

**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:** Strategic Investigations Division  
Office of Enforcement  
U.S. Customs Service  
U. S. Department of the Treasury  
Washington, DC

**Claim:** Back pay for FLSA overtime  
when employed as a nonsupervisory  
Criminal Investigator, GS-1811-13

**OPM decision:** Denied; Time barred

**OPM decision number:** F-1811-13-06

/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 March 2, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim dated February 20, 2007, from [name]. The claimant states he was employed with the “legacy U.S. Customs Service (USCS)” in a nonsupervisory Criminal Investigator, GS-1811-13, position from May 10, 1988, to August 13, 1988, which we construe to be the period of his claim. 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. In response to OPM’s request for a copy of any information on this matter, the U.S. Customs and Border Patrol headquarters human resources staff reported they were unable to locate any pertinent records.

## Background

Claimant states in his February 20, 2007, claim request that he “requested an appeal of [his] overtime eligibility” under the FLSA, culminating in the transfer of his:

appeal from the General Accounting Office (GAO) to the Office of Personnel Management (OPM) on December 10, 1996. I can only assume that from there my claim was denied based on the court decision (*Stephen Adams v. The United States*, Fed. Cl. No. 90-162C) that GS[-]1811-13 [sic] were FLSA exempt.

Claimant states “[i]t is now public record that former U.S. Customs Service Special Agents GS[-]1811-13 were subsequently included in the Federal Judicial decision which determined them to be non-exempt from FLSA regulations.” Claimant requests OPM reconsider the aforementioned “denial and grant [him] proper compensation for the period established by the federal ruling for GS-1811-13’s under *Adam’s [sic] v. U.S.*”

By letter dated May 30, 2007, OPM asked the claimant to submit any and all information he wished to present in support of his request, including copies of information previously provided to USCS and GAO in support of his claim, within 25 days of the date of the letter. The claimant failed to respond to this letter.

## Jurisdiction

The record contains a copy of a May 8, 1990, letter from the claimant to USCS stating he wished to “appeal [his] overtime eligibility for the years 1984 to the present” and that “[d]uring portions of this time period, [he] was placed in a pay status which...incorrectly listed [him] as exempt from the provisions of the FLSA regulations.” A May 15, 1990, USCS memorandum to the claimant acknowledged receipt on May 10, 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 [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.”

The record contains a copy of USCS's June 27, 1994, FLSA "Status Determination Appeal" decision, which states:

The Court has ruled that Criminal Investigators GS-9, 11, and 12 in the Customs Service were properly classified as non-exempt from the overtime provisions of FLSA. At the same time, the Court ruled that Customs Criminal Investigators at the GS/GM[-]13 level were properly classified as FLSA exempt.

As all of the time claimed in your May 8, 1990 appeal was at the GS-13 level or above, your FLSA status appeal is denied.

The USCS decision advised the claimant he could appeal the decision to GAO, and stated his claim with GAO would be limited to the two year period just prior to May 10, 1990, the date USCS received his claim.

The record also contains a copy of claimant's May 16, 1995, letter to GAO, date stamped as received by GAO on May 23, 1995, 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 June 27, 1994. The decision limited the retroactive period to two years prior to receipt of my FLSA claim (May 15, 1990) and ruled that Customs Criminal Investigators at the GS/GM-13 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. Attached please find correspondence from the United States Customs Service dated June 27, 1994 denying my claim.

By letter dated May 24, 1995, GAO returned the claimant's May 16, 1995, request. GAO stated their procedures required a claim submitted to GAO contain an administrative report and asked the claimant to resubmit his claim to his "administrative agency for reconsideration." The record contains a July 27, 1995, letter from GAO to the claimant acknowledging receipt of his "fax (coversheet and 5 pages), dated and received on July 11, 1995." The July 27, 1995, letter states "[t]he issue of the statute of limitations for FLSA claims is being considered by our Office, and we will send you a copy of any decisions our Office may issue on that matter." The record also contains a December 10, 1996, letter from GAO to the claimant stating it had received the claimant's November 27, 1996, correspondence relating to his claim and advising the claimant that, pursuant to § 211 of Public law 104-53 of November 19, 1995, the authority to resolve his claim had been transferred to OPM.

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 16, 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).

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 and subsequently with GAO regarding his FLSA exemption status did not preserve his exemption status claim. Further, USCS's advice that the claimant could appeal the USCS FLSA exemption status decision to GAO was erroneous.<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 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

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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).

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 May 8, 1990, claim on February 20, 2007, with OPM under 5 CFR 551.702(a) (December 23, 1997, regulations in effect on February 20, 2007) is misplaced. Under the administrative claims procedures in place during the period of this claim, filing a claim with the employing agency on May 8, 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 March 2, 2007, any claim for FLSA overtime pay expired on March 2, 2005, based on application of the two-year statute of limitations in effect for FLSA claims filed after June 30, 1994 (March 2, 2004, if willful violation had occurred). Therefore, any claim for FLSA overtime pay for work performed during the period of the claim described previously as alleged by the claimant 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.