

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

Claimant: [name]

Agency classification: Investigator
GS-1810-12

Organization: [name] Field Office
Western Group
Field Operations Program
Federal Investigative Services Division
Office of Personnel Management
[location]

Claim: Back Pay for Nonexempt Overtime Work

OPM decision: Denied

OPM decision number: F-1810-12-03

/s/

Robert D. Handler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

6/11/07

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, to ensure that they are treated in a manner consistent with this decision. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision.

Decision sent to:

[name and address]

Deputy Associate Director
Center for Human Capital Management Services
Office of Personnel Management
1900 E. Street, NW
Room 1469
Washington, DC 20415

Director for Human Resources
Defense Security Service
1340 Braddock Place
Alexandria, VA 22314-1651

Chief, Classification Appeals
Adjudication Section
Department of Defense
Civilian Personnel Management Service
1400 Key Boulevard, Suite B-200
Arlington, VA 22209-5144

Introduction

In his undated letter received by OPM on May 17, 2007, [name] seeks “assistance in filing a Claim for Back Pay Overtime” during his employment with the Defense Security Service (DSS).” He states:

This claim is being filed based on an earlier decision notice issued in late 2005 by the Department of Labor relative to the Fair Labor Standards Act (FLSA), which designated the Investigator Position I presently occupy and I also occupied while employed with DSS...from 08/15/1985 to 02/20/2005, from FLSA Exempt to FLSA Nonexempt....I have not previously filed a claim for Overtime Back Pay from DSS...I have not filed a Claim for this Back Overtime Pay in any US Court, nor have I been represented by a Collective Bargaining Unit regarding this Claim.

We have accepted and decided this claim under section 4(f) of the FLSA as amended and OPM’s implementing regulations under 5 CFR part 551, subpart G.

Background

The claimant’s request for back pay for FLSA overtime he worked is not based on a Department of Labor FLSA decision. Rather, it is based on a February 2005 decision by OPM’s Center for Human Capital Management Services to change the exemption status of field investigators, such as the claimant, from exempt to nonexempt. OPM made these employees whole and advised them of their right to file FLSA claims for overtime performed while employed by DSS.

OPM’s decision on such a claim filed by a similarly situated DSS investigator (OPM decision number F-1810-12-02) found the work the DSS investigator performed was nonexempt, reversing an OPM FLSA Oversight Division decision (June 26, 2001, Decision No. F-1810-12-1) which found such work to be exempt.

Evaluation

Timeliness

The FLSA claims process in 5 CFR part 551 includes the adjudication and settlement of claims for unpaid overtime. Any FLSA claim filed by a Federal employee on or after June 30, 1994, is subject to a two-year statute of limitations (three years for willful violations) contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, United States Code). In order to preserve the claim period, a claimant or a claimant’s designated representative must submit a written claim either to the agency employing the claimant during the claim period or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is responsible for proving when the claim was received by the agency or OPM.

The claim in this case accrued on February 20, 2005. Assuming willful violation attached, any claim for the FLSA overtime pay in question in this case would expire no later than three years

after the claim accrued; i.e., February 20, 2008. The claimant is responsible for preserving his claim (see (5 CFR § 551.702(c)). The claimant acknowledges he had not preserved his claim prior to filing with OPM, which received his claim request on May 17, 2007. Therefore, based on the record, we find the claimant preserved his claim no earlier than May 17, 2007. Because the maximum three-year statutory limitation period for filing the claim with OPM had not yet run out on May 17, 2007, the claim is not barred from our consideration.

Evaluation of the Overtime Claim

Assuming, *arguendo*, the claimant performed nonexempt work while employed in an Investigator, GS-1810-12, position with DSS, and willful violation did not occur, any entitlement to back pay for FLSA overtime based on this claim expired on February 20, 2007, due to the running of the two-year statute of limitations period. Therefore, any entitlement to back pay and interest due the claimant must be based on our finding DSS willfully violated the FLSA with regard to the claimant.

Willful Violation

In order for the claimant to receive back pay for three years, in accordance with 5 CFR 551.702 (a and b), we must determine the agency knew its conduct was either prohibited or showed reckless disregard of the requirements of the Act. Willfulness presupposes a violation of the Act has actually occurred. As noted previously in this decision, DSS exempted the claimant's position and work based on an OPM FLSA Oversight Division decision (June 26, 2001, Decision No. F-1810-12-1) which found such work to be exempt. Reliance on a decision issued by the Federal agency with final administrative authority for FLSA matters for DSS employees cannot be construed as willful violation of the Act.

Because willful violation is not attached to this claim, any entitlement to back pay for FLSA overtime based on this claim expired on February 20, 2007, due to the running of the two-year statute of limitations period. Therefore, the claim is barred and may not be allowed. The Portal-to-Portal Act does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order to be considered on its merits. OPM does not have any authority to disregard the provisions of the Act, make exceptions to its provisions, or waive the limitations it imposes.

Decision

The claim is denied since it is time barred.