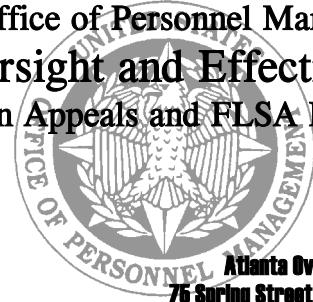


U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and FLSA Programs



Atlanta Oversight Division
76 Spring Street, SW., Room 872
Atlanta, Georgia 30303

**Fair Labor Standards Act Decision
Under Section 4(f) of the Act as Amended**

Claimant: [claimant]

Position: Civil Engineer
GS-810-13

Organization: U. S. Army Corps of Engineers
Jacksonville, Florida

Claim: Exemption status during
emergency duty. Owed
payment for overtime.

OPM decision: Nonexempt. Overtime payment due.

OPM decision number: F-0810-13-01

Kathy W. Day
FLSA Claims Officer

2/25/00
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 OPM administers the Act. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that 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 (address provided in 5 CFR 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this 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.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed him. A copy of the computations and the date payment was made to the claimant should be furnished to this office within four pay periods following the date of the decision. If the claimant believes that the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

Decision sent to:

[appellant]

Ms.
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Human Resources Office
U.S. Army Corps of
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Director of Human Resources
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Chief, Position Management and
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Introduction

On August 27, 1999, the Atlanta Oversight Division of the U.S. Office of Personnel Management (OPM) accepted a Fair Labor Standards Act (FLSA) claim from [appellant]. The claimant believes that emergency duties he performed for the U. S. Army Corps of Engineers, Emergency Field Office,[city/state], from October 2, 1998, through December 11, 1998, were improperly designated as exempt under the Act, and he is owed payment for overtime worked. During the claim period, [appellant] was officially assigned to the position of Civil Engineer, GS-810-13, in the [District], Army Corps of Engineers. We have accepted and decided his claim under section 4(f) of the FLSA, as amended.

Determination of emergency

The President of the United States declared parts of Puerto Rico an emergency disaster area in the aftermath of Hurricane Georges in September 1998. The Federal Emergency Management Agency (FEMA) is responsible for activating the Federal Response Plan when the President declares an emergency. The Secretary of the Army has designated the Corps of Engineers as Army's executive agent for the Federal Response Plan with responsibility for executing the emergency mission whenever FEMA activates the plan and needs assistance. Once FEMA notified the Corps of Engineers of a designated emergency requiring their help, Corps personnel were authorized to participate in the emergency efforts under Emergency Declaration FEMA-1251-DR-MS.

In such a designated emergency, the regulation found in title 5, Code of Federal Regulations (CFR) Part 551, Subpart B, Section 551.208(d), governs the determination of exemption status. The regulation states:... *regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency. ... an exempt employee becomes nonexempt for any workweek in which the employee performs nonexempt work or duties for more than 20 percent of the worktime in a given workweek.*

If the agency determines that an emergency situation exists and sends an employee to perform work at the emergency site, 5 CFR Part 551, Subpart B, Section 551.208(d) applies (i.e., if the employee performs nonexempt work for more than 20 percent of any workweek, the employee is considered nonexempt for that entire workweek).

General issues

The claimant states that he was temporarily assigned to emergency duty in Puerto Rico in response to Hurricane Georges, during the period from October 2, 1998, to December 11, 1998. He believes that over 20 percent of the work he performed each week was nonexempt. He provided time sheets for each two week pay period signed by his supervisor. Each time sheet described the work performed and the percentage of time spent on each function.

In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency and conducted telephone interviews with the claimant and his supervisors from the emergency site.

Evaluation

An employee's exemption from the overtime provisions of the FLSA is determined by comparing the *actual duties and responsibilities performed* by an employee to the FLSA exemption criteria found in 5 CFR Part 551, Subpart B.

To be exempt from the overtime provisions of FLSA, the employee must meet the executive, administrative, or professional exemption criteria in sections 551.205 through 551.207 of 5 CFR. The claimant's duties do not meet the professional exemption criteria as described in section 551.207 of 5 CFR and neither the claimant nor his agency contests this. The agency determined that the claimant's duties were exempt based on the executive exemption criteria. The claimant disagrees. He believes that he performed nonexempt work for over 20 percent of the time each week.

The claimant states that he was asked to oversee the debris collection, pick-up, storage, and volume reduction operations for the entire island of Puerto Rico. He was primarily responsible for managing the supervisors of the Quality Assurance Inspector teams (referred to as Zone Engineers or Zone Leaders). He determined the number of workers needed in each work zone, decided who would be assigned to the various zones, and instructed the workers in how to separate and calculate the volume of debris. He determined suitable sites for debris storage and processing and coordinated with real estate representatives, contractors, and Zone Leaders to get the sites up and running. He also had the authority to tell Zone Leaders when to shut down operations, e.g., due to flooding. Due to the frequent turnover of inexperienced workers, the claimant had to constantly check on and train the inspectors to ensure they were performing their duties correctly. He personally measured debris and conducted quality assurance inspections in the field. He conducted pre-construction conferences with contractors to explain requirements and safety standards and had authority to shut down any contractor who did not meet those requirements and standards. He performed organizational and management related duties for 60 to 65 percent of the time each week from October 2, 1998, through November 21, 1998. During the same time period, the quality assurance, debris measurement and sorting, and safety inspection work accounted for 35 to 40 percent of his time.

From November 22, 1998, through December 11, 1998, the claimant was removed from managing the operation. He spent over 50 percent of the time locating, physically measuring, and calculating the quantity of debris in collection sites in order to verify the amount of debris claimed by the various municipalities.

EXECUTIVE EXEMPTION CRITERIA (5 CFR 551.205)

An executive employee is a supervisor or manager who manages a Federal agency or any subdivision of the agency (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets both of the following criteria:

- (a) Meets the primary duty test. The primary duty test is met if the employee (1) has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and (2) customarily and regularly exercises discretion and independent judgment in such actions as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

The claimant's emergency duties do not meet (a)(1) and (a)(2).

Although the claimant was responsible for overseeing the debris collection operations and was primarily responsible for managing the supervisors of the Quality Assurance Inspector teams, he did not have authority to select, remove, or promote the employees involved in the temporary emergency work. Therefore, he does not meet (a)(1). He planned and organized the work; made assignments; and reviewed and evaluated the work. However, his duties did not include personnel administration activities which are required to meet (a)(2).

The claimant's emergency duties do not meet the executive exemption criteria in 5 CFR 551.205,

ADMINISTRATIVE EXEMPTION CRITERIA (5 CFR 551.206)

To meet this criteria, the employee must be an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets *all* of the following:

- (a) His primary duty consists of work that (1) significantly affects the formulation or execution of management policies or programs; or (2) involves general management or business functions or supporting services of substantial importance to the organization serviced; or (3) involves substantial participation in the executive or administrative functions of a management official;
- (b) He performs office or other predominantly nonmanual work which is (1) intellectual and varied in nature; or (2) of a specialized or technical nature that requires considerable special training, experience, and knowledge; and

- (c) He must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) General schedule employees classified at GS-5 or GS-6 (or the equivalent in other systems) must spend 80 percent or more of the workweek in administrative functions.

For an employee's work to satisfy one of the applicable parts of 5 CFR 551.206(a), the work in question must be the employee's primary duty. An employee's primary duty is defined as that which constitutes the major part (over 50 percent) of the employee's work.

The agency determined that the claimant's primary duty was exempt. However, during an emergency, an exempt employee becomes nonexempt for any workweek in which that employee performs nonexempt work for more than 20 percent of the time. Since the claimant asserts that he spent more than 20 percent of the time each week performing nonexempt work, we will only review those duties to determine if they meet the criteria to be nonexempt and if they accounted for over 20 percent of his time.

For over 20 percent of the time, the claimant's emergency duties do not meet (a)(1).

Established OPM guidance concerning work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals that are expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly through developing proposals that are acted on by others. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or organizations, both within or outside the Federal government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs).

10/2/98 to 11/7/98: During this period, the claimant and his supervisor in Puerto Rico verified that the claimant's primary duty (accounting for 60 to 65 percent of his time) consisted of managing the debris removal operation. This included setting up the organizational structure; selecting and supervising the lead or zone engineer for each of six zones as well as the workers assigned to each zone; identifying property for debris sites and determining how sites would have to be configured; conducting pre-construction briefings with contractors explaining the requirements they had to meet and what was expected of them; and evaluating the operations. These duties were part of the core mission of the emergency management functions and were crucial to the establishment and execution of the debris removal program in Puerto Rico. The claimant used his judgment to develop plans, procedures and timetables for the debris removal operations. He independently determined who performed what duties, decided how standard requirements (e.g., for site layout) would have to be adjusted to meet current situations and conditions, and directed the building of

a test site for burning debris which he used as a model for environmentalist in Puerto Rico who were against burning.

The claimant's time sheets state that the remaining 35 to 40 percent of the time was spent conducting quality assurance inspections. According to the claimant and his supervisor, this included ensuring that zone inspectors were doing their jobs; providing training on measuring and sorting debris; assessing contractor performance; personally measuring and sorting debris; and conducting safety checks. The claimant performed the actual measuring and sorting of truck loads of debris to instruct others, remeasured and inspected the trucks and landfills to evaluate the accuracy of measurements taken by others, and physically examined sites for safety violations. These duties were not program management functions but rather involved the application of very specific guidelines and regulations to a limited set of tasks.

Accordingly, we find that 35 to 40 percent of the work performed during this period does not meet the criterion in (a)(1).

11/8/98 to 12/11/98: According to the supervisor, the claimant's program management duties were given to someone else and the claimant spent over 50 percent of each week during this time period in the field physically measuring debris. He was no longer involved in the management or administration of the program.

We find that over 50 percent of the work performed during this period does not meet the criterion in (a)(1).

For over 20 percent of the time, the claimant's emergency duties do not meet (a)(2).

This subpart is met if the employee exercises substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced. Guidance from OPM characterizes employees in general management, business, or supporting services as providing support to line managers through: (1) expert advice in a specialized subject matter; or (2) assuming aspects of overall management function in such areas as safety, personnel, or finance; or (3) representing management in business functions such as negotiating or administering contracts; or (4) providing supporting services such as automated data processing.

10/2/98 to 11/7/98: For 35 to 40 percent of the time, the claimant worked independently, provided training on measuring and sorting debris, measured debris, and checked sites against a list of safety requirements. These duties involved a limited number of tasks and did not require expert knowledge of specialized subject matter. Although the claimant had the authority to shut down a contractor's site if safety standards were not met, he was not responsible for negotiating or administering the contracts. He did not provide support services to the field operations. We find that 35 to 40 percent of the work performed during this period does not meet the criterion in (a)(2).

11/8/98 to 12/11/98: For over 50 percent of the time, the claimant worked as part of a team measuring debris. This required limited knowledge and ability to insert numbers into a standard mathematical formula. He was not responsible for negotiating or administering the contracts. He did not provide support services to the field operations. We find that over 50 percent of the work performed during this period does not meet the criterion in (a)(2).

For over 20 percent of the time, the claimant's emergency duties do not meet (a)(3).

Work involving participation in the functions of a management official includes employees, such as secretaries and administrative assistants, who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such assistants must have knowledge of the policies, plans, and views of the supervisor and must be delegated and exercise substantial authority to act for the supervisor.

The claimant did not perform in this manner during any part of the claim period.

For over 20 percent of the time, the claimant's emergency duties do not meet (b)(1).

Office or predominantly nonmanual work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject-matter fields, or work involving mental processes which require substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized procedures, or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions.

10/2/98 to 11/7/98: When performing quality assurance, physically measuring debris, and checking safety conditions for 35 to 40 percent of the time, the claimant was performing predominantly manual work. He relied on a standard formula and prescribed regulations. The problems he dealt with were limited in nature with easily recognizable solutions or solutions based on precedent situations (e.g., his experience doing the same type of work in previous hurricane emergencies). This work did not require the degree of judgment and innovation or the range of possible actions required to meet the criteria in (b)(1).

11/8/98 to 12/11/98: Over 50 percent of the claimant's time was spent measuring debris during this period. This was manual work, and for the reasons stated immediately above, this work does not meet the criteria in (b)(1).

For over 20 percent of the time, the claimant's emergency duties do not meet (b)(2).

OPM guidance indicates that work which is of a specialized or technical nature requiring considerable specialized training, experience, and knowledge means specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject-matter field.

10/2/98 to 11/7/98: The claimant was chosen to train first-time workers on measuring debris, conducted quality assurance inspections on the debris collection and performed safety inspections because he had performed this type of work during a previous emergency. However, the specialized knowledge employed by the claimant was equivalent to lower level technical work and required limited on-the-job training and experience to acquire. Approximately 35 to 40 percent of the claimant's work does not meet the criteria for (b)(2).

11/8/98 to 12/11/98: The specialized knowledge employed by the claimant to measure debris was equivalent to lower level work and typically required no more than a few hours of on-the-job training and experience to acquire. Over 50 percent of the claimant's work does not meet the criteria for (b)(2).

For over 20 percent of the time, the claimant's emergency duties do not meet (c).

Established OPM guidance is that the exercise of discretion and independent judgment involves interpreting results or implications and independently taking action or making a decision after considering the various possibilities. The work must involve sufficient variables as to regularly require discretion and judgment; the employee must have the authority to make determinations or take action; and the decisions must be significant. Employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents or other guidelines which specifically govern their actions would not meet this element. In addition, deciding whether a situation does or does not conform to clearly applicable criteria would not be considered making significant decisions.

10/2/98 to 11/7/98: For the time spent on quality assurance and debris measurement related duties, the claimant worked independently; however, he typically followed standardized procedures to resolve the problems he handled. There was little room for discretion since the debris was measured according to a standard formula and sorted based on specific guidelines. In addition, contracts were explicit in what was to be done and what safety standards were to be used. Between 35 and 40 percent of the claimant's work during this time period does not meet the criteria for (c).

11/8/98 to 12/11/98: The claimant followed standard procedures when he was measuring debris. There was little room for discretion since the debris was measured according to a standard

formula. Over 50 percent of the claimant's work during this time period does not meet the criteria for (c).

Paragraph (d) is not applicable.

The claimant is not a GS-5 or GS-6 level employee.

Summary

More than 20 percent of the claimant's time each week during the emergency was spent performing duties that do not meet the administrative exemption criteria in 5 CFR 551.206 and are nonexempt,

Decision

During the period of his emergency assignment, the claimant performed work that was nonexempt and accounted for more than 20 percent of the work performed each week. The claimant is due overtime pay under FLSA at the rate of one-and-a-half times his regular hourly rate of pay less any overtime pay already received under title 5 for the period of the claim.

Compliance instructions

The claimant is entitled to FLSA compensation for all overtime hours worked for the period of the claim: 10/2/98 to 12/11/98. Based on regulations in 5 CFR 550.806, the claimant is also owed interest on the back pay. Therefore, the agency is instructed to compute the interest as described in the regulation and pay the claimant the total amount owed him less the amount of any overtime already paid under title 5.