

STRATEGIC COMPENSATION
CONFERENCE

FLSA/POSITION
CLASSIFICATION APPEALS
UPDATE

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August 2002

Agenda

✓ Classification Appeals Program

- Digests 27 and 28

✓ Fair Labor Standards Act Program

- Recent Issues and Decisions

✓ Compensation and Leave

- Recent OPM Claim Decisions



Adjudication Statistics

✓ Classification Appeals - 60%

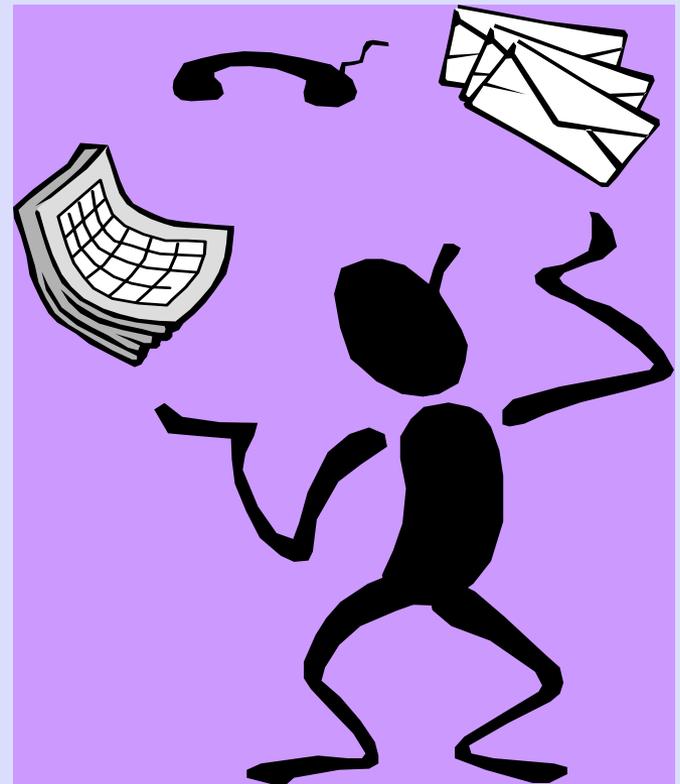
– Between 125 - 150

✓ Pay Claims - 30%

– Between 60 - 75

✓ FLSA Claims - 10%

– Between 10 - 25

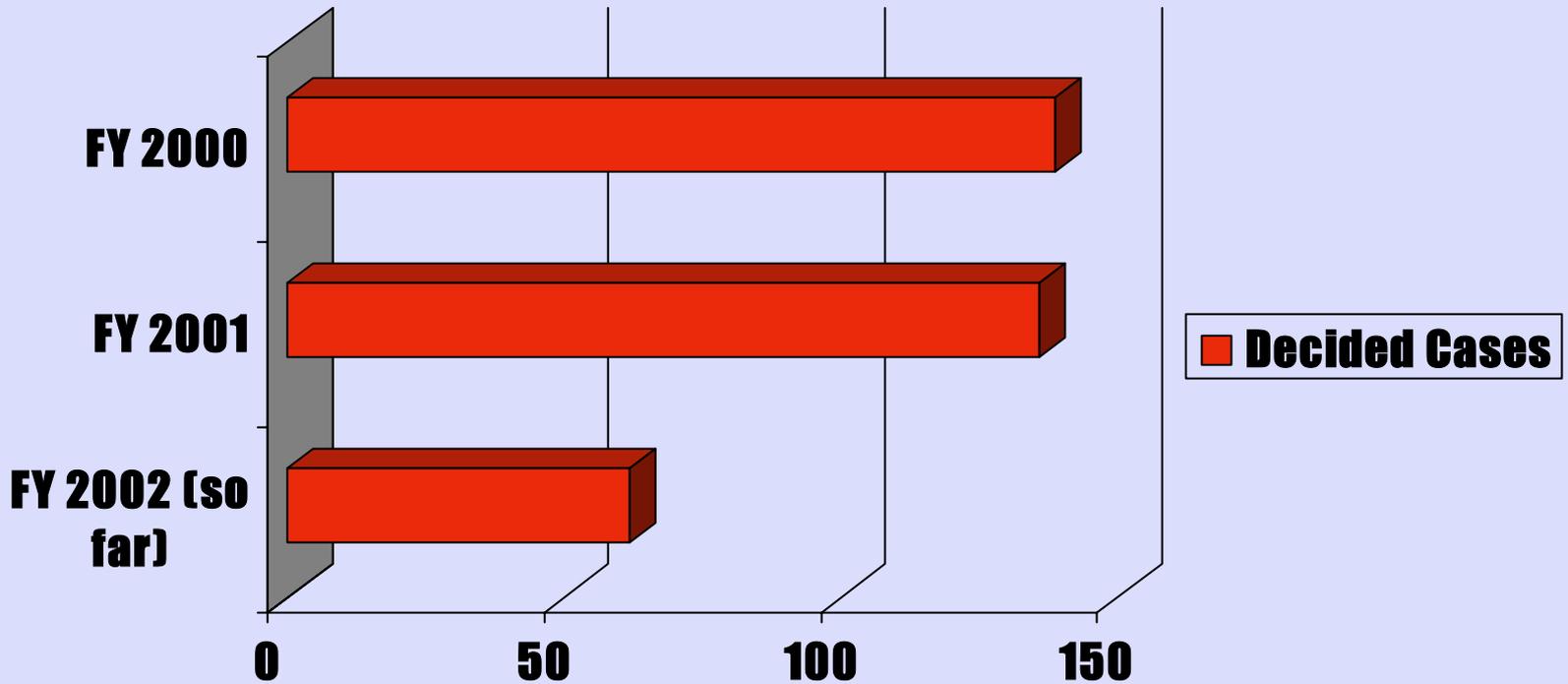


Important Aspects of Classification Appeals Process

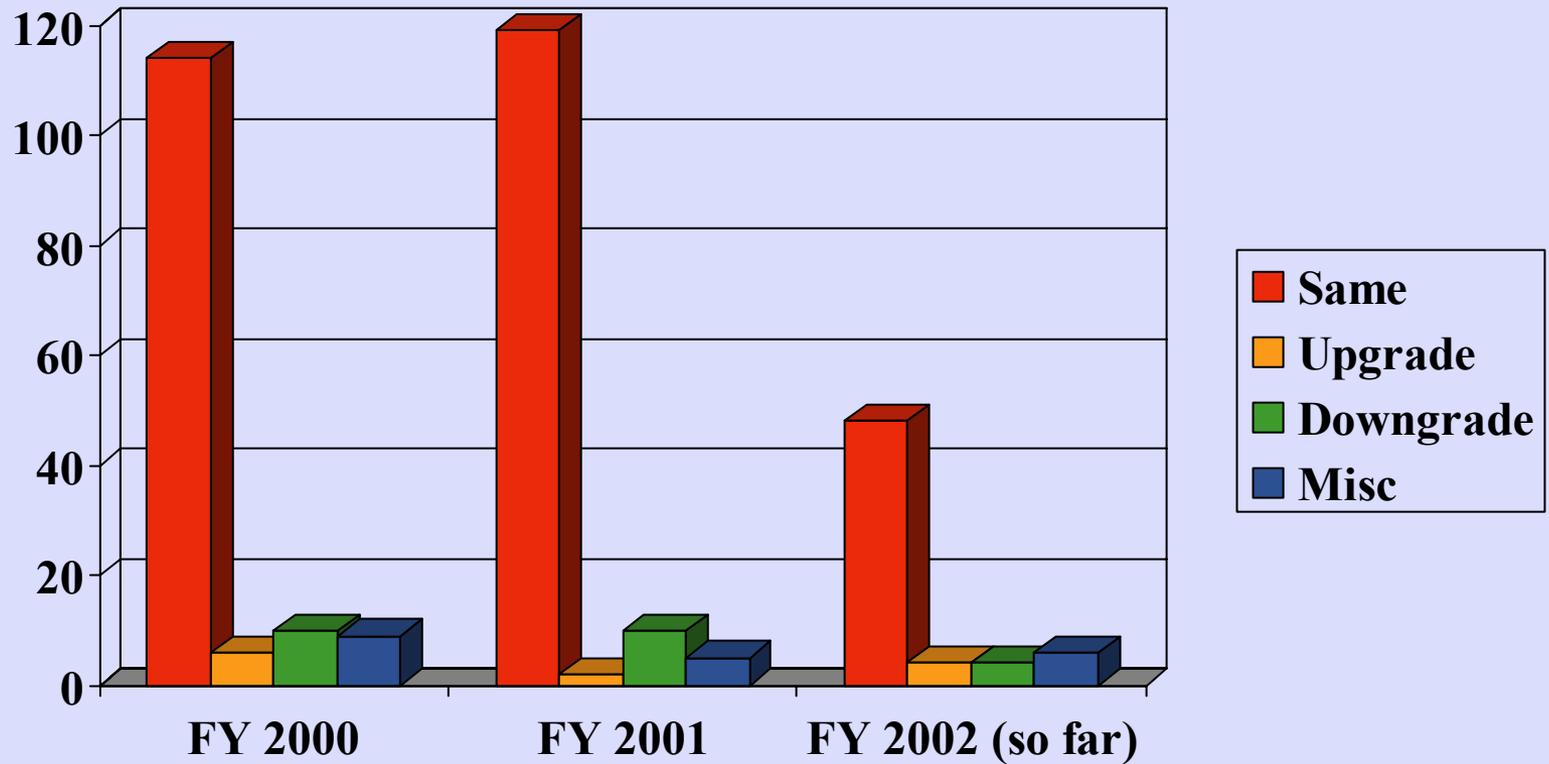
- ✓ Differs based on Nature of Position
- ✓ PD Accuracy Issues
- ✓ Agency Administrative Report
- ✓ Factfinding
- ✓ Application of OPM standards
- ✓ OPM Decision is final and binding
 - Applies to similarly situated positions



Appeal Decisions FY00 - FY02



Appeal Outcomes FY00 - FY02

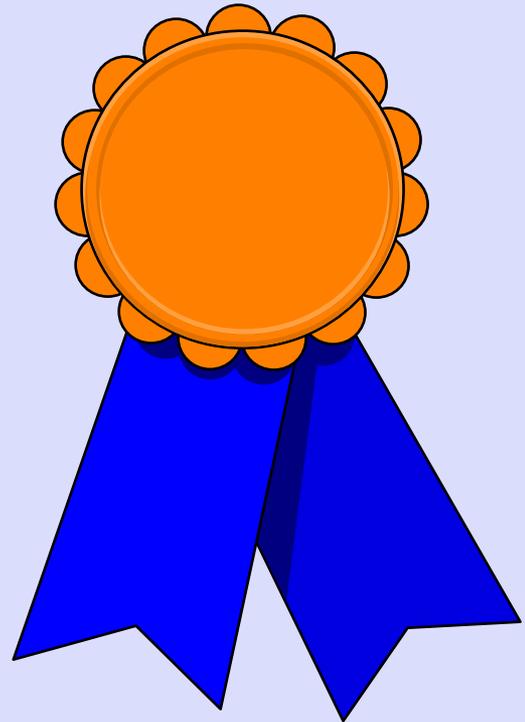


Outcome of Appeals Decided by Division



Recent Digest Articles

- ✓ Digests 27 and 28
- ✓ 'Back to the Basics'
- ✓ Links to Decisions
- ✓ Website



IT WORK - #27-01, #28-01

✓ New IT JFS and special salary rate

- GS-335-10 wanting to be GS-2210-11
- GS-335-7s wanting to be GS-2210-07 or 09



- Support of small LANs and integration with other networks and mainframes
- Work on home pages and Intranet
- Provided hardware support to IT specialists and used knowledge of hardware, peripheral devices, memory storage, etc.
- No in-depth knowledge of IT principles to plan/analyze, design, test, configure, etc.

GS-644 FES STANDARD - #28-03



- ✓ F2 - Overall priorities and objectives were established by a higher-level position
- ✓ F3 - To ensure the integrity of the quality control, the appellants adapted existing tests instead of developing them and were not allowed the ability to substantially deviate from established practice
- ✓ F4/5 - Work did not involve systemic problems or those that required major testing or modification of quality assurance programs for other laboratories

GEG FOR POSITIONS OF MGRS OF OPERATING ED. PROGRAMS - #28-04, #28-05

✓ Factor 1 – Student Load

- Agency was inconsistent with tracking courses
- OPM took an average number from two categories

✓ Factor 2 – Course Range and Variety

- What is a “creditable course”? - It must meet the general intent/objectives of a college-level course
- OPM disagreed with the agency, which changed the factor level designation



PREFIXES - #27-04, #27-06, #27-07

✓ 018, Safety and Occupational Health

- Grade level was based on supervisory duties, requiring “supervisory” prefix

✓ GSLGEG

- Did not meet 25% threshold due to subordinates’ independence, no “lead” prefix
- Led technical projects assigned to ad hoc teams; did not have both technical *and* administrative “lead” responsibilities on a continuing basis



GSSG - #28-06, #28-07

✓ Deputy positions

- A deputy must fully share in the authorities and responsibilities of the Chief

✓ Crediting for subordinate supervisors

- Factor 3-3b can only be credited to those who direct two or more subordinate supervisors, team leaders, or comparable personnel

✓ Term and temporary work

- Guide covers temporary employees, unpaid volunteers, student trainees, etc.



FWS VS. GS - #27-08, #28-08



✓ 4805, Medical Equipment Repairer

- Repair/troubleshooting of medical equipment did not require knowledge of an electronics technician

✓ 2604, Electronic Mechanic

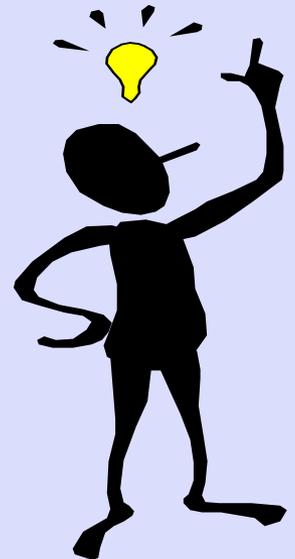
- Appellant used Internet operating systems to analyze, diagnose, test, configure, and verify functionality of networking systems
- Work required trade knowledge of electronics principles to determine whether problems were hardware- or software-based and to make repairs

OPM GUIDANCE - #27-05, #28-02

- ✓ Factor 5 in GS-460 Forestry Standard
 - Addressed breadth and impact of position

- ✓ Level 1-9 in GS-200 JFS

- How important is the “and” in the criteria?
 - Conceptual expert generating new concepts OR
 - Functional Program expert who:
 - conceives/plans broad or critical large-scale agency programs,
 - serves as consultant to top agency officials, AND
 - advises other HR experts throughout the agency.



Proposed Regulatory Changes for 5 CFR 511

- ✓ Require agencies to establish a classification appeal program.
- ✓ Remove the option of having appellants appeal to OPM through their agencies.
- ✓ Remove the option of filing a reconsideration request with the OPM Director.

GS

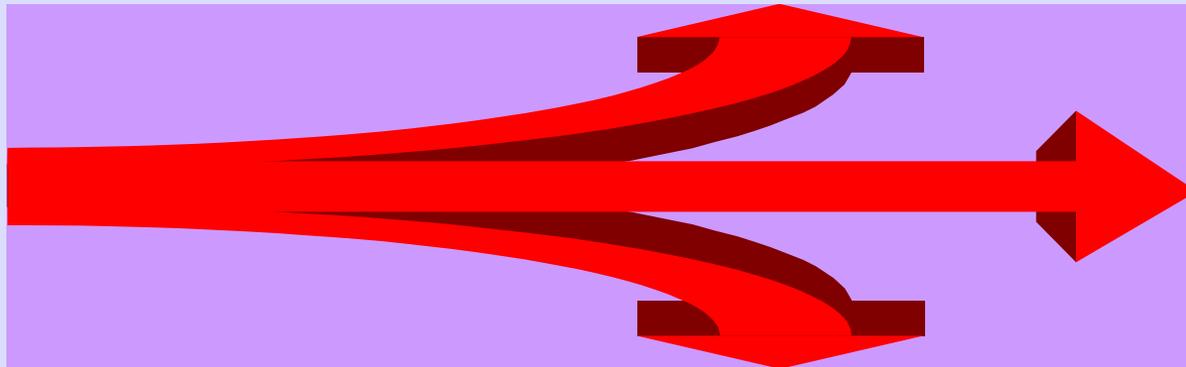
Proposed Regulatory Changes for 5 CFR 532

- ✓ Add subpart on how to comply with job grading decisions, job grading appeal decisions, and OPM job grading certificates.
- ✓ Remove the option of filing a reconsideration request with the OPM Director.

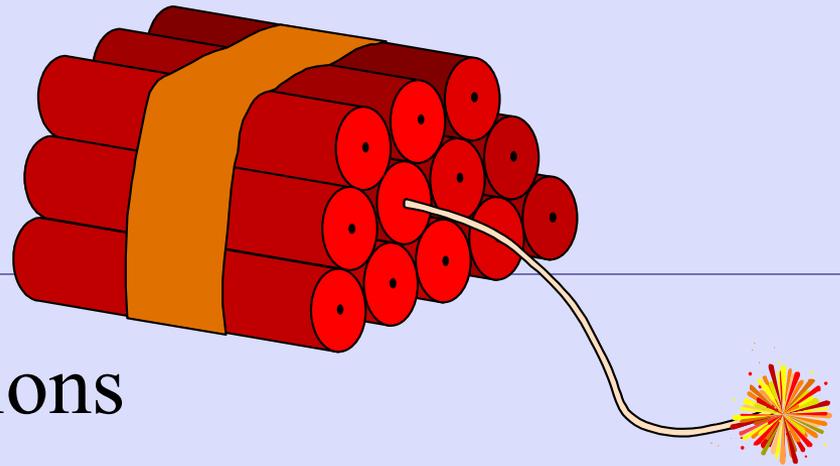
FWS

FLSA Information

- ✓ Federal Sector Administration - OPM
 - FLSA Program Office
 - Coverage and Claims
 - Pay and Leave Administration Division
- ✓ Private Sector - Department of Labor



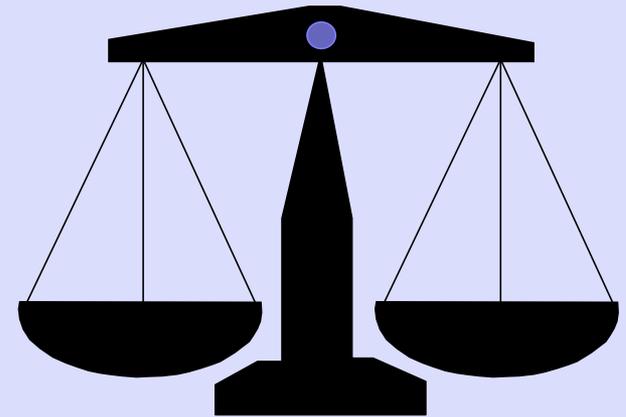
Hot Topics



- ✓ Mirror DoL regulations
 - Bates v. U.S., January 15, 2002
- ✓ Issue of Back Pay Interest
 - U.S. vs. Rowdy Adams, February 13, 2001
- ✓ Temporary Work – Schaller vs. U.S.
- ✓ Reconsideration of FLSA Decisions -
5 CFR 551.708
- ✓ Centralization of FLSA Claims function

Important FLSA Moments

- ✓ **1938** - The Act is passed by Congress
- ✓ **1974** - Becomes applicable to public employees
- ✓ **1990** - Carter vs. Gibbs
- ✓ **1994** - Statute of Limitations Changes
 - 6 to 2 years (3 years for willful violation)



Important FLSA Guidance

✓ 29 U.S.C.

✓ 5 CFR 551

- Definitions
- General Principles
- Exemption Criteria

✓ Factsheets on Claims and Coverage

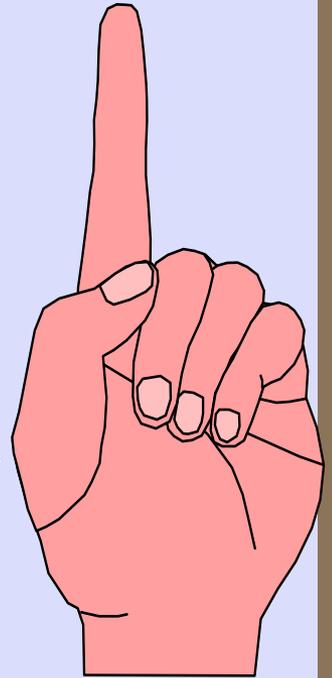
✓ Work Aid

✓ OPM FLSA Claim Decisions



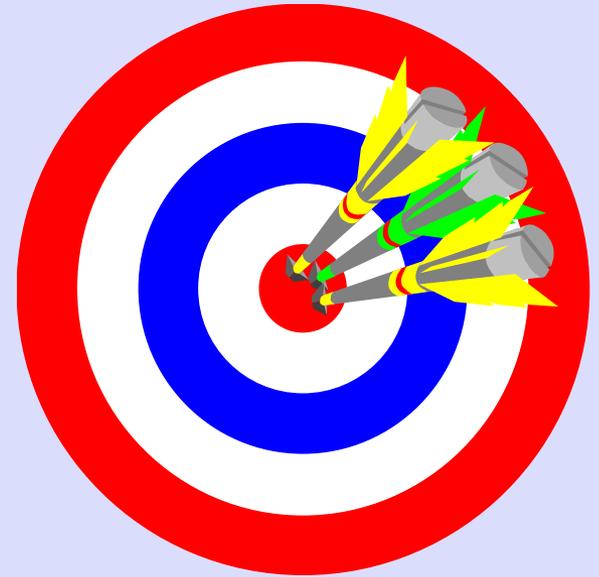
Important FLSA Terminology - 5 CFR 551.104

- ✓ **Exemption Status** - an employee's designation by the agency
- ✓ **Exempt** - not covered by minimum wage/overtime provisions
- ✓ **Nonexempt** - covered by minimum wage/overtime provisions
- ✓ **Primary duty** - duty that constitutes the major part of an employee's work



General Principles of Exemption - 5 CFR 551.202

- ✓ Each employee is presumed to be FLSA **non-exempt**.
- ✓ If there is reasonable doubt on meeting exemption criteria, the employee should be FLSA **non-exempt**.
- ✓ Burden of proof rests with the agency.
 - Three Exemption Categories



Summary of General Exemption Principles - 5 CFR 551.202

- ✓ An employee who meets the exemption criteria must be designated FLSA exempt.
- ✓ Failure to meet exemption criteria under one category does not preclude exemption from under another category.
- ✓ FLSA designation rests on the duties actually being performed by the employee.



Making Exemption Determinations

✓ Preparation

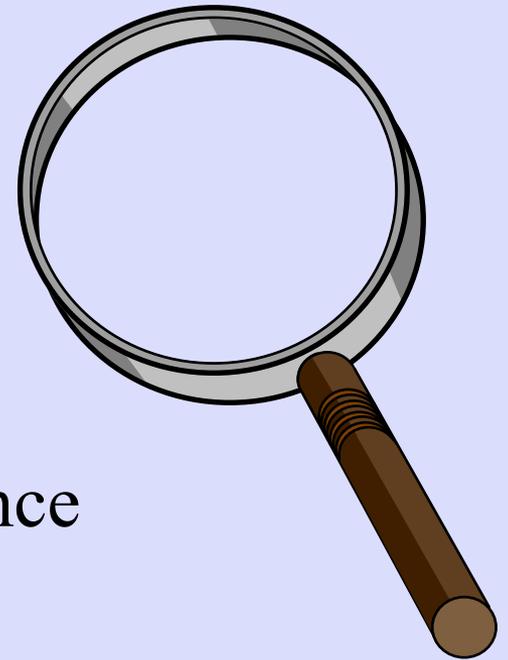
- Gather Materials and confirm PD accuracy

✓ Factfinding

✓ Analysis

- Eliminate primary duty tests
- Analyze the pd and evaluation statement with regulatory guidance

✓ Conclusion



Executive Exemption Criteria

- ✓ Is the primary duty test met?
 - Makes personnel changes and has authority to recommend personnel changes

- ✓ 80% test for certain employees

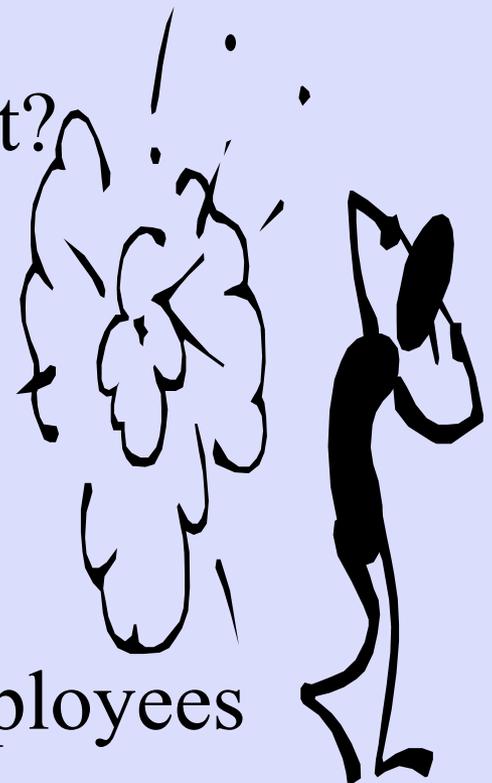
5 CFR 551.205



Administrative Exemption Criteria

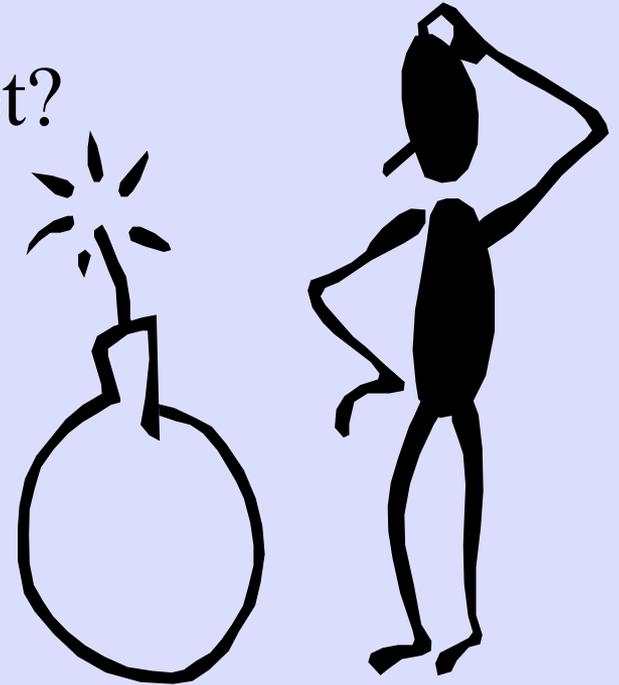
5 CFR 551.206

- ✓ Is the primary duty test met?
- ✓ Is the nonmanual work test met?
 - Intellectual OR specialized training/experience
- ✓ Is discretion/independent judgment used?
- ✓ 80% test for GS-5 or GS-6 employees



Professional Exemption Criteria

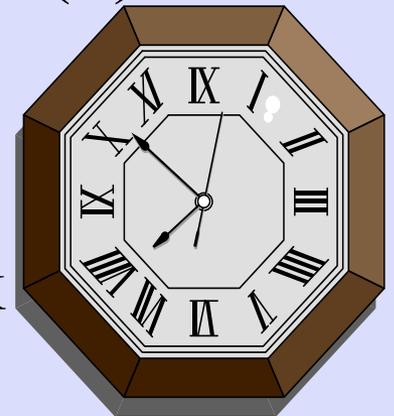
- ✓ Is the primary duty test met?
- ✓ Does the work require creative/analytical thought processes?
- ✓ Is discretion/independent judgment used?
- ✓ 80% test for GS-5 or GS-6 employees



5 CFR 551.207

Temporary Work - 5 CFR 551.208

- ✓ Does the period of temporary work exceed 30 consecutive calendar days?
- ✓ Does the work not support the current FLSA designation?
- ✓ Emergency Work - 5 CFR 551.208(d)
 - Affects exempt employees if nonexempt duties are performed for more than 20% of the workweek



Recent OPM Decisions

- ✓ Analysis of Three Criteria – F-0802-11-04
 - Also discusses the issue of back pay and references the FPM Manual
- ✓ Willful Violation – F-0856-11-01
 - Not simply an error
 - Did agency know that its conduct was prohibited by the Act or did it show reckless disregard of the requirements of the Act?



Recent OPM Decisions (con't)

✓ Executive Exemption – F-0081-09-01

- Exempt Supervisory Firefighter
 - Percentage of time on duties



✓ Professional Exemption – F-0334-12-01

- Exempt - First Decision in IT Specialist Work

FLSA - Jurisdictional Issues

✓ OGC Advisory

- Impact of MOA on *Carter v. Gibbs*

✓ Rowdy Adams v. U.S., 96-93C, September 30, 1999

- Supervisory Border Patrol Agent
 - Number of Employees Supervised
 - Primary Duty Test
 - Recognized Organizational Unit



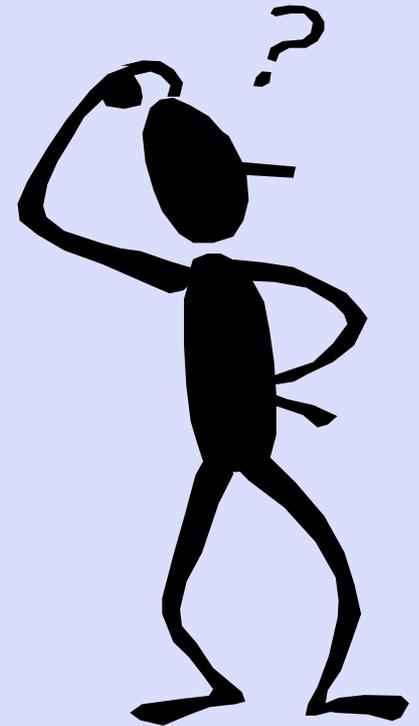
Applying Exemption Criteria (2)

✓ *Berg v. U.S.*, 95-748C, May 1, 2001

- Production vs. Supporting Service
- Adequacy of PD/Written Record
- Impact of Step-by-Step Instructions

✓ Berg's Unaddressed Issues

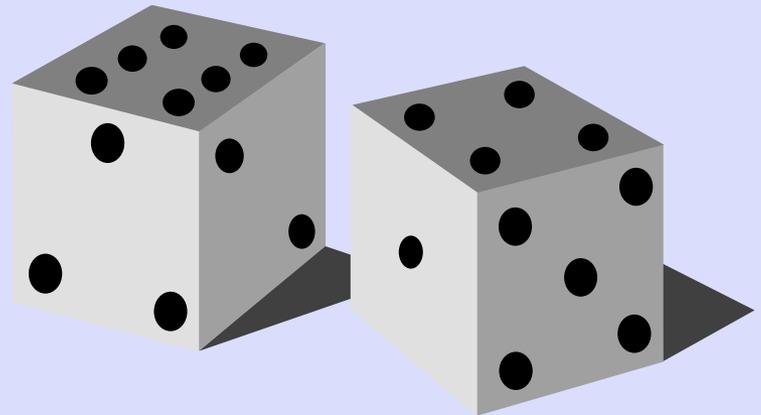
- Professional Exemption Criteria
- Pay Category of Work



Other Issues

✓ Agency Agreements/Practices

- Determination by Grade Level
- Interrelationship of FLSA and Classification
- Non-exemption
Presumption



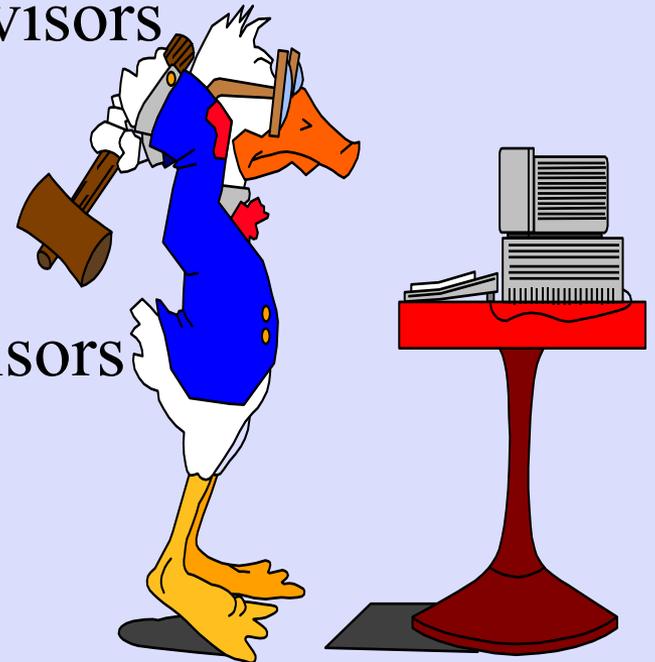
Are Your FLSA Designations Correct?

✓ Cabinet-Level Agencies

- 1,527 GS-04 Exempt Employees
- 149 Nonexempt GS Supervisors
- 598 Nonexempt GS-13s

✓ Independent Agencies

- 14 Nonexempt GS Supervisors
- 545 Nonexempt GS-13s



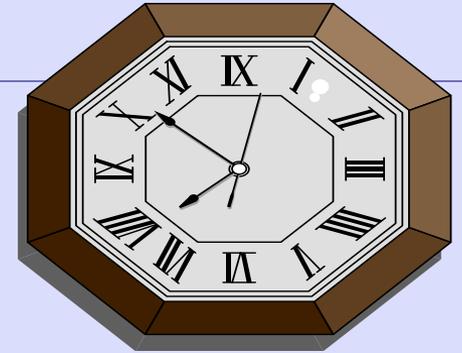
FLSA Claims

✓ Federal Employees file with OPM

- Preserve the Claim Period
 - Burden of Proof is on the Claimant
- Exemption Status
 - Burden of Proof is on the Agency
- Impact of *Carter v. Gibbs* Decision



Proposed Regulatory Changes for 5 CFR 551



- ✓ Address FLSA jurisdiction for DC Government employees.
- ✓ Clarify our role in administering the FLSA in comparison to Department of Labor.
- ✓ Stipulate that the 30-day test must be 30 consecutive calendar days.
- ✓ Establish a 45 calendar day time limit for filing reconsideration requests.

Pay Claims - 5 CFR 178

✓ Similarities with FLSA

- Must follow NGPs if covered by an agreement



✓ Differences with FLSA Claims

- Agency denial is required
- 6-year Statute of Limitations
- Burden of Proof is on the claimant
- Decision is based upon the written record

Findings of Pay Claims

- ✓ Carter v. Gibbs
- ✓ Barring Act - 31 U.S.C. 3702(b)(1)
- ✓ Majority find in favor of the agency
 - Clear and convincing evidence before overturning an agency
- ✓ OPM decision is final
- ✓ Claimants may pursue further in court

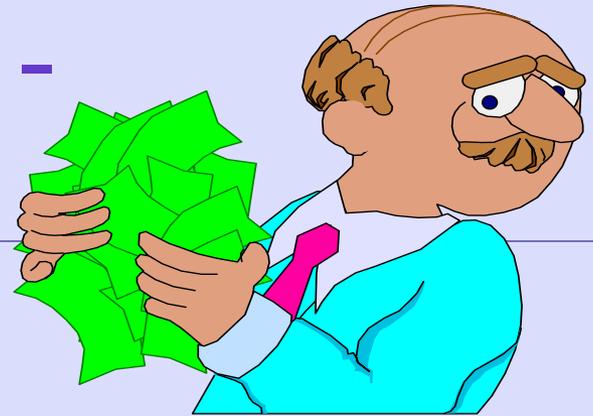


Authority for Adjudication of Pay Claims - PL 104-316, 110 Stat. 3826

- ✓ Legislative Branch Appropriations Act of 1996
 - Uniformed service members' claims to DOD
 - Travel, transportation, and relocation expenses to GSA
 - Compensation and Leave claims for civilian employees to OPM



Types of Pay Claims - Compensation



✓ Pay Retention - #01-0026

- Misinformation does not allow granting of claim: {60 Comp. Gen. 417 (1981)}

✓ Retroactive Promotion (error) - #01-0020

- Require approval by appropriate authority:
{B-190408, December 21, 1977}

✓ Performance of Higher Duties - #01-0012

- Requires an official personnel action:
{61 Comp. Gen. 408 (1982)}

Types of Pay Claims - Leave

✓ Incorrect SCD affecting accrual - #01-0017

– Employees must review their LES'

{B-189353, August 10, 1977}

✓ Annual Leave Buyback - #01-0035

– Subject to forfeiture if not used

{B-182608, August 9, 1977}

✓ Suspension and non-pay status - #00-4386

– Lump-sum payment not allowable for SL

{B-190152, November 30, 1977}



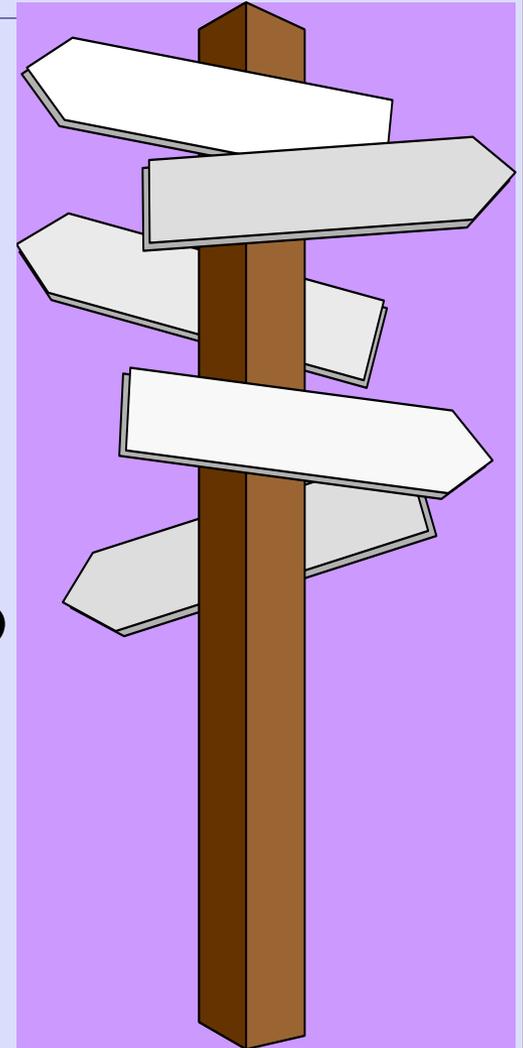
Types of Pay Claims - Unpaid Compensation



- ✓ Beneficiary involved in murder of deceased - #00-3118:
 - Disqualified {*B-175195, April 26, 1972*}
- ✓ Divorce Decree - #01-0023
 - Courts of state of domicile have no jurisdiction {*B-227728, March 23, 1988*}
- ✓ Court-Ordered Child Support or Bankruptcy
 - Advisory Opinion - Yes and No {*42 USC 659; 58 Comp. Gen 644 (July 9, 1979)*}

Excellent Representation

- ✓ Atlanta - Ginny Magnuson
- ✓ Chicago - Vacant
- ✓ Dallas - Bonnie Brandon
- ✓ Philadelphia - Bob Hendler
- ✓ San Francisco - Carlos Torrico
- ✓ Washington - Linda Kazinetz
- ✓ FLSA/Pay -
Deborah McKissick



QUESTIONS AND ANSWERS

- ✓ FEDCLASS_APPEALS@OPM.GOV
- ✓ FEDERAL_FLSA@OPM.GOV
- ✓ MADRUMMO@OPM.GOV
- ✓ (202) 606-2990

Thanks!

