

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

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

**Position:** Lead Border Patrol Agent  
(Senior Intelligence Agent)  
GS-1896-12

**Organization:** [city] Border Patrol Sector  
Coastal Border Division  
Office of Border Patrol  
U.S. Customs and Border Protection  
U.S. Department of Homeland Security  
[city, state]

**Claim:** 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-1896-12-01

/s/ Jeffrey Sumberg

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

6/24/09

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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 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]

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## **Introduction**

On October 9, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim from [claimant's name]. He believes he should have been treated as FLSA nonexempt in the former position he occupied from March 19, 2006, through June 23, 2007, and is entitled to FLSA overtime pay for that time period. The claimant's former position was classified as a Lead Border Patrol Agent (Senior Intelligence Agent), GS-1896-12, and located at the [city] Border Patrol Sector, Coastal Border Division, Office of Border Patrol, U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security, in [city, state]. Effective December 20, 2007, the claimant was promoted to a Supervisory Border Patrol Agent (Intelligence), GS-1896-13, position with the agency, thus no longer encumbers the position occupied during the claim period. 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 February 5, 2008. In addition, to help decide the claim we conducted a telephone interview with the claimant on September 2, 2008, and interviewed by telephone his first-level supervisor on September 10, 2008. The supervisor has since retired from the agency.

## **Background**

The claimant was placed in the Lead Border Patrol Agent (LBPA), GS-1896-12, position [position description (PD), number [number]], on March 19, 2006. At the time, the claimant's and other similar LBPA positions were not covered by the FLSA. However, CBP's Office of Human Resources Management conducted a study of the positions' FLSA exemption determinations. Their findings were summarized in a June 25, 2007, memorandum which concluded that LBPA positions like the claimant's were appropriately FLSA nonexempt. Consequently, effective June 24, 2007, the agency changed the FLSA designation of the positions to nonexempt.

Employees occupying affected LBPA positions were notified of their possible entitlement to back pay for overtime worked for periods prior to June 24, 2007, and advised of their right to file a claim with either CBP or OPM. The claimant subsequently submitted a claim to OPM. In its response to OPM's request for information received on February 5, 2008, CBP's Compensation and Organizational Effectiveness Division reversed its June 2007 determination by indicating it now believed the claimant's position was exempt under both the executive (5 CFR 551.205) and administrative (5 CFR 551.206) exemption criteria of the FLSA. However, they indicated that all LBPA's would temporarily remain nonexempt pending a review of each individual claim either by the agency or OPM. [Claimant's name] claim is part of that review.

**Position information**

The claimant's LBPA position was assigned to the Coastal Border Division's [city] Sector Intelligence Unit (SIU), which has an estimated five employees. Overall, the Sector covers approximately [number] square miles with a [number] mile coastal border along the [name] shores in [state, state, and state]. The Sector is divided into six stations located in [cities]. The claimant, along with three other GS-1896-12 LBPA's, was assigned to the SIU to support the approximately 50 to 75 GS-1896 border patrol agents (BPA) located at any of the Sector's six stations. The claimant's position was supervised by the SIU's Patrol Agent-in-Charge, who occupied a GS-1896-13, supervisory BPA position.

CBP's chief function is to prevent and deter the illegal entry of aliens into the country, identify and apprehend smugglers of aliens, and enforce the criminal provisions of immigration and nationality laws. As communicated by the claimant's former supervisor, the Sector's primary threat is the introduction of terrorism into the country from [country]. CBP needs actionable intelligence to combine with the ongoing operational information in building a complete and accurate view of potential threats from across the border. As an intelligence agent, the claimant was responsible for collecting, refining, and analyzing strategic and tactical intelligence. The claimant gathered information from his own observations (e.g., from interviewing individuals) or indirectly from various sources such as the stations' BPAs; informants; Federal, State, and local law enforcement agencies; social service organizations; and private citizens. Using this information, he identified, assessed, forecasted, and reported on trends, patterns, and potential threats to assist those agents involved in granting or preventing people, goods, and conveyances from entering through the maritime border. The claimant prepared reports for dissemination throughout the stations, Sector, Division, or CBP, and to other law enforcement agencies via various intelligence databases on topics including specific incidents, information from partner agencies, apprehensions, statistical data, etc. He completed field intelligence reports covering topics or major developments regarding weapons, drugs, smuggling, and other illegal activities. Depending on the threat's imminence, the claimant also e-mailed or phoned the stations' staff to share urgent information.

The claimant performed other enforcement functions that required using a variety of techniques such as interviewing, record searches, surveillance, and information collection from other law enforcement agencies. He prepared for interviews with apprehended individuals by using information systems and databases to conduct searches for prior criminal record, current residence, property records, etc. Occasionally, the claimant participated on local law enforcement taskforces whose targets included criminal aliens. The claimant estimates spending 50 percent on the enforcement functions described above and the remaining 50 percent on team leader duties. The claimant said this work entailed providing training, guidance, and technical assistance to the stations' BPAs on the work methods, policies, procedures, guidelines, and techniques for identifying, collecting, disseminating, and analyzing information. Specifically, he provided classroom training to BPAs on how to write reports, collect information, use automated law enforcement and immigration databases, etc.

The claimant and the SIU's Patrol Agent-in-Charge certified to the accuracy of the duties described in PD number [number] in separate September 20, 2007, memorandums. The PD

includes the position's major duties and responsibilities, but our review found it also includes misleading and inaccurate statements. For example, the PD describes performing a broader spectrum of leader duties than those previously performed by the claimant. The claimant said he was responsible for individuals assigned to the SIU, including GS-11 BPAs detailed from their border patrol stations and National Guard members, for an on-the-job cross training in the intelligence field. As team leader, the claimant assigned work based on individual capabilities, provided verbal feedback on work performed, reviewed work products, reported conduct- or performance-based issues, and provided technical guidance and assistance. Although he provided technical assistance, the claimant did not assign work; monitor work progress; make recommendations on leave requests, disciplinary actions, performance evaluations, promotion actions, awards, or any other personnel management-related issues; resolve informal complaints; or advise employees on other administrative matters. The PD and corresponding evaluation statement should be carefully examined to ensure it describes and considers only those duties assigned, observable, identified with the position's purpose and organization, and expected to continue or recur on a regular basis over a period of time.

### **Evaluation of FLSA coverage**

To determine whether the claimant is owed overtime pay under the Act, the normal process is to first determine whether the work performed is exempt or nonexempt from FLSA overtime pay provisions. 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 which 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.

In its AAR, CBP's Compensation and Organizational Effectiveness Division (COED) concluded the claimant's position meets the executive and administrative exemption criteria. Neither the claimant nor the agency assert the claimant's work is covered by the professional exemption; and, based on careful review of the record, we agree that it is not covered. Therefore, our analysis is primarily limited to the executive and administrative exemption criteria in effect during the claim period. Only the 1998 FLSA regulations in place during the claim period apply to this claim, but the following evaluation includes a brief analysis of the position against the current FLSA regulations, effected on October 17, 2007, in order to fully respond to the agency's coverage evaluation.

## I. Executive Exemption Criteria

### FLSA Regulations (1998)

Under the executive exemption criteria in 5 CFR 551.205 (1998) in effect at the time of the claim, an executive employee is a supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets both of the following criteria:

- (a) The employee's primary duty consists of work which:
- 1) Has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and
  - 2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.
- (b) In addition to the primary duty criterion that applies to all employees, the following employees must spend 80 percent or more of the work time in a representative work week on supervisory and closely related work to meet the 80 percent test: (1) employees in positions properly classified in the General Schedule (GS) at GS-5 or GS-6 (or the equivalent in other white collar systems); (2) firefighting or law enforcement employees in positions properly classified in the General Schedule at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29, United States Code; and (3) supervisors in positions properly classified in the Federal Wage System below situation 3 of Factor 1 of the *Federal Wage System Job Grading Standard for Supervisors* (or the equivalent level in other comparable wage systems).

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

The agency's rationale for supporting the criteria, as stated in the AAR, is as follows:

The Lead Border Patrol Agent exercises operational authority over a group of agents by "providing guidance and technical direction to the team, conducting or arranging for training on team activities concerning work methods,...and the techniques of operational briefings for Sector personnel. He serves as a coach and facilitator to build an effective and efficient team." He ensures that work assignments and projects are carried out in a timely and efficient manner. He is responsible for reviewing and approving completed work for accuracy, completeness, substance of reports...to ensure they reflect the policies, position and views of the Agency.

As an LBPA, the claimant was limited in responsibility to providing technical assistance to the BPAs assigned to and performing intelligence functions for any of the Sector's six stations. Interviews with the claimant and former supervisor confirmed that personnel management authorities at that time rested solely with the Sector's managers and supervisors. The claimant's work supported the Sector's intelligence gathering efforts, but his position was organizationally assigned to the Sector with supervision received from Sector supervisors and managers. The claimant provided technical assistance to the stations' BPAs, but these individuals were not directly part of the SIU organization and not "subordinates." Consequently, the claimant was not vested with the authority to make or recommend personnel changes including selecting, removing, advancing in pay, or promoting subordinate employees as described in (a)(1).

The claimant performed a broader range of leader duties when assigned responsibility for employees detailed to the SIU. The duties included assigning work, setting work priorities, reviewing work, making decisions on work problems, providing technical on-the-job training, and reporting conduct- or performance-based issues. Regardless, the team leader duties did not extend to having authority or making recommendations on the hiring, firing, promoting, or any other personnel administration issues concerning subordinate employees. It is at the Sector management's discretion to select individuals for SIU details without his involvement or feedback. The claimant's substantive interaction with detailed SIU employees was limited to the technical aspects of their work (i.e., the work methods, quality, quantity, timeliness, etc.) rather than the personnel administration by-products of their work (i.e., promoting, advancing in pay, removing, etc.).

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

As described in 5 CFR 551.104 (1998), exercising discretion and independent judgment involves: (1) comparing and evaluating possible courses of conduct; and (2) interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Firm commitments or final decisions are not necessary to support exemption. "Decisions" made as a result of the exercise of independent judgment may consist of recommendations for action rather than the actual taking of action. Work reflecting discretion and independent judgment must meet the three following criteria:

- 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 performing work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines specifically governing the employee's action.
- The employee must have authority to make such determinations during the course of assignments.
- Decisions made independently must be significant. Although this term is not so restrictive as to include only the kinds of decisions made by employees formulating policies or exercising broad commitment authority, it does not extend to the kinds of decisions affecting 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 claimant did not perform any leader duties which regularly required discretion and independent judgment in making recommendations or decisions affecting the SIU function. He prioritized work, assigned work, offered work instructions and on-the-job training, and provided performance evaluation feedback for individuals detailed to the SIU. However, the claimant's limited delegated leader responsibilities rarely extended beyond the procedural details of his subordinates' own work. In contrast to (a)(2) criterion, his decisions and recommendations did not affect the quality and effectiveness of the Sector's intelligence gathering function. The claimant shared meaningful assessments on potential threats to Sector and station management, who utilized this information to make those significant planning-related decisions or recommendations on the budget, staff, goals, etc.

Criterion (b) did not apply to the claimant's work.

The claimant's work did not meet the executive exemption criteria.

#### FLSA Regulations (2007)

Recent FLSA regulations are intended to update and clarify preceding issuances by providing a clearer understanding of coverage for executive employees with new definitions and examples. See Federal Register, Vol. 72, No. 179, September 17, 2007. Current regulations state "An *executive employee* is an employee whose primary duty is management (as defined in 5 CFR 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function)..." 5 CFR 551.205(a) (2007).

Distinct from prior regulations, 5 CFR 551.104 (2007) includes the *management* definition as follows:

...performing activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production of financial records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

The analysis above under the 1998 regulations which were applicable during the claim period determined the claimant's work did not meet the executive exemption criteria. We note that the claimant's work also would not have met the executive exemption criteria under the current regulations. The current regulations make it apparent the claimant's work would not even satisfy

the fundamental definition of an executive employee with “management” being its position’s primary duty. The claimant performed a limited number of activities under the “management” definition, but there is an expectation that an executive employee has a broader scope of work planning and control and human resource management responsibilities than the limited range of leader responsibilities performed by the claimant.

## II. Administrative Exemption Criteria

### FLSA Regulations (1998)

Under the administrative exemption criteria in 5 CFR 551.206 (1998) in effect at the time of the claim, 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 primary duty consists of work which:
  - 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 work did not meet (a)(1).

OPM defines 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. 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 or 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 engaged in such roles as developing, maintaining, or evaluating SIU's program operations. The claimant was responsible for the daily intelligence activities directly impacting the detection and prevention of illegal border activities. The work entailed providing technical guidance to the stations' BPAs on, for example, the best apprehension methods, tactics, evidence collection, case processing, setting up surveillance equipment, storing and obtaining data, writing intelligence reports, and general safety issues. He also shared information on trends involving drugs, weapons, assaults on agents, smugglers, etc. This work did not significantly affect the execution of management programs and policies. As an LBPA, the claimant's role was as an advisor to the stations' intelligence agents, assisting them in the day-to-day methods of identifying, collecting, and analyzing information to assess its credibility and take appropriate action to interdict criminal activities. As a Sector employee with responsibility for supporting BPAs at various stations, the claimant's position was impeded from either making significant determinations on the overall Sector program operations or enforcing compliance of Sector work objectives while performing station-directed work. He was concerned with the operating functions of the intelligence gathering process, but the responsibility for the operation and accomplishment of the SIU program, including interpreting and developing policies and procedures to be acted on by SIU staff, was held by others like the SIU's Patrol Agent-in-Charge.

The claimant's 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. Criterion (a)(2) was, therefore, not met.

The claimant's 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 such work.

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

As described in 5 CFR 551.104 (1998), 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. 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 required exercising judgment in collecting, assessing, analyzing, and disseminating credible intelligence information, but his work was limited to a single subject matter area (Sector- and station-level border protection intelligence) rather than multiple subject matter fields. The claimant and supervisor confirmed the work requires good writing skills; interviewing skills; interpersonal skills; and understanding of the criminal element and how they operate; familiarity with common border patrol operations and practices; and proficiency in multiple languages including English, Spanish, Portuguese, or Creole. It also requires familiarity with several intelligence databases. For example, the Treasury Enforcement Communication System is an overarching law enforcement information collection, risk assessment, and information sharing repository for law enforcement and investigative information. The claimant used the combination of knowledge, skills, and abilities to identify intelligence leads, issues, and trends from piecing together information gathered by him or the stations' BPAs. The claimant's work required being mindful of the constant changes in the conditions of the environment with its potential affects on the relevancy, legitimacy, importance, etc. of the intelligence collected.

The claimant's work required applying a high degree of skill and knowledge, but it provided little discretion or opportunity to adapt or innovate SIU's established techniques and procedures. The chief objective was to gather and analyze actionable intelligence for identifying potential national threats. How the claimant approached this work was pre-determined by applying standardized, well-established techniques and precedents outlined in the agency's intelligence operating manuals and practices. His work did not require weighing the best alternatives from among a broad range of possible actions; therefore, the (b)(1) criterion was not met.

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

As described in 5 CFR 551.104 (1998), 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. Such knowledge typically is 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.

To provide intelligence information on various subjects (e.g., terrorism and other activities detrimental to national security), the claimant's work required determining whether information called for more development, immediate action, and/or dissemination to the station, Sector, or agency-wide level. Fully developing the information was critical to expanding the advance knowledge on incoming people and goods, enabling BPAs to more thoroughly assess risk levels and detect potential threats earlier. The information obtained from interviews was a critical source of intelligence. During interviews, the claimant applied investigative techniques such as reading body language and facial expressions, as well as preliminary document and database research, to establish facts or the "who, what, when, where, and how's" of the situation. Moreover, the claimant's interviews were often confrontational when attempting to obtain sensitive and/or potentially incriminating information.

As an intelligence agent, the claimant applied a substantial knowledge of immigration and nationality laws, regulations, policies, methods, and procedures as it applied to the identification, collection, analysis, and dissemination of intelligence information. Briefly, this required knowledge, skills, or abilities in the following: report writing, briefing techniques to present findings to higher-level officials, investigative training methods and techniques to instruct other agents on intelligence collection responsibilities, and common methods on developing trends and profiles for a variety of sensitive national security issues. Developing these knowledges and skills required considerable specialized formal or on-the-job training and practical work experience typically gained from many years in a variety of CBP positions.

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

As described in 5 CFR 551.104 (1998), the exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making decisions after considering the various possibilities. The work must involve sufficient variables as to regularly require discretion and judgment. The employee must have the authority to make determinations or take action, and the decision must be significant. The agency's rationale for supporting the criterion, as stated in the AAR, is as follows:

A considerable portion of the work includes the exercise of discretion and independent judgment with respect to matters of significance (5 CFR 551.206). The recommendations resulting from the investigations he oversees and conducts often have Agency-wide impact on significant programs and operations. The parties affected include Agency personnel, government contractors and non-government personnel. This is an example of the level of importance or consequence of the work performed.

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 (including the planning, organizing, prioritizing, and executing of assignments), but he did not exercise the degree of discretion and independent judgment characteristic of criterion (c). As previously mentioned, the claimant's work was governed by and performed within the context of standardized agency intelligence procedures and past precedents in collecting, analyzing, and evaluating intelligence information. He used established agency guidelines, standards, and processes, in addition to past

practices, to deal with smuggling, narcotics trafficking, use of informants, and the sharing of information with other law enforcement agencies in determining when sufficient information was collected for interdiction purposes. In performing his work, the claimant used CBP-issued standard operating procedures which were supplemented by collection requirement guidelines developed by the SIU's Patrol Agent-in-Charge and other Sector supervisors. The Sector-specific guidelines prescribed the usual steps to be taken in certain situations. For example, terrorist or gang activities require interviewing appropriate individuals; contacting the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the National Targeting Center; preparing reports for headquarters; etc. The claimant's work was also governed by a variety of immigration laws applicable to the rights of the accused, search and seizure, admission and deportation, rules of evidence, etc.

The claimant's decisions were not significant within the meaning of the regulation in that they primarily affected the procedural details of his work (e.g., by establishing processes for sharing intelligence information with applicable parties, developing trend analyses, etc.). He typically referred situations to his supervisor for guidance or approval when the impact may extend beyond the routine details of his work, e.g., when recruiting an informant, requesting information or assistance from other law enforcement agencies, etc.

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

Since the claimant's work met only (b)(2) of the administrative exemption criteria, the position cannot be considered exempt using those criteria.

FLSA Regulations (2007)

Recent FLSA regulations are intended to update and clarify preceding issuances by providing a clearer understanding of coverage for administrative employees with new definitions and examples. Current regulations state, "An *administrative employee* is an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations, as distinguished from production functions, of the employer or the employer's customers and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 5 CFR 551.206 (2007).

The claimant's work did not meet the administrative exemption criteria. He performed non-manual work related to SIU's operations, but his primary duties did not include the exercise of discretion and independent judgment with respect to matters of significance. The current regulations include factors to consider when determining if an employee exercises discretion and independent judgment with respect to matters of significance including, but not limited to, whether the employee:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices;
- Carries out major assignments in conducting the operation of the organization;

- Performs work that affects the organization's operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the organization;
- Has the authority to commit the employer in matters that have significant financial impact;
- Has authority to waive or deviate from established policies and procedures without prior approval;
- Has authority to negotiate and bind the organization on significant matters;
- Provides consultation or expert advice to management;
- Is involved in planning long- or short-term organizational objectives;
- Investigates and resolves matters of significance on behalf of management; and
- Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

While the claimant's work required choosing between alternative intelligence collection methods and techniques depending on the circumstances, this does not meet the "discretion and independent judgment" threshold with respect to matters of significance as described in the ten factors catalogued above. He carried out very specific, short-term assignments, rather than major ones, related to immediate interdiction activities that did not affect the organization's operations to a substantial degree. He was not vested with the authority to formulate, affect, interpret, or implement management policies or operating practices at his level. He also could not waive or deviate from established agency policies or procedures, and was not authorized to negotiate or bind his organization on significant matters. The claimant is very knowledgeable and experienced in the intelligence field, but it was the Sector's supervisors and managers who were tasked with providing consultation and expert advice to others on intelligence program matters, as well as planning and submitting short- and long-term organizational objectives to higher level management officials.

The analysis above under the 1998 regulations applicable during the claim period determined the claimant's work did not meet the administrative exemption criteria. We note the claimant's work also would not have met the administrative exemption criteria under the current regulations. Under the current regulations, exercising discretion and independent judgment implies the employee has authority to make an independent decision, free from immediate direction or supervision. Decisions made may consist of recommendations for action rather than the actual taking of action. The regulations note the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. Although he worked with independence as well as freedom from immediate supervision and direction, the claimant's work

required using skill in applying well-established intelligence collection and enforcement techniques outlined and governed by agency operating standards and procedures.

### Conclusion

The claimant's work in his former 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. The claimant is owed compensation for the difference in overtime payment due under the FLSA and any overtime payment received under title 5.

### **Claim Period**

Under the regulations applicable during the claim period, all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (and three years for willful violations). See 5 CFR 551.702 (1998). 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 October 9, 2007, when OPM received the claimant's request. The claim's time period began on October 9, 2005. In this instance, the claim's time period starts on March 19, 2006, when the claimant was placed in the LBPA position and assigned to PD number [number], and ends on June 24, 2007, when the agency designated the position as nonexempt pending review by OPM of this and other claims filed by LBPAAs assigned to the same PD.

Although not germane to this claim, the next issue normally examined in establishing the claim period is if it should be extended to three years based on whether the agency's actions met willful violation criteria. "Willful violation" is defined 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.

5 CFR 551.104 (1998).

Clearly not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that CBP erred in the claimant's exempt status determination and those of other LBPAAs. Based on fact-finding conducted as a result of an earlier LBPA FLSA claim, COED (then the Compensation Programs and Policy Division) determined the individual's work was nonexempt and awarded him back pay and interest. As a result of CBP's study, its June 25, 2007, memorandum found the LBPAAs positions were appropriately nonexempt. Shortly thereafter, the FLSA designations of affected LBPA positions were changed to nonexempt. In response to OPM's request for information, the CBP's COED, in an apparent reversal of the agency's June 2007 findings, provided an analysis determining the claimant's work is exempt under the executive and administrative criteria of the FLSA. However, COED indicated all LBPA positions would nonetheless remain nonexempt pending OPM's review.

To prove willful violation, there must be evidence that CBP showed reckless disregard of the Act's requirements. Instead, we find the agency took proactive steps to correct erroneous FLSA determinations discovered as the result of an earlier FLSA claim. In keeping with the principle of the presumption of nonexemption, CBP declined to change the exemption status pending OPM's review of this claim and other LBPA claims filed with OPM. These actions, combined with the inherent complexity of applying exemption criteria to positions like the LBPA, causes us to conclude the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

### **Decision**

The claimant's work was nonexempt (i.e., covered by FLSA's overtime provisions), and he is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on October 9, 2007, and the claimant can receive back pay only for two years prior to that date. We find no indication of willful violation by the agency. The claim period begins on March 19, 2006, when the claimant was assigned to the GS-12 LBPA position.

The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime pay already 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 he believes the agency incorrectly computes the amount, the claimant may file a new FLSA claim with this office.