant worked overtime hours under the FLSA for which he was not paid. This conclusion is based largely on evidence provided by the claimant including his written submissions; and his statements over the telephone. Careful consideration was also given to all statements made in interviews with the supervisor, current and previous work leaders, and a current co-worker whose names and contact information the claimant provided. He has therefore shown he performed FLSA overtime work for which he was not paid.

2. Is there enough evidence to show the amount and extent of overtime work as a matter of reasonable inference?

We must now decide if the claimant has produced enough evidence to show the amount and extent of his overtime work as a matter of reasonable inference. To do this, we first examine what evidence we have concerning the amount and extent of the claimant's overtime work:

- The claimant calculates working 129.5 hours during his scheduled lunch break from April 1, 2004, to August 11, 2005. He indicates working through lunch basically

every workday except when he took sick, annual, or other leave during the lunch period. He also estimates leaving the landfill once or twice each week for lunch.

- Since the claimant is not involved in completing time cards, the agency submitted his time cards for the claim period. For the days he worked less than eight hours, the time cards are inconsistent in specifying the hours for which the claimant used the approved leave. However, the time cards will support the claimant's estimates concerning hours for which he was paid and identify the days he took leave. They do not show whether he worked during lunch.
- In phone conversations, the claimant stated that during the claim period, he worked through lunch essentially every workday except when he took leave during the lunch period and when he occasionally left the landfill. The claimant also provided a transaction log documenting the volume of trucks arriving at the landfill during lunch although it does not specifically identify which employee weighed the truck.
- We interviewed the current work leader, a previous work leader, and a current co-worker. They indicated the claimant regularly weighed trucks during his lunch period and routinely answered incoming telephone calls.

Based on all the above evidence considered together, one can make a reasonable inference that during the claim period, the claimant worked during lunch essentially every workday except when he took leave during the lunch period and when he physically left the landfill for lunch. On these occasions, the work leader would have an equipment operator weigh the trucks in and out. Given this conclusion, the claimant's time cards, and any other available evidence, one can make a further reasonable inference as to the amount and extent of overtime hours worked by the claimant during the claim period. Since the evidence on which the above inferences are based was largely provided by the claimant, he has provided enough evidence to show the amount and extent of his overtime work as a matter of reasonable inference.

Decision

For each workweek in the claim period, the claimant is generally due FLSA overtime pay for his total uncompensated overtime hours worked. This is subject to the guidance provided below.

Compliance instructions

The claimant calculates working 129.5 hours at lunch during the claim period. If the agency is unable to produce specific evidence to refute the number of hours claimed, then all hours claimed may be considered as compensable. Once the exact number of compensable hours is determined, the agency is to compute the claimant's pay entitlement in accordance with Subpart E of 5 CFR 551.

5 CFR 550.806 shows the claimant is also owed interest on the back pay discussed above. Therefore, the agency is to compute the interest as described in the regulation. See www.opm.gov/oca/pay/BACKPAY/HTML/BACKPAY.asp.

The agency should pay the claimant the total amount owed him. If he believes the agency has computed the amount incorrectly, the claimant may file a new FLSA claim with this office.