

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

Claimant: [name]

Agency classification: Investigator
GS-1810-12

Organization: Atlanta Field Office
Southeastern Region
Defense Security Service
Department of Defense
Atlanta, Georgia

Claim: Back pay; Should Have Been
Classified as Nonexempt

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

OPM decision number: F-1810-12-02

/s/ Kevin E. Mahoney

Kevin E. Mahoney
Deputy Associate Director
Center for Merit System Accountability

10/16/06

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 Office of Personnel Management 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. 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, and then pay the claimant the amount owed him. The agency must also submit a Standard Form 50 showing that the claimant's exemption status has been changed to comply with this decision. The SF 50 should be sent to this office within 15 workdays of receiving 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:

[claimant's name and address]

Mr. James Wachter
Director for Human Resources
Defense Security Service
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Alexandria, VA 22314-1651

Chief, Classification Appeals
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Introduction

On June 2, 2006, the Office of Personnel Management (OPM), Division for Human Capital Leadership and Merit System Accountability, Center for Merit System Accountability, Atlanta Field Services Group, received an FLSA claim from [name]. He currently occupies an Investigator, GS-1810-12, position with OPM's Federal Investigative Services Division, Center for Investigative Programs Operations, Field Operation Program, Southern Group, Atlanta Investigations Field Office, in Atlanta, Georgia. The claimant seeks overtime pay under the FLSA for work he performed prior to March 20, 2005, when he was employed in an Investigator, GS-1810-12, position with the Defense Security Service (DSS), before he and his DSS component were transferred from DSS to OPM. He seeks "all back-pay overtime I am eligible for from DSS, going back as many years as possible." We received the agency administrative report (AAR) on July 26, 2006.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his former employing agency, including information developed during telephone interviews on August 4, 2006, with the claimant and his immediate supervisor during the period of the claim, and other information we developed during our fact-finding process.

General Issues

The claimant disputes DSS' designation of his position, and the work he performed, as exempt. He believes he performed the same work for DSS as he currently performs for OPM which recently changed his FLSA status from exempt to nonexempt.

In its AAR, DDS asserts it properly exempted the claimant's position based on its analysis of the duties of the position described in a "decision from the OPM FLSA Oversight Division in 2001 (June 26, 2001, Decision No. F-1810-12-1...." The agency indicates the change in FLSA exemption status by OPM has no bearing on this claim since the work assigned to the claimant "may or may not be the same as the duties performed for the DSS."

We concur with DSS that we must make exemption determination decisions by comparing the actual duties performed by the claimant to criteria and guidance in FLSA regulations, laws, and guidelines. Therefore, our decision rests upon our analysis of the duties and responsibilities assigned to and performed by the claimant while he was employed by DSS.

Position Information

The claimant was assigned to a DSS standard position description (PD) (PD number 2833). The major duties are not annotated with percentages of time. Although the PD lists such duties as accompanying Industrial Security Representatives on security review and assistance visits to contractor facilities and participating on planning committees, focus groups, and/or process action teams engaged in developing and recommending new or more efficient methods and techniques for conducting investigations, the claimant performed these duties a small minority of the time. The claimant stated, and the former immediate supervisor confirmed, the claimant spent 95 percent or more of his time conducting personnel security investigations (PSIs). The investigative reports were used by adjudicators within the Department of Defense to make security clearance determinations.

The claimant was responsible for conducting background investigations that relate to varying levels of security clearances. Work typically was assigned geographically primarily based on where the claimant resided. He would review the case coversheet and attached papers to determine the aspects of the subject's life he needed to cover, e.g., residences, educational institutions, and employment. Based on the coverage requirements of the type of investigation, he would determine the functions he needed to perform to obtain necessary information, e.g., record reviews (e.g., police records, divorce records), subject interviews, and reference checks, determining the action necessary to develop the record sufficiently to meet investigative manual guidelines. The claimant then wrote reports of the information found. The reports identified the sources contacted, the type and extent of contact the source had with the subject, going into detail by exception. Information gathered was forwarded to the Personnel Investigations Center (PIC) at Fort Meade, Maryland, and to other field offices for follow-up, e.g., derogatory information, unclaimed residences, unclaimed employment. Once the PIC received information from all investigators who were assigned pieces of a case and was satisfied coverage met established requirements, it forwarded the completed background investigation package to adjudicators who made the security clearance determination.

The work required applying investigative techniques, such as interview techniques, reading body language and facial expressions, various document research techniques, to establish case facts; i.e., "the who, what, where, when and how." He needed to determine whether answers provided were conflicting, and if there has been falsification on the security application. This might lead to a confrontational interview with the subject under investigation when the subject's claim of past, limited drug use was contradicted by other interviews indicating current drug use. If the subject deliberately withheld the information, this might leave him/her vulnerable to coercion and/or blackmail, which could pose a national security threat. Fully developing information was critical for the adjudicator to determine whether the subject could be appropriately placed in a position of public trust.

Evaluation of FLSA Coverage

Sections 551.201 and 551.202 of title 5, Code of Federal Regulations, require that an employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles. Each employee is presumed to be FLSA nonexempt. Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption. The burden of proof rests with the agency that asserts the exemption. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. There are three exemption categories applicable to Federal employees: executive, administrative, and professional. Neither the claimant nor the agency assert the claimant's work is covered by the executive or professional exemptions and, based on careful review of the record, we concur. Therefore, our analysis is limited to the administrative exemption.

The agency asserts in its rationale for FLSA exemption that the:

implementing regulations that govern OPM and DOL [Department of Labor] are completely different....The August 19, 2005, opinion letter [cited by OPM in its

memorandum changing the claimant's FLSA status from exempt to nonexempt] cites the "revised final FLSA regulations under 29 C.F.R. [sic] § 541.203(j)" that specifically finds that public sector investigators do not meet the requirements for the administrative exemption, but the very abbreviated OPM regulation is silent on jobs or job types that should or should not be exempt...It is important to note that the DOL opinion letter is simply that: an opinion letter issued at the request of an unknown individual seeking an official DOL opinion, much like a non-binding private IRS ruling letter....In contrast, OPM's June 26, 2001 Decision No. F-1810-12-1 adjudicated a true case and/or controversy between the DSS and a GS-12 non-supervisory investigator. The duties...did not change in any important way at DSS between the time that the ...Oversight Division decision was issued and the date the employees transferred to OPM....

The OPM June 26, 2001 Decision No. F-1810-12-1 is determinative regarding whether former DSS GS-1810-12 investigators should be re-classified as non-exempt based upon the administrative capacity exemption pursuant to 29 U.S.C. § 213(a)(1), unless OPM revises 5 C.F.R. [sic] § 551.206 by specifically declaring public sector investigators are non-exempt as DOL does with 29 C.F.R. [sic] § 541.203(j), or if OPM reconsiders and overrules Decision No. F-1810-12-1.

Administrative Exemption Criteria

Section 551.206 of 5 CFR contains the criteria governing whether the claimant's position should be exempt from the FLSA under the administrative exemption criteria. The position is exempt if it meets administrative exemption criteria (a)(1), (2), or (3), known as the primary duty test, and (b) through (d). We note the agency's argument that OPM's FLSA implementing regulations are separate and distinct from those issued by DOL. We concur. As indicated in *Billings v. United States*, 322 F.3d 1328 (Fed. Cir. 2003):

Because OPM administers the Fair Labor Standards Act with respect to employees of the federal government [sic], it is the OPM regulations, rather than the Labor Department regulations, that govern the application of the Fair Labor Standards Act to appellants. To be valid, however, the OPM regulation must be consistent with the Labor Department regulation.

Further, *Billings* states:

Thus, we must first determine whether the OPM interpretation of the statute is reasonable, as well as whether any difference between OPM's interpretation and the Labor Department standard is required to effectuate the consistency of application of the provision to both federal [sic] and non-federal [sic] employees. *See, e.g., Zumerling v. Devine*, 769 F.2d 745, 750 (OPM's guidelines must "harmonize with the statute's 'origin and purpose,' ... as well as with the Secretary of Labor's regulations." (internal citations omitted)).

Primary duty test

The primary duty test is met if the work meets criterion (a)(1), (2), or (3).

Criterion (a)(1) deals with work that significantly affects the formulation or execution of management policies or programs.

Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals 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 others act on. 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.

The administrative exemption applies to work directly related to assisting with the running or servicing of the agency or its customers. The DSS program functions covered by criterion (a)(1) were vested in other DSS employees engaged in such functions as developing and maintaining the investigator manual and evaluating field office program operations. The claimant was not engaged in formulation or execution of management policies or programs, e.g., evaluating operating programs of the organization. He was not engaged in obtaining compliance with program policies or determining the accomplishment of program objectives. Rather, he was responsible for conducting day-to-day investigative duties leading to the development of complete background investigations for DSS' customers. This work contributed to, but did not significantly affect security clearance and employment decisions since such decisions were made by the security and/or human resources staff of DoD components based on the factual information presented in the claimant's investigative reports which presented facts but did not draw conclusions or recommend actions. Therefore, we find that the claimant's work did not meet criterion (a)(1). Our previous decision cited by DSS failed to properly address the nature of DSS' investigations work and, therefore, must be set aside.

Criterion (a)(2) involves general management or business functions or supporting services of substantial importance to the organization serviced.

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, general management or support services include services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject-matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into non-exempt production functions. To warrant exemption from the FLSA, such work must involve 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.

Security functions are, in their broadest sense, staff support functions in that they assist management in making employment and security clearance decisions. However, just as clerical, technician, and blue collar work in a staff supply function fail to meet the administrative

exemption, not all work in other staff functions meet the administrative exemption. The claimant did not perform a support function of substantial importance to the organizations serviced as envisioned in the FLSA. While his work entailed the application of specialized subject-matter knowledge; i.e., a breadth and depth of investigative techniques, he did not perform support or other staff services as discussed under (a)(1). Rather than advising DSS management on program matters, representing DSS on management and/or program matters with customer agencies, he conducted fact-finding background investigations as discussed previously. Therefore, we find that the claimant's work does not meet criterion (a)(2).

Criterion (a)(3) involves substantial participation in the executive or administrative functions of a management official.

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 this type of work. Therefore, we find that the claimant's work did not meet criterion (a)(3).

Based on the preceding analysis, the claimant's work did not meet the primary duty test.

Nonmanual duty test

The nonmanual work test is met when the employee performs office or other predominantly nonmanual work which meets either criterion (b)(1) or (b)(2).

Criterion (b)(1) covers work that is intellectual and varied in nature.

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. 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.

According to the claimant, and corroborated by his supervisor, most of claimant's work was based on standardized procedures or precedents. For example, the investigation manual contained specific coverage requirements depending on the type of clearance, e.g., seven years' coverage for top secret. The manual provided a decision logic table for secret clearances to determine the scope of investigation necessary to respond to negative information, e.g., what action to take depending on the nature of the arrest or conviction. While the claimant was required to remain aware of changing conditions and interpreting findings, e.g., identifying leads and issues to explore by piecing together the information gathered, his selected courses of action were driven by established case coverage standards. The work was performed within the confines of well-established techniques and did not require or permit selecting, adapting, and

applying principles. While requiring the application of a high degree of skill and knowledge, the claimant had little discretion or opportunity to adapt or innovate techniques and procedures. The claimant's work does not meet criterion (b)(1).

Criterion (b)(2) covers work of a specialized or technical nature that requires considerable specialized training, experience, and knowledge.

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledge characteristically acquired through specialized academic training.

The claimant's work required knowledge of personnel investigation and related laws, rules, and regulations; and knowledge of investigative techniques and procedures. This knowledge and skill was applied to the full range of PSIs, and highly sensitive special investigations. The in-depth practical knowledge required to perform the full range of work would typically come from several years of on-the-job training and experience. Accordingly, we find the position meets criterion (b)(2).

Discretion and independent judgment test

Work meeting this test (criterion (c)) requires the employee to frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. 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 the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The "decisions" made as a result of the exercise of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption.

Work reflective of discretion and independent judgment must meet the three following criteria: (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action; (2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently; and (3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria. 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. Decisions made as the result of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion.

The claimant worked independently. However, he did not have the opportunity to exercise independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. Instead, he applied approved procedures and techniques and had limited discretion within those approved procedures, e.g., obtaining a sufficient number and quality of sources to meet coverage requirements, information sufficient for an adjudicator to reach a conclusion on derogatory and discrepant issues. The decisions he made were not significant within the meaning of the regulation in that they affected the procedural details of his work, e.g., how to balance work on the multiple investigations assigned at any time. As discussed previously, the work performed by the claimant involved the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment. Therefore, the claimant's work fails to meet criterion (c).

Criterion (d)

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. Because the claimant's position was classified above these grade levels, this criterion does not apply to the claimant's work.

The administrative exemption criteria are not met.

Decision on FLSA Coverage

Based on the above analysis, the claimant's position did not meet the criteria for executive, administrative, or professional exemption and is, therefore, properly covered by the overtime provisions of the FLSA.

Willful Violation

The claimant asks that we determine whether his back pay should extend for two or three years. The latter is applicable to situations in which the employing agency willfully violated the FLSA. 5 CFR 551.104 defines "willful violation" specifically as follows:

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

Clearly, not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that the agency erred in the exempt status of the claimant. However, error alone does not reach the level of willful violation as defined in the regulations. A finding of

willful violation requires that either the agency knew that its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. The regulation further instructs that the full circumstances surrounding the violation must be taken into account.

In the instant case, DSS' exemption determination was based on a decision issued by OPM as discussed previously. Therefore, we also find that the agency acted in good faith and did not recklessly disregard the requirements of the Act. Therefore, we find the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

Decision

The claimant's work is nonexempt; i.e., covered by the overtime provisions of the FLSA. Therefore, the claimant is entitled to compensation for all overtime hours worked at the FLSA overtime rate.

The agency states:

If OPM overrules its decision or revises 5 C.F.R. [sic] 551.206, there should be no retroactive effect. *See generally Ackinclose v. Palm Beach County, Florida*, 845 F. 2d 931, 932-936 (11th Cir. 1988). (In the case of *Garcia v. San Antonio Metropolitan Authority* (1985) the US Supreme Court overruled its own decision, *National League of Cities v. Usery* (1976) (1976). For reasons analogous to this FLSA issue, the 11th Circuit refused to apply the *Garcia* decision retroactively).

Under 29 U.S.C. § 216, Federal courts have substantial discretion in fashioning remedies for violations of the FLSA. Unlike the courts, OPM's administrative claims process derives its remedy authority from the Back Pay Act, codified as 5 U.S.C. § 5596. It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). According to the plain language in 5 U.S.C. § 5596, there is no provision to modify or waive its retroactive effect.

The claim was received by OPM on June 2, 2006. The claimant can receive back pay only for two years prior to that date, less the back pay and interest from OPM received for FLSA overtime performed within the claim period. 5 CFR 550.806 also states that the claimant is owed interest on the back pay. The agency must follow the compliance requirements on page ii of this decision.