

**Fair Labor Standards Act Decision**  
**Under section 204(f) of title 29, United States Code**

**Claimant:** [claimant's name]

**Position:** Construction Inspection Technician,  
YE-0809-03

**Organization:** [city] Resident Office  
Construction Branch  
Construction Operations Division  
[city] District  
U.S. Army Corps of Engineers  
[city, state]

**Claim:** Temporary position should be  
nonexempt, thus due FLSA overtime pay

**OPM decision:** Nonexempt. Due the difference between  
FLSA and title 5 overtime pay

**OPM decision number:** F-0809-03-01

/s/ Jeffrey E. Sumberg

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Jeffrey E. Sumberg  
Deputy Associate Director  
Center for Merit System Accountability

11/30/09

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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 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 (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

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

**Decision sent to:**

[claimant's name and address]

[servicing HR office and address]

[servicing HR office and address]

Director of Human Resources  
U.S. Army Corps of Engineers  
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441 G. Street, NW  
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## Introduction

On April 30, 2007, the U.S. Office of Personnel Management's (OPM) San Francisco Field Services Group (now San Francisco Oversight and Accountability Office) received an FLSA claim from [claimant's name]. This claim was forwarded to the OPM Center for Merit System Accountability's Classification and Pay Claims Program Manager in Washington, DC, in accordance with agency procedures. [Claimant's name] is assigned to the [city] Resident Office, Construction Branch, Construction-Operations Division, of the U.S. Army Engineer District, with a duty station of [city, state]. He currently occupies the position of Construction Inspection Technician, YE-0809-03, under the National Security Personnel System (NSPS). His position was converted to NSPS from a Construction Representative, GS-809-11, position in February 2008. The claimant states he applied for and was selected for a Construction Inspector (Non-Exempt) position to serve for 179 days in support of the recovery efforts for Hurricane Katrina. He found that, after a month, the non-exempt status was not reflected in his pay voucher. He disagrees with the agency denial of his claim which he states was based on the "quality/level of work performed, rather than the contract (**Tasker [number] non-exempt**)" between the [city] District and himself. We accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency, including the agency's administrative report (AAR) which we received on May 19, 2008. In addition, to help decide the claim we conducted a telephone interview with the claimant on February 4, 2009, and interviewed by telephone the on-site team's lead construction inspector on March 23, 2009, and the claimant's second-level supervisor, the Resident Engineer of the [name] Resident Office, on March 16, 2009.

## General Issues

As an appointed Federal Government employee, the claimant's entitlement to compensation is based on Federal pay statutes. *See United States v. Testan*, 424 U.S. 392 (1976). Under the FLSA claims adjudication process, we render decisions based on application of the relevant statutory and regulatory provisions. Claimant's belief that the FLSA overtime pay at issue in this claim is owed based on the terms of a contract is, therefore, misplaced.

## Background

The claimant provided a copy of a sample recruitment bulletin released October 25, 2005, for a Construction Inspector (non-exempt)/EM-047 duty description, to solicit volunteers for 179-day deployments for Katrina's Task Force [name]. This task force's goal was to rebuild levees to pre-Katrina protection levels by the start of hurricane season 2006. He expressed his interest by email in volunteering for one of the non-exempt construction inspector positions. He was notified of his nomination and selection on January 23, 2006, by AutoNotify-ENGLink (a COE automated email) to fill a position and was assigned to the previously cited tasker. Copies, provided by the claimant, showed the assigned tasker with the deployed duty description [number] with an estimated arrival date of February 6, 2006. The duty description information provided in the tasker states in part "Serves in a developmental capacity for potential progression

to GS-6 DUTY #[number] and ultimate progression to the target position, GS-7, DUTY #[number].” It states the duties involve serving as an on-site construction inspector where work projects involve standardized procedures of limited difficulty, and assisting in the inspection of more difficult work.

The claimant indicated that, when he discovered his pay did not reflect the non-exempt status in his overtime pay rate, he contacted the human resources representative and was advised she had been instructed to change the FLSA status from non-exempt to exempt. He first requested a position audit through the [city] District which advised him the matter must be resolved through his home district. He indicates his request to the [city] District HR was sent back to the [city] District. The claimant states that office ruled against him, “basing their decision on the quality/level of work performed, rather than the contract which was agreed to.” He stated a fourth request was sent to the [city] District Equal Employment Opportunity Office.

The agency advised when employees are needed for emergency work, they are recruited by use of a bulletin, such as the appellant provided, and, as selected, are assigned to a specific tasker which is used in place of an SF-50, a notification of personnel action. The tasker provides information as to the event, deployed duty description, individual tasker number, and estimated arrival date, along with contact information and other instructions. The duty description information provides a duty title, duty number, and FLSA exemption status as well as a brief description of the duties, supervision, qualifications, required training, required equipment, and physical demands and medical factors.

The agency’s administrative report (AAR) provided copies of two duty statement position descriptions (PD); i.e., [number] and [number]. [PD number] is the Construction Inspector (QA/QC) PD, an FLSA non-exempt position which describes the developmental duties discussed above. The second, [PD number], is a PD titled Construction Inspector (full performance) and is stated to be FLSA exempt. It indicates the incumbent is assigned at an Emergency Field Office with responsibility for unusually difficult and complex inspection work of either an assigned shift; an unusually large single-phase project; several projects in a geographical area, or as a specialist. While these duty statement PDs list a duty title and FLSA exemption status, they do not show an occupational series or grade level, or any basis for the FLSA exemption determination. The section for Qualifications shows only a requirement to possess a valid State and Government driver’s permit to operate motor vehicles in accomplishing assigned duties.

The AAR also provided copies of two personnel taskers, [number] and tasker extension [number]. The first tasker shows the claimant to be assigned to a duty title of Construction Inspector (full performance), Duty number [number], an FLSA exempt position. The second tasker was for the purpose of extending the original deployment end date from June 1, 2006, until August 4, 2006. It shows the claimant assigned to the same duty title, duty number, and exempt FLSA status. The claimant returned to his home station June 28, 2006.

### **Position information**

The claimant was assigned to Construction Inspector duties on the [name] Canal, Interim Closure Structure, Contract No. [number], in [city, state]. [Name] is one of three outfall canals, [name]

and [name] being the others, which drain water from [city] northward into [lake name]. This contract was one of three for installation of interim flood gates and pump stations to close off a storm surge from entering the canals from the Lake yet allowing rainfall runoff to move out of the canals and into the Lake when the gates are closed. The [name] Canal suffered breaches in two places during Hurricane Katrina. The Corps committed to have the interim closures and temporary pumps operational before the start of the 2006 hurricane season, a goal which they met.

The claimant was part of a team of four construction inspectors working at the [name] site, which operated on a 24 hours per day, 7 days per week basis. The resident engineer indicated he rotated the inspectors so at least one was physically on-site at all times. Construction was occurring on both sides of the canal. When not on the construction site, the inspectors would use the trailer to complete paper work, e.g., maintain logs, check data, record progress, write reports, etc.

The AAR included a statement from the Resident Engineer indicating he was the claimant's supervisor for the time he was assigned to Task Force [name]. He states the duties performed by the claimant were in accordance with those described in the Construction Inspector (full performance) level PD, which was noted to be FLSA exempt. He annotated that PD as to the percent of work performed as follows.

40 percent – Under duty 1, describes compiling daily record of progress of work, delivery of material and equipment and installation of the same, incidents, weather, men and equipment used, rate of progress, instruction issued to contractors, agreements reached with contractors, general working conditions, etc. Responsible for preparing monthly estimates of work in place and rate of progress, submit contractor's partial payment estimates and progress reports to resident Engineers.

40 percent – Under duty 2, is responsible for compliance of contractor and government employees with approved safety precautions for the projects and safety program in general. Incumbent advises personnel on safety requirements and makes follow-up contacts with contractors to ensure correction of violations. Incumbent takes appropriate action to correct any conditions that (1) appear to be potential accident hazards, (2) impair the safety of the work or other individuals, or (3) might cause damage to Government or contractor property.

10 percent – Under duty 3, as necessary, assists the Office Engineer by preparing estimates of quantities for lump sum contract payment items of work performed, preparing quantity and cost estimated for modification and change orders, and compilation of data for reports.

10 percent – Also under duty 3, could also include assisting in administration of contracts for construction/operations/maintenance/and rehabilitation/renovation of roads, buildings, utility systems, grounds etc. Incumbent inspects items under construction and service contracts for operation and maintenance of project facilities. Maintains a daily log of

projects inspected, records facts concerning work activity, and assists construction representative and project engineer in preparing a variety of documents.

### **Evaluation of FLSA coverage**

The provisions of 5 CFR part 551 (1998), the regulations in effect during the period of this claim, govern the FLSA exemption determination in this claim.<sup>1</sup> The terms of 5 CFR 551.208 discuss the effect of performing different work or duties for a temporary period of time on FLSA exemption status. As noted in 5 CFR 551.208(a)(1), this section applies only when an employee performs work or duties which are not consistent with the primary or grade controlling duty of the official PD. This period of temporary work may or may not involve a different geographic duty location. As further provided in 5 CFR 551.208(a)(2), this section does not apply if an employee is detailed to an identical additional position as the employee's position or to a position at the same grade, series code, basic duties, and FLSA exemption status as the employee's position.

The claimant was not assigned to an identical additional position but to a duty description which differs from his position of record. Therefore, the provisions of 5 CFR 551.208 apply.

Under 5 CFR 551.208(c), an exempt employee not covered by the special provisions of paragraph (c)(3) of this section (i.e., performing temporary work at the GS-5 or GS-6 level), who must temporarily perform work or duties which are not consistent with the primary or grade-controlling work of the employee's official PD remains exempt for the entire period of temporary work or duties unless all three of the following conditions are met: (i) The period of temporary work or duties exceeds 30 calendar days; and (ii) the employee's primary duty for the period of temporary work or duties is not exempt work or duties as defined in this part; and (iii) the employee's position (including one to which the employee is temporarily promoted) is properly classified at GS-7 or above or as a Federal Wage System (FWS) supervisor at situation 3 or 4 of the FWS Job Grading Standard for Supervisors.

To determine whether the claimant is owed overtime pay under the FLSA, the normal process is to first determine whether the work performed is exempt or nonexempt from the overtime pay provisions of the FLSA. According to 5 CFR 551.201 and 5 CFR 551.202, an agency may designate an employee FLSA exempt only when the agency correctly determines the employee meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles: (1) each employee is presumed to be FLSA nonexempt; (2) exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption; (3) the burden of proof rests with the agency that asserts the exemption; and (4) the employee should be designated FLSA nonexempt if there is a reasonable doubt as to whether an employee meets the criteria for exemption. There are three primary exemption categories applied to Federal employees: executive, administrative, and professional.

The agency did not provide any rationale for its FLSA determination.

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<sup>1</sup> OPM's FLSA regulations have since been revised, effective October 2007. See 72 FR 52762.

### Executive exemption criteria

5 CFR 551.205 defines an executive employee as a supervisor or manager who manages a Federal agency or any subdivision thereof; regularly directs the work of subordinate employees; has authority to make personnel changes such as selecting, removing, advancing in pay, or promoting; and exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review; and evaluation; and other aspects of personnel management.

The claimant's temporary duties were nonsupervisory. He did not serve as a supervisor or manager. Therefore, this exemption does not apply.

### Administrative Exemption Criteria

Under the administrative exemption criteria in 5 CFR 551.206, an administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all four of the following criteria:

- (a) The employee's work:
  - 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) The employee 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.
- (c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, GS employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

The claimant's temporary work did not meet (a)(1).

OPM regulations define the formulation or execution of management programs and policies as work involving management programs and policies ranging from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. 5 CFR 551.104. Employees make policy decisions or participate indirectly, through developing proposals that are acted on by others. Employees significantly affect the execution of management policies or programs typically when the work involves obtaining compliance with such policies by individuals or organizations, inside 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).

Program management functions covered by the (a)(1) criterion were vested in other positions at higher levels within the organization. The claimant's temporary work entailed providing technical oversight of contractors' construction operations for quality control purposes to ensure compliance with the existing construction contract and its provisions.

The claimant's temporary work did not meet (a)(2).

The claimant did not perform work involving general management, business, or supporting services, which includes a wide variety of specialists providing support to line managers by providing expert advice in specialized fields such as that provided by management consultants or systems analysts; by assuming facets of the overall management function such as personnel management or financial management; by representing management in business functions such as negotiating contracts; or by providing support services such as procurement and distribution of supplies.

Based on the intense nature of the contractor's operations and the time pressures for completion, the Project Engineer required all team inspectors to attend the meetings held with contractors, so all would be aware of any changes to operations. The claimant's participation in these meetings did not meet the levels required for (a)(2), representing management in negotiating contracts or equivalent representational functions.

The claimant's temporary work did not meet (a)(3).

This criterion describes work involving participation in the functions of a management official, which 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 work aspects. To support exemption, such assistants must have knowledge of the supervisor's policies, plans, and views and must be delegated and exercise substantial authority to act for the supervisor. The claimant did not perform work of this nature with the delegated authority to act for the supervisor.

The claimant's temporary work did not meet (b)(1).

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 involve substantial judgment based on considering, adapting, and applying principles to numerous variables. See 5 CFR 551.104. 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.

The claimant was required to use his knowledge of construction methods and techniques and to exercise judgment while observing the contractor's construction operations, e.g., driving steel piles, forming and pouring concrete, etc., to assure that the correct materials were being supplied, contract specifications were being followed as to depth, angles, and spacing of pilings; nature, spacing, and dimensions of concrete reinforcement; composition of concrete; safety of operations; etc. The contract specifications were defined. The claimant's review was based on the application of well-established standardized construction methods and techniques. If the claimant had a question or concern, it was raised with the inspection team leader who would deal with the contractor. Only in case of a safety issue presenting an immediate danger was the claimant authorized responsibility for stopping contractor operations.

The claimant's temporary work met (b)(2).

OPM regulations indicate that work 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. 5 CFR 551.104. These knowledges typically are acquired through considerable on-the-job training and experience in the specialized subject-matter fields, as distinguished from professional knowledge characteristically acquired through specialized academic education.

The claimant's work requires a practical knowledge of engineering methods and techniques; combined with knowledge of construction practices, methods, techniques, costs, materials, and equipment; and the ability to read and interpret engineering and architectural plans and specifications. During his assignment to the [city] District, his work involved serving as a construction inspector (quality assurance) monitoring the work performed by contractors while building an interim closure gate and new pumping stations. This included drilling and setting of pilings, and construction of the pump station buildings. He was responsible for monitoring construction operations to assure safety requirements were adhered to and construction deficiencies did not occur, e.g. concrete was properly tested, reinforcement material was used in accordance with contract specifications, etc.

The claimant's temporary work did not meet (c).

OPM regulations indicate discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering various possibilities. 5 CFR 551.104. However, firm commitments or final decisions are not necessary to support exemption. The “decisions” may consist of recommendations for action rather than actual taking of action. The fact that decisions may be subject to review, and may occasionally be reversed, does not mean discretion and independent judgment is not exercised. Briefly, such work must meet the following criteria. 1. Work must be sufficiently complex and varied as to regularly require such judgment in determining approaches and techniques to be used and evaluating results. This precludes work where standardized techniques, procedures, or other guidelines specifically govern the action. 2. The employee must have authority to make such judgments. 3. The decision must be significant. The term significant is not so restrictive as to include only decisions made by employees who formulate policy, however it does not extend to kind of decisions that affect only procedural details of the employees own work or deciding whether a situation conforms to clearly applicable criteria.

Positions excluded from the (c) criterion typically apply standardized techniques or procedures to govern their actions. Consequently, the appropriate course of action is oftentimes apparent. The claimant worked independently to perform his daily activities but he did not exercise the degree of discretion and independent judgment characteristic of criterion (c). As previously discussed, the claimant’s work was performed independently using the context of the agency’s contracts and procedures and well-established standardized construction methods and techniques. However, any problems or deviations pertaining to the actual management of the work would be reported to others on the staff for resolution.

Criterion (d) did not apply to the claimant’s temporary work.

The claimant’s work did not meet the administrative exemption.

### **Professional Exemption Criteria**

Under the professional exemption criteria contained in 5 CFR 551.207, a professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee’s primary duty consists of --

- (1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor’s or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

- (2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee; or
  - (3) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the items listed under 5 CFR 551.207 (a)(3).
- (b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.
  - (c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
  - (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at the GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

The claimant's temporary work does not meet (a)(1).

To meet (a)(1), the claimant must perform work comparable to that performed by professional employees on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field. The claimant uses a practical knowledge of civil engineering principles and construction methods and techniques to perform his work. His duties do not require the professional engineering knowledge gained through formal education resulting in a degree in engineering. His construction inspector duties are performed in support of a resident or project engineer.

The claimant's temporary work does not meet (a)(2).

The claimant's work is not in a field of artistic endeavor.

The claimant's temporary work does not meet (a)(3).

The claimant's work is not in the computer software field.

The claimant's temporary work does not meet (b).

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 involve substantial judgment based on considering,

selecting, adapting, and applying principles to numerous variables. See 5 CFR 551.104. 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.

The claimant's work did not meet (b) for the same reasons as discussed under the administrative exemption.

The claimant's temporary work does not meet (c).

The claimant's work did not meet (c) for the same reasons as discussed under the administrative exemption.

Criterion (d) is not applicable to the claimant's temporary work.

The claimant's temporary work was not professionally exempt.

If an exempt employee becomes nonexempt under the criteria of 5 CFR 551.208(c), the employee must be considered nonexempt for the entire period of temporary work or duties. If the employee received title 5 overtime pay for work performed during the first calendar day, the agency must recalculate the total pay retroactive to the beginning of the period because the employee may now not be entitled to some or all of title 5 overtime pay received but may be owed FLSA overtime pay. 5CFR 551.208(c)(2).

The claimant's work in his temporary position did not meet the executive, administrative, or professional exemption criteria. Therefore, it is nonexempt; and properly covered by the overtime provisions of the FLSA.

### **Claim Period**

Under 5 CFR 551.702, all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (three years for willful violations). A claimant must submit a written claim to either the employing agency or OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date establishing the period of possible back pay entitlement. The appropriate date for preserving the claim period is April 30, 2007, when OPM received the claimant's request. In this instance, the claim's time period starts on February 6, 2006, when the claimant was deployed to Task Force [name] and ends on June 28, 2006, when he returned to his home duty station.

### **Decision**

The claimant's work performed during his temporary assignment was nonexempt (i.e., covered by the FLSA's overtime pay provisions) and he is entitled to compensation for all overtime hours worked at the FLSA overtime rate.

The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid. As stated in 5 CFR 550.806, the claimant is also owed interest on the back pay. The agency must follow the compliance requirements on page ii of this decision. If the claimant believes the agency has incorrectly computed the amount after implementing this decision, he may file a new FLSA claim with this office.