

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

**Claimant:** [name]

**Agency classification:** Police Officer  
GS-083-5

**Organization:** [#] Security Forces Squadron  
[#] Mission Support Group  
[#] Air Base Wing  
[name] Air Force Base (AFB)  
Department of the Air Force  
[location]

**Claim:** FLSA Overtime Pay for Hours Worked  
in Excess of 8 Hours in a Day

**OPM decision:** No FLSA Overtime Worked; No Money  
Due

**OPM decision number:** F-0083-05-01

/s/

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

8/6/07

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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, 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.

Those aspects of this decision reviewed under the authority of 31 U.S.C. § 3702 and 5 CFR part 178 are not subject to further administrative review. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States court.

**Decision sent to:**

[name and address]

[name and address]

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## **Introduction**

On July 25, 2005, the OPM received a Fair Labor Standards Act (FLSA) claim from [name]. During the claim period, he occupied a Police Officer, GS-083-5, position in the [#] Security Squadron, [#] Mission Support Group, [#] Air Base Wing, [name] Air Force Base (AFB), Department of the Air Force, at [location]. The claimant was terminated from employment during probation by the agency on August 22, 2005. He claims he should have been paid for overtime for all hours worked in excess of eight hours in a day and seeks “liquidated damages in double the above amount of all the overtime that is due, because of the agency[’s] willful violation of the Act.” OPM received the agency administrative report (AAR) on March 21, 2006, and comments on the AAR from the claimant on April 3, and May 18, 2006. We conducted additional fact-finding to clarify the record, including contacting people knowledgeable of the claimant’s work schedule. We accepted and decided this claim under section 4(f) of the FLSA as amended, and 31 U.S.C. § 3702.

In reaching our decision, we reviewed all information of record furnished by the claimant and his former employing agency and information we obtained from interviews with people knowledgeable of the work scheduling issues underlying this claim.

## **General Issues**

In his correspondence with OPM, the claimant makes various statements about what he views as [name] AFB’s management decision to change how he and similarly situated police officers were paid, alluding to police officer efforts to join the American Federation of Government Employees (AFGE) bargaining unit at the activity. In adjudicating this claim our responsibility is to make our own independent decision about how much FLSA overtime pay the claimant is owed, if any. We must make that decision by analyzing the facts in the case against criteria in Federal laws, rules, and regulations. Therefore, we have considered the claimant’s statements only insofar as they are relevant to making that analysis.

## **Background**

The activity AAR indicates the claimant (appointed on September 20, 2004) was one of the first police officers appointed to fill 50 security forces positions authorized in late 2004. The purpose of the positions was to provide security for sensitive munitions maintenance facilities. The positions were excluded from the bargaining unit (AFGE Local [#]) because they were engaged in duties directly related to national security. In November 2004, Department of Defense (DoD) policy changed regarding using civilians to perform those duties and the affected employees were reassigned effective May 1, 2005, to base operations support.

The union filed a petition with the Regional Director, Federal Labor Relations Authority (FLRA) seeking a unit clarification concerning these affected employees. The Stipulation in Lieu of Hearing (Case No. [#]) signed by the activity (August 11, 2005) and the union (August 24, 2005) states the petition was filed by the union with the FLRA Dallas Regional Office on March 8, 2005. However, the claimant provided a copy of a petition signed by a union official and dated January 27, 2005, and the agency AAR also states the petition was filed on that date. The record

shows FLRA issued its unit clarification decision and order on August 31, 2005, after the claimant's employment with the agency ended.

## **Evaluation**

### Jurisdiction

The AAR states after 15 April 2005, the claimant was a member of the bargaining unit represented by AFGE Local [#] and covered by a collective bargaining agreement (CBA). The activity states the CBA did not specifically exclude matter under the FLSA from the scope of the negotiated grievance procedure (NGP) contained and, therefore, the claimant was required to use the NGP as his exclusive administrative remedy for all claims under the FLSA as stipulated in 5 C.F.R. § 551.703.

In support of this position, the activity states the union provided the activity with an updated list of union stewards on April 15, 2005, including two new stewards from the Security Squadron in which the claimant's name appeared as a steward in training. The activity indicated the claimant filed his first grievance using the CBA's NGP on April 23, 2005, and cited other related actions in support of its assertion he was covered by the CBA from April 15, 2005, until he left the agency in August 2005.

The claimant's rationale, however, is based on his view he was not officially in a bargaining unit position or covered by the CBA and its NGP since the unit clarification order was not issued by the FLRA until August 31, 2005. Although the claimant availed himself of the protections afforded by the CBA's NGP while employed by the activity and functioned as a union official, we agree he was not in a bargaining unit position covered by the CBA's NGP during the period of his claim. Under 5 U.S.C. § 7105(a)(2)(A), questions concerning the bargaining unit status of employees are exclusively reserved for final resolution by FLRA. See U.S. Department of Housing and Urban Development Headquarters and American Federation of Government Employees Local 476, 41 FLRA 96 (1991); U.S. Department of Labor, Mine Safety and Health Administration, Southeastern District and American Federation of Government Employees, Local 2519, 40 FLRA 937, 941 (1991); and U.S. Small Business Administration and of American Federation of Government Employees, Local 2532, AFL-CIO, 32 FLRA 847, 850, 852-3 (1988). Therefore, we find OPM has jurisdiction to consider this claim.

Based on the analysis which follows, the claimant's entitlement to overtime is not covered by the FLSA. Rather, it is covered by the compressed schedule premium pay provisions of 5 U.S.C. § 6128. Such claims are subject to OPM's compensation and leave claims settlement authority under 31 U.S.C. § 3702.

### Evaluation of Overtime Claim

The activity determined that claimant's position is nonexempt from the overtime provisions of the FLSA. Based on careful review of the record, we concur based on direct application of the Act and its implementing regulations.

We will now explore whether the claimant performed overtime work for which he should be paid under the FLSA.

***1. Did the claimant perform unpaid overtime work?***

The claimant asserts he is due overtime pay under the FLSA because the activity:

Implemented a Compress [sic] Work Schedule (CWS) without Police Officer, GS-0083-05 and Lead Police Officer, GS-0083-06...being notified, or the employer securing a vote, or any kind of determination for a CWS, that is in violation of 5 U.S.C. 6127(b)(1).

The employer is currently attempting to have employees that are (non-exempt FLSA) pay back overtime monies for all hours worked over 8 hours during previous pay periods (**See Enclosed: Email from [name] Lt. USAF**)

The employer explanation in employees paying back monies was because employees initially was [sic] suppose [sic] to be working on a 12 hour shift, and the overtime amounts was [sic] having an adverse action on the employer.

The fact of the matter is that the employer implemented the CWS when the employer became aware that the employee petition [sic] the American Federation of Government Employees (AFGE) for inclusion into the union....Furthermore, the employer explanation that the overtime amount was having an adverse action on the employer is absolutely ridiculous, because the employer currently has employees working on a 4/2 schedule @ 13 hours per day, where employees received approximately 45 hours in overtime each pay period. (**See Enclosed: Department of Defense, Civilian Leave and Earning Statement**)

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On January 8, 2005, the employer forced a CWS without employees being notified of the CWS. Where prior to the forces CWS employees had been working on a schedule receiving overtime for all hours worked over 8 hours, where the employer implemented the CWS that charged hours to 12 hours. (**See Enclosed: Pay Adjustment**)

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On April 18, 2005, the employer notified employees that they were overpaid during the previous pay periods, because employees were initially supposed to be working on 12 hours shift [sic]. (**See Enclosed: Pay Adjustment**)

The activity AAR includes an affidavit from the Operations Superintendent for the [#] Security Forces Squadron who states he has held this position continuously since June, 2004, and:

3. When the civilian police officers were initially hired into the GS-0083 positions at the [#] Security Forces Squadron...in late 2004, they were assigned to an uncommon tour of duty. The uncommon tour of duty they were assigned to work in each 80 hour pay period was comprised of three (3) days on, two (2) days off, two (2) days on, and three (3) days off. For each 80 hour pay period this gave the civilian police officers four twelve (12) hour shifts one week and two twelve hour shifts and one eight (8) hour shift the other week of the pay period, resulting in 80 hours each pay period. This was their regularly scheduled duty.
4. The civilian police officers were paid overtime for any hours they worked in addition to their regularly scheduled duty as outlined in paragraph 3. In addition the civilian police officers were paid differentials when they worked nights, weekends or holidays as appropriate.

The AAR further states the time and attendance records show the claimant was not on this schedule the first two weeks on duty while he was in training. The record includes a June 9, 2005, memorandum the Defense Finance and Accounting Service Pensacola civilian pay office from the activity requesting a waiver for “[#] Air Base Wing Security Forces Officers” which states, in part:

Initially, each of the members [civilian police officers] was put on an 80 hour pay period working 8 hours a day for their work schedule. Since the officers were working a panama schedule, 6 twelve hour shifts & 1 eight hour shift, and overtime, their cards reflected the actual hours the individuals worked. Unfortunately, since an 8 hour day schedule was input into the Defense Civilian Pay System, and Leave Without Pay was not input for the days the officers did not work, they were overpaid for several pay periods.

The record contains copies of e-mails describing the actions taken to correct the pay records, copies of the claimant’s corrected time sheets, and information on how the affected employees could request a waiver of indebtedness. Rather than a change in work schedule, the “Pay Adjustment” cited by the claimant reflects the reconstruction and correction of pay records caused by the errors in time and attendance information caused by erroneous payroll input. Therefore, we must reject the claimant’s attempt turn the correction of pay records into a change in work schedule; i.e., the “forced” implementation of CWS. Instead, we must determine whether the claimant was properly subject to FLSA overtime pay provisions or CWS premium pay provisions during the claim period.

We note the claimant’s assertion in his July 13, 2005, letter “On January 8, 2005, the employer forced a CWS without employees being notified...” appears to conflict with the assertion in his April 13, 2006, letter to OPM: “The time and attendance record for pay period (27) dated 12/25/2004 shows when the agency implemented the CWS.” In his April 13, 2006, letter to OPM, the claimant also appears to assert the agency was precluded from changing his schedule once it had implemented a CWS without obtaining another vote on the change in schedule:

Additionally, the time and attendance record for pay period (4) dated 02/19/2005 and pay period (5) dated 03/05/2005 shows the agency removed the claimant from CWS, placing claimant on a [sic] 8 hours a day 5 days a week schedule. The claimant perform [sic] the same duties as the claimant perform [sic] on the CWS. The agency during pay period (6) dated 03/19/2005 remove [sic] claimant from the 8 hours a day 5 days a week schedule, placing claimant back on CWS without securing a vote for this CWS. The claimant remind [sic] on this CWS until claimant left agency on August 16, 2005.

OPM's *Handbook on Alternative Work Schedules* (Handbook) recognizes the fact:

Under its authority to determine the administrative workweek (5 CFR 610.111), an agency may change an employee's schedule (and scheduled days off) for operational reasons. Schedule changes must be documented and communicated to employees in advance of the start of an administrative workweek except when the criteria in 5 CFR 610.121(a) apply. (Also, see 5 CFR 610.121(b)(2).)

The Handbook directly addresses potential changes in schedule when an employee is on a temporary duty assignment. Other changes would be expected to occur when an employee is sent to formal training or in instances where an employee might request a temporary change in schedule for personal reasons. These cited schedule changes do not change the fact that the claimant worked a panama schedule for all but a few weeks while he was employed at the activity and, therefore, we must conclude the schedule changes he cited were temporary in nature.

The claimant would have us interpret 5 U.S.C. § 6127(b)(1) as requiring a vote each and every time an employee in a unit not represented by a union has a change in schedule as discussed previously. The language of 5 U.S.C. § 6127(b)(1), however, makes clear the required vote is limited to a decision as to whether the unit will "participate in any program" (i.e., a CWS program). There is no statutory basis for voting on temporary schedule changes as the claimant's payroll records suggest occurred.

The crucial issue in the instant case is when a vote would have to take place. Senate Report No. 97-365, April 28, 1982, on P.L. 97-221, Federal Employees Flexible and Compressed Work Schedules Act of 1982, makes clear such a vote was intended to be held in an *existing* unit:

Section 6127(B) provides protections for employees when a majority of employees in a unit do not wish to participate in a compressed work schedule program, or when participation would impose a personnel hardship.

In the instant case, however, no unit of Federal civilian employees was in existence at the time the panama schedule was established. The vacancy announcement for the claimant's position (04MAR[#]; Police Officer, GS0083-05) clearly stated: "OTHER SIGNIFICANT FACTORS....2. May be required to work an uncommon tour of duty, to include nights, weekends, or holidays." Page 7 of Core Personnel Document, CPD Number [#], which is page 7 of the claimant's PD, states: 9. May be required to work an uncommon tour of duty, to include nights, weekends, or holidays." This page shows the claimant's signature dated November 2,

2004, and “I have read this/and understand this document.” Therefore, we must conclude the claimant was aware of these conditions of employment when he applied for and was selected for his Police Officer position at the activity. A vote under these circumstances would vest acceptance of CWS coverage in the first employee entering the unit (which the claimant asserts he was) and would, by rejection of the CWS program, nullify the conditions of employment clearly stated in the vacancy announcement and the claimant’s position description of record which he signed on November 4, 2004. Therefore, we find the claimant’s interpretation is not consistent with clear language and intent of 5 U.S.C. § 6127(b)(1).

Air Force Instruction 36-807, June 21, 1999, Weekly and Daily Scheduling of Work and Holiday Observances, defines uncommon tour of duty as: “Any 40 hour basic workweek scheduled to include Saturday and or Sunday, for four workdays or less but not more than six days of the administrative workweek.” The claimant’s “panama schedule, 6 twelve hour shifts & 1 eight hour shift” fits within this definition and the definition of a CWS in 5 U.S.C. § 6127(a): “a 4-day workweek or other compressed schedule.” A former co-worker whose name was supplied by the claimant and whom we contacted confirmed he and the claimant worked the panama schedule, but also recalled he worked an eight hour schedule when he attended training. This former co-worker recalled he was hired “maybe a couple of weeks” after the claimant and worked the panama schedule for the entire time (six or seven months) he was employed at the activity. As the two civilians in what was a preponderantly military organization, the former co-worker stated their panama schedule was like the schedule worked by the military. He corroborated the claimant’s assertion the two of them worked the panama schedule while the other civilian police officers who were assigned to the “confinement” (called the “Correctional Facilities Sections” by the claimant), worked 8 hour days. The claimant, however, notes these employees were affected “because the agency required these employees to re-pay back monies receive [sic] from working overtime when they worked in the law enforcement sections, before going to perform duties in the correctional facility.”

Therefore, we must conclude the claimant was covered by a CWS during the claim period and was covered by the compressed schedule premium pay provisions of 5 U.S.C. § 6128(b) which, in the case of any full-time employee, provides for payment of overtime pay for “hours worked in excess of the compressed schedule.” In the claimant’s situation, he would be due premium pay for all hours worked in excess of his 80-hour biweekly CWS based on 5 U.S.C. § 6128(a) which states that FLSA overtime provisions do not apply to the hours which constitute a compressed work schedule. As such, the claimant’s assertion regarding FLSA overtime entitlement is moot since CWS requirements are not workweek based, but biweekly pay period based; i.e., an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays (section 6121(5)(A)).

Section 7(a)(1) of the FLSA provides for the payment of overtime “at a rate not less than one and one-half times the regular rate of pay” for hours worked in excess of 40 hours in a workweek (or, under 5 U.S.C. § 6128(b), hours worked in excess of the 80-hour biweekly compressed work schedule).

The claimant’s rationale is based on application of FLSA overtime pay to his work situation. He has not provided comments on or challenged the calculation of his pay under CWS procedures.

Therefore, we find the claimant has not shown he performed overtime work under 5 U.S.C. § 6128 for which he was not properly paid.

**2. *Did the agency willfully violate the Act?***

The claimant believes the agency willfully violated the FLSA. The agency did not address the issue in its decision or AAR. The claimant alleges that his termination was as a result of his efforts to be paid overtime for the time period at issue in his claim.

5 CFR 551.104 defines “willful violation” specifically as follows:

*Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.*

Clearly, not all violations of the FLSA are willful as this term is defined in the regulations. However, error alone does not reach the level of willful violation as defined in the regulations. A finding of willful violation requires that either the agency knew that its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. The regulation further instructs the full circumstances surrounding the violation must be taken into account.

In the instant case, since the claimant is not due any overtime, and the activity’s determinations regarding the pay matters at issue in this claim are appropriate, we must conclude the activity did not willfully violate the Act defined in the regulations on matters of overtime compensation.

Documentation submitted by the claimant and the activity show his removal was for failure to meet annual recertification requirements unrelated to the provisions of the FLSA. Review of the removal process as applied to the claimant is a matter beyond the scope of OPM’s claims adjudication authority under the FLSA or 31 U.S.C. § 3702. As such, we will not address this issue.

**Decision**

The hours worked at issue in the claim were not overtime under the FLSA and no money is due the claimant.