

**U.S. Office of Personnel Management
Division for Human Capital Leadership and Merit System Accountability
Compensation Claims and Fair Labor Standards Act Programs**

**Center for Merit System Compliance
1900 E Street, NW
Washington, DC 20415-6000**

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

Appellant: [name]

Agency classification: Aerospace Engineer
GS-0861-13

Organization: U. S. Army Space Command
Assistant Chief of Staff, G6
[location]

Claim: Exemption status. Request backpay.

OPM decision: Exempt. Must file OPM
compensation claim for backpay.

OPM decision number: F-0861-13-01 originally released as
F-0861-13)

//signed//

Deborah Y. McKissick
FLSA Claims Officer

August 2, 2004

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 Office of Personnel Management administers the Fair Labor Standards Act. 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]

[name], Acting Chief
Civilian Personnel Advisory Center
[location]

Introduction

On March 4, 2003, the Center for Merit System Compliance, of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name]. The agency's administrative report was received on March 4, 2003, and the claimant's response to the report was received on April 1, 2003. We accepted and decided his claim under section 4(f) of title 29 (FLSA), United States Code.

In reaching our FLSA decision, we carefully reviewed all information furnished by the claimant and his agency.

General issues

The claimant believes he is entitled to pay for the period from June 3, 2002 to February 6, 2003, when his position FLSA status was designated nonexempt as reflected on the Notification of Personnel Action form (SF-50) of June 3, 2002, appointing him as a career-conditional employee in the competitive service. The claimant was an Aerospace Engineer, GS-0861-13, during the claim period.

Background

The claimant and the agency agree that the SF-50, effective date June 3, 2002, showed the claimant's FLSA status as nonexempt. On February 6, 2003, an authorized agency official approved and signed a corrected SF-50 changing the FLSA status to exempt.

In his response to the agency administrative report, the claimant addressed the issues surrounding his termination from the agency, during the probationary period. The claimant also stated that he is seeking reinstatement with full back pay and benefits. The claimant correctly submitted a claim regarding his termination to the Merit Systems Protection Board (MSPB). OPM does not have jurisdiction to adjudicate the matter of the claimant's termination or to reconsider the decision of the MSPB and, therefore, may not consider these matters in adjudicating an FLSA claim.

The agency administrative report stated that "an administrative error was made when [the claimant] was brought on board on 3 June 2002. His position was Aerospace Engineer, GS-0861-13 and the Position Description read it was EXEMPT."

Evaluation

FLSA Exemption Designation

The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (5 CFR 551.202). Sections 551.205, 551.206, and 551.207 of title 5, Code of Federal Regulations (5 CFR) contain criteria governing whether the claimant's position should be exempt from the FLSA.

Professional Exemption Criteria

The professional exemption criteria in 5 CFR 551.207, define a professional employee as 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) *Primary duty test.* OPM guidance indicates that the primary duty test is met if the employee's work 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 items in (3)(i) to (3)(iv).

The claimant's work meets (a)(1) of the primary duty test. The position description, whose accuracy the appellant did not dispute, states that the claimant "must have in-depth knowledge of the principles and practices involved in the variety of professional, technical, and specialty fields based on professional training in aerospace engineering and extensive experience in research and development; testing and evaluation of and/or involving satellite communications user terminals, and related ground systems; to research data and recommend solutions to novel and unique testing problems; and to provide expert technical advice pertaining to SATCOM test and evaluation programs."

- (b) *Intellectual and varied work test.* OPM guidance indicates that the employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

The claimant's work meets the intellectual and varied work test. During the claim period, the claimant's responsibilities included providing expert technical advice concerning satellite orbital characteristics, development and evaluation programs for the new Satellite Wideband constellation based on the application of professional aerospace engineering knowledge.

- (c) *Discretion and independent judgment test.* Established OPM guidance indicates that the employee frequently exercises discretion and independent judgment under only general supervision, in performing the normal day-to-day work.

The claimant's work meets the discretion and independent judgment test. The record shows that independently provided advice, recommended a course of action, and coordinated on professional aerospace engineering assignments. His supervisor provided administrative rather than technical oversight and guidance.

- (d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

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

Based on the information provided, the claimant's work meets all of the professional criteria as described in 5 CFR 551.207.

Decision

Based on the above analysis, the claimant's position meets the professional exemption criteria, and is therefore, exempt, i.e., not covered by the provisions of the Fair Labor Standards Act.

As an exempt employee, any claim for backpay must be adjudicated as a compensation claim under OPM regulations at Part 178 – Procedures for Settling Claims, in Title 5 of the Code of Federal Regulations (CFR). Because the record does not show that the claimant has filed a title 5 claim with his former employing agency and received a denial of the claim, we may not accept and process a compensation claim on his behalf at this time.