

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

Claimant: [name]

Agency classification: Airway Transportation Systems
Specialist
FG-2101-I

Organization: Department of Transportation
Federal Aviation Administration (FAA)
Airway Facilities Division
SMO [name]
[location]

Claim: Exemption status and backpay for overtime.

OPM decision: Nonexempt. Due any difference between FLSA overtime pay and overtime pay received under FAA's personnel management system

OPM decision number: F-2101-I-01

/s/ Jeffrey E. Sumberg

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

5/27/09

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 (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 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]

The Honorable [name]
United States Senator
[address]

Assistant Administrator for Human
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U.S. Department of Transportation
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Program Director for Personnel
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Introduction

On June 6, 2002, the Center for Merit System Compliance, now the Center for Merit System Accountability (also formerly the Office of Merit System Oversight and Effectiveness), of OPM received an FLSA claim from [name]. We received a partial agency administrative report on February 6, 2003, from the Federal Aviation Administration (FAA), and the claimant's response to the report on February 13, 2003. We received the final parts of the agency report on August 31, 2005. We accepted and decided his claim under section 204(f) of title 29 (FLSA), United States Code.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and the agency, including information obtained from telephone interviews with the claimant, his first-level supervisor, and higher level FAA Technical Operations program officials, and current work samples provided by the claimant in November 2008.

General issues

The claimant believes his FLSA exemption status in the positions he occupied was misclassified from June 1995 to the present. The claimant believes he is due backpay plus interest for any overtime worked during the claim period, as an FLSA nonexempt employee.

Background

Effective March 3, 2000, the claimant was promoted from Airway Transportation Systems Specialist, FG-2101-12 [position description (PD) number SO-E481 converted to FV-2101-H on July 2, 2000], to Airway Transportation Systems Specialist, FG-2101-13 (PD number SOAAF027). The claimant's position was reassigned from FG-2101-13 to FV-2101-I, effective July 2, 2000. The claimant was temporarily promoted to Supervisory Airway Transportation Systems Specialist, FV-2101-J, from February 17, 2002, to March 17, 2002. On March 17, 2002, the claimant returned to his permanent position, Airway Transportation Systems Specialist, FG-2101-I. All the aforementioned positions were classified FLSA exempt, except the FV-2101-H position was converted to nonexempt status in July 2000 after the claimant had already left the position as the result of a May 23, 2001, Memorandum of Agreement (MOA) between the FAA and the Professional Airway System Specialist (PASS) union representing the employees occupying those positions. As noted in the MOA:

[O]n April 14, 2000, U.S. Court of Federal Claims Judge Christine O.C. Miller issued a decision finding, among other things, that plaintiffs Garry Davidson, an 856 Electronics Technician, Danny Koonce, a 2101 Environmental Support System Specialist and 2101 NAS Area Specialist, and James Kelley, an 1825 Aviation Safety Inspector, were misclassified by the FAA as exempt from the FLSA....

Evaluation

Jurisdiction

FAA and PASS executed an MOA, effective May 23, 2001, in response to a bench ruling issued by the United States Court of Federal Claims which held that certain employees in the 2101 and other series were nonexempt from the overtime provisions of the FLSA. See *Davidson v. United States*, No. 98-535C (Fed. Cl. April 14, 2000). Under the terms of the bargaining unit agreement (BUA), the OPM “complaint and compliance system” must be used for matters relating to overtime pay entitlement under the FLSA, as amended. These matters are excluded from the scope of the negotiated grievance procedures. See BUA Article 34, Section 6, and Article 5, Section 6. By entering into the MOA, FAA and PASS have not modified or nullified the terms of the BUA. The BUA, Article 79, Section 2, provides: “Upon implementation of this Agreement, any pertinent provisions of any written local, regional, or national agreements, understandings or like documents which increases or diminishes entitlements as expressly contained within or otherwise conflict with the express provisions of the Agreement are invalid.” Therefore, any terms of the MOA which conflict with or diminish entitlements within the BUA are invalid.

The MOA is not, nor does it purport to be, an amendment of the BUA. See BUA, Article 80. OPM retains the authority to review PASS employees’ claims as provided for in the BUA. The language of the MOA supports this conclusion since it directs the parties to resort to an “applicable statute or regulation” to resolve the FLSA overtime back pay issues unresolved by the parties through the ADR process (MOA, Section 2). In this situation, the applicable statute (section 204(f) of title 29, United States Code) and regulation (part 551 of title 5, Code of Federal Regulations (CFR)) authorize OPM to administer the FLSA for FAA employees. Therefore, the terms of the MOA prohibiting the advancement of additional claims in any forum are invalid under the terms of the BUA, and OPM retains jurisdiction over *FLSA overtime pay claims* filed by PASS bargaining unit members. (Emphasis added).

Current case law indicates if a person filing an FLSA claim was a bargaining unit member during any part of the complaint period, the unit was covered by a collective bargaining agreement (CBA), and the agreement did not explicitly exclude FLSA matters from its negotiated grievance procedure (NGP), then the person’s administrative avenue of redress is limited to the NGP. Congress intended that such a grievance procedure is to be the exclusive administrative remedy for matters not excluded from the grievance process. *Carter v. Gibbs*, 909 F.2d 1452, 1454-55 (Fed. Cir. 1990) (en banc), cert. denied, *Carter v. Goldberg*, 498 U.S. 811 (1990); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). Section 7121(a)(1) of title 5 mandates that the grievance procedures in negotiated collective bargaining agreements be the exclusive administrative procedures for resolving matters covered by the agreements. *Accord, Paul D. Bills, et al.*, B260475 (June 13, 1995); *Cecil E. Riggs, et al.*, 71 Comp. Gen. 374 (1992). Based on the information provided by the claimant and the agency, the claimant was covered by the CBA between the Professional Airways Systems Specialists Division (PASS), (AFL-CIO) and the Federal Aviation Administration, U.S. Department of Transportation. Section 6 of Article 5 of the BUA specifically excludes matters concerning overtime under the FLSA, as amended. Because determination of exemption status is necessary to determine FLSA overtime

entitlement, OPM has jurisdiction to adjudicate both the FLSA exemption status and overtime parts of the claim.

Period of the Claim

As provided for in the Portal-to-Portal Act of 1947, as amended (section 255(a) of title 29, United States Code), FLSA pay claims are subject to a two-year statute of limitations, except in cases of willful violation where the statute of limitations is three years. On December 5, 2001, the claimant filed a grievance on this matter, which ultimately was withdrawn by the claimant on May 16, 2002. He subsequently filed a claim with OPM as noted previously in this decision. Under the specific and controlling language of the CBA covering the claimant, this matter was specifically excluded from coverage by the CBA's NGP. Therefore, we find the claim was preserved effective June 6, 2002, when it was received by OPM.

Claim Adjudication Process

In his FLSA claim letter, claimant indicates his belief, based on the *Davidson* decision, he was wrongly classified as exempt under the FLSA. Further, he states in the MOA "the FAA admits its mistake and attempts to make restitution with most of the bargaining unit. I however, was excluded."

Under the provisions of section 204(f) of title 29 (FLSA), United States Code and 5 CFR 551.706, OPM determines the facts necessary to adjudicate a claim decision. As stated in 5 CFR 551.202, the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee.

We note the agency changed the exemption status of the claimant's FV- 2101-H position to comply with *Davidson v. United States*, No. 98-535C (Fed. Cl. April 14, 2000). We will not substitute our judgment for that of the court. Accordingly, we find that the claimants' work in that position during the claim period was nonexempt despite the fact it was not covered under the conditions of the MOA. *Davidson* did not address his FV-2101-I work. Therefore, we may not rely on the MOA or *Davidson* for determining the exemption status of his work in his FV-2101-I position, but must base our decision on the actual work assigned to and performed by the claimant.

Position Information

The following is a description of the duties performed by the claimant based on all information of record.

The GS-12/Level H PD states the claimant works in the Maintenance Operations Area of a General NAS (National Airspace System) Sector, performing a variety of functions "relating the operation of the NAS." Maintenance Operations is "responsible for ensuring NAS facilities, services, systems, and equipment perform their intended function and conform to national and regional policy, procedures, and standards." The first listed work "objective" of the position, occupying 35 percent of the time, is "determining whether specific services, systems, or

subsystems are operating (or capable of operating) within applicable parameters and specifications, and the technical acceptability or status thereof.” This includes providing “appropriate systems and service certification as required by agency policy and guidelines.” This function is followed by 10 tasks, ranging from planning and conducting operational and diagnostic tests to recommending system software design changes.

The second major duty, occupying 40 percent of the time, states the incumbent “[i]nitiates action for the repair or restoration of services and systems, possible reconfigurations to minimize service interruptions, and the relative criticality of particular functions to safe and efficient operation of the NAS.” The six tasks associated with this function range from coordinating maintenance and operational activities to “takes decisive action to resolve major problems and assure the continuous availability and total reliability of NAS services.” The third major duty, occupying 20 percent of the time, states the incumbent “[c]oordinates and directs the maintenance and restoration of critical systems and subsystems within the sector.” The three tasks supporting that duty range from providing technical assistance to maintenance personnel for resolution of subsystem malfunctions to “makes independent determinations regarding continuity of the facilities that comprise the NAS and resolve major coverage problems through the use of various system configurations.” The last major duty, occupying five percent of the time, states the incumbent implements changes to NAS systems and services, assisting FAA and contract activities to “ensure interface compatibility in the development, procurement, and installation of modification and enhancements.” The four tasks supporting that duty range from testing or modifying systems, identifying needed improvements, and developing requirements to “develops methods of enhancing efficiency of service through modification/application of existing technology.”

The knowledge requirements are those “of the technology, system interrelationships, and concepts” of the NAS. The PD states the incumbent of the position needs “skill in planning, developing, and integrating new systems, including requirements and specifications for new, large scale systems.” It does not address what the subject matter of the technology is, whether the work requires the application of the theories and practical knowledge of any recognized scientific field. However, other factors imply the primary technical field is and/or includes electronics.

The PD notes supervision is limited, e.g., “When the work is performed in a 24 hour facility no supervisory presence is available for much of the time.” Substantial and significant decision-making responsibilities are described under “Complexity:”

The work includes responsibility for evaluating diagnostic data from multiple systems that are integrated to provide several services or service products within the facility for use in the NAS. The responsibilities extend to software development and adaptation for both diagnostic and operational purposes and the integration of individual products into an advertised level of service. The work also involves the identification and application of workable solutions in situations requiring reconfiguration of major system elements or “work-arounds” to meet operational needs.

The GS-13/Level I Service Center Coordinator (SSC) PD includes the same or similar duties:

Determines whether the majority of services, systems, or subsystems are operating (or capable of operating) within acceptable parameters and specifications, and the technical acceptability or status thereof. Provides appropriate systems and service certification as required by agency policies and guidelines. Decisions and recommendations involve major segments of the NAS which extends beyond the SMO [System Management Office] boundaries.

Initiates action for timely repair or restoration of services and systems, taking into account the availability of back-up systems, possible reconfigurations to minimize service interruptions, and the relative criticality of particular functions to the safe and efficient operation of the NAS. Directs work for the timely restoration of services and systems throughout the area of geographic responsibility of the position.

In addition, the PD states the claimant's SCC functions are:

Coordinates and directs the maintenance of critical services/systems and subsystems within the Systems Management Office (SMO) and commits resources to restoration of failed facilities.

Coordinates, evaluates, and implements changes to NAS systems and services. Coordinates FAA and contractor activities to ensure interface compatibility in the development, procurement, and installation of modifications and enhancements.

In his February 11, 2003, letter on the case, the claimant stated the significant difference between the I and H positions as follows:

...in addition to equipment responsibilities, I have an administrative overhead element to my position. I direct existing resources to help them do their jobs more efficiently by identifying needs and trends that will improve the work environment. My supervisor still has to provide those resources to me. I can only direct their usage....I cannot appropriate funds. I cannot engage in LMR or conduct or discipline procedures. I cannot speak on behalf of the FAA in any situation. In addition, I cannot assign work to specialists. I can only direct the work that has already been assigned.

Both PDs speak to the application of extensive technical knowledge. For example, the I PD states the knowledge required includes:

Extensive knowledge of the technology, systems interrelationships, and management of the NAS...In-depth knowledge to extend and refine available approaches and methods for meeting unanticipated needs affecting heavily utilized or operationally critical components of the NAS. In-depth knowledge of most or all NAS service areas (e.g., Communications Service, Surveillance Service, etc.), supplemented by substantial knowledge of all other service areas or major system....Skill in planning, developing, and integrating new systems, including requirements and specifications for new, large-scale systems.

In discussing the complexity of work, the I PD states:

The responsibilities extend to software development and adaptation for both diagnostic and operational purposes and integration of workable solutions in situations requiring reconfiguration of major system elements or “work-arounds” to meet operational needs.

The description of work implies the claimant must apply technical knowledge and skill sufficient to develop software typical of the Information Technology occupation and develop requirements and specifications for large-scale electronic and/or other systems typical of work performed by professional engineers. However, our fact-finding shows these functions are not performed by the claimant and are not part of the mission and functions of the FAA organization in which he works. Instead, we find the primary and paramount work performed by the claimant entails maintaining and certifying the systems for which he has been certified by FAA, certifying the acceptability of equipment maintained by authorized contractors, and assisting his supervisor in a senior-worker capacity in coordinating work assigned to co-workers.

The claimant’s senior worker/coordinator duties include such functions as coordinating contractor-performed maintenance and repair work; coordinating system shut down with other FAA facilities to allow maintenance and repair of equipment and systems; contacting technical staff, such as safety and engineering, for guidance on potential repair methods, such as rerouting wiring; and ordering replacement parts and ensuring availability of tools and vehicles needed to perform the work. The claimant serves as the contact point for customer-generated equipment and system maintenance and repair issues, contacting the supervisor for authorization to change co-worker assignment priorities based on customer needs. He performs a variety of administrative support functions, such as conducting safety inspections, preparing property inventory reports, tracking certifications to ensure they conform to published standards, tracking trouble tickets to identify potential trends. Therefore, we find the I PD is not fully accurate in its description of the work performed by the claimant in his coordinator position.

Evaluation of FLSA Coverage

Sections 551.201 and 551.202 of 5 CFR require an employing agency to 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 which 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. The designation of a position’s FLSA status ultimately rests on the duties actually performed by the employee. There are three primary exemption categories: executive, administrative, and professional. Our analysis of each follows. Because the claimant’s duties have not substantially changed from the beginning of the claim period to the present, and in the interests of providing a complete analysis of the claim, we have analyzed the claim under the applicable versions of the regulations in effect during the claim period.¹

¹ The current FLSA regulations took effect on October 17, 2007.

I. Executive Exemption Criteria

A. 1998 Regulations

Under the executive exemption criteria in effect at the time of the claim contained in 5 CFR 551.205 (1998), 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 primary duty test and (b) the 80 percent test.

(a) The primary duty test is met if the employee:

(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.

The primary duty test is not met.

The record shows the claimant has no delegated authority to make, suggest or recommend the personnel changes listed under the first element of the primary duty test. Instead, the claimant's authority is limited to such matters as granting spot leave for a few hours in the absence of his supervisor and providing informal input on his co-workers' performance. While the claimant functions in a team coordinator capacity, the record shows his supervisor retains the personnel authorities required to fully meet the first element of the primary duty test.

The claimant's work also does not meet the second element of the primary duty test because he does not exercise discretion and independent judgment on matters of significance as defined in 5 CFR 551.104 with regard to planning, organizing, assigning, directing, reviewing and evaluating the work of subordinates, as well as other aspects of management of subordinates, including personnel administration. The claimant's co-workers receive work assignments on an annual basis from their supervisor, authorizing them to work on specific equipment and systems. In turn, the claimant tracks work being performed to ensure his co-workers are carrying out their assignments. As stated by all persons whom we interviewed, the claimant directs work, but he does not assign work. Furthermore, we find the claimant has no subordinates within the meaning of the FLSA as discussed previously.

(b) The 80 percent test makes special provisions for employees in positions properly classified as GS-5 or GS-6; firefighting or law enforcement employees in positions properly classified at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29 U.S.C.; and supervisors in Federal Wage System positions classified below situation 3 of Factor 1 of the *Federal Wage*

System Job Grading Standard for Supervisors. These employees must spend 80 percent or more of the work time in a representative workweek on supervisory and closely related work to meet this test.

The 80 percent test is not appropriate for the claimant's position.

B. 2007 Regulations

Under the current FLSA regulations (2007), 5 CFR 551.205 provides:

(a) an executive employee is defined as 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) and who:

(1) *Customarily and regularly directs* the work of two or more other employees; and

(2) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees, are given particular weight.

(b) *Particular weight.* Criteria to determine whether an employee's suggestions and recommendations are given particular weight by higher-level management include, but are not limited to: Whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendation are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions or recommendations must pertain to employees whom the executive customarily and regularly directs. Particular weight does not include consideration of an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have particular weight even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

As defined in 5 CFR 551.104, *management* means 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 or 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 claimant's work does not meet the executive exemption criteria under the current regulations. His primary duties do not constitute *management* as defined in section 551.104 because he does not fully perform any of the activities listed. Although he orders supplies, materials, etc., to support the work assigned by the supervisor to his co-workers, his responsibilities for such work are limited as discussed previously. Additionally, he does not *customarily and regularly direct* the work of two or more other employees, and has no authority to hire or fire other employees, or make suggestions or recommendations regarding hiring, firing, advancement, promotion, or any other change of status of other employees, with particular weight given to such suggestions or recommendations.

Therefore, the claimant's work did not and does not meet the executive exemption.

II. Administrative Exemption Criteria

A. 1998 Regulations

Under the administrative exemption criteria in effect at the time of the claim contained in 5 CFR 551.206 (1998), an administrative employee is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four of the following criteria:

- (a) *Primary duty test.* The primary duty test is met if the employee's work (1) significantly affects the formulation or execution of management programs or policies; or (2) Involves management or general 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) *Nonmanual work test.* 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) *Discretion and independent judgment.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (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 white collar pay systems) must spend 80 percent or more of their work time in a representative work week on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

The primary duty test is not met.

The first element of the primary duty test is not met because the claimant's work does not significantly affect the formulation or execution of management programs or policies. As defined in section 551.104, *formulation or execution of management programs or policies* means work that involves management programs and policies which range 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 or recommending

proposals acted on by others. Employees significantly affect the execution of management programs or policies typically when the work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulations or other controls).

The claimant's work neither involves the formulation or execution of management policies or programs, nor does it *significantly* affect their execution. These functions are vested in the claimant's supervisor and higher level technical operations/facilities program managers and management staff. Instead, the claimant supports the work assignments made by the supervisor to his co-workers and himself. The claimant does not formulate policies, make policy decisions, or participate indirectly in developing or recommending proposals that are acted on by others. Such tasks are performed by higher management officials in the facilities program. The claimant's work does not significantly affect the execution of management programs or policies because he is not in a position to obtain compliance with such policies by other individuals or organizations. Instead, his role in certifying the work of contractors is to ensure contract-authorized work is performed within established technical parameters and standards. Although he is concerned with the daily and immediate operating functions of his co-workers, responsibility for the overall operation and accomplishment of his works unit's functions is held by the claimant's supervisor. Unlike exempt administrative employees, he does not perform any of the phases of program management described above, e.g., planning, coordinating, or evaluating operating programs.

The claimant does not meet the second element of the primary duty test because his work does not involve management or general business functions or supporting services of substantial importance to the organization serviced.

As defined in section 551.104, management or general business function or supporting service, as distinguished from production functions, mean the work of employees who provide support to line managers. (1) These employees furnish such support by (i) Providing expert advice in specialized subject-matter fields, such as that provided by management consultants or systems analysts; (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting or financial management; (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or (iv) Providing supporting services, such as automated data processing, communication, or procurement and distribution of supplies. (2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, 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.

The claimant's work does not meet the criteria because his work does not involve management or general business functions or supporting services of substantial importance to his organization as defined above. Such support is furnished to line managers by designated administrative support staff at higher organizational levels within the agency.

The claimant's position does not meet the third element of the primary duty test because his work does not involve substantial participation in the executive or administrative functions of a management official. As defined in section 551.104, *participation in the executive or administrative functions of a management official* means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., 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 employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor's effectiveness.

The claimant does not occupy such a position, and is neither delegated the authority nor responsibility to participate in the executive or administrative functions of his supervisor or any other management official, including acting for them in the absence of specific instructions, or taking any actions which significantly affects the supervisor's effectiveness. As discussed previously, the claimant works within clearly defined parameters on technical and administrative matters, e.g., notifying the contracting officer if landscaping, pest control, and/or janitorial contract personnel are not responsive.

The nonmanual work test is met.

The claimant's hands-on equipment and systems support work fails to meet the nonmanual work test in that it is not office work within the meaning of the FLSA. Although the claimant performs office work in his coordinator role, we find that it does not meet the first element of the nonmanual work test because it is not intellectual and varied in nature. As defined in section 551.104, *work of an intellectual nature* means work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject-matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established 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.

While the claimant exercises judgment in determining emergency work priorities when assigned to units geographically distant from the supervisor's worksite, his work is limited to a single subject-matter area (i.e., support of equipment and systems work assigned to his work unit and overseeing such work performed by contractors) rather than multiple subject-matter fields. Additionally, in overseeing and checking the work performed by contractors, he relies on application of standardized procedures, and well-established techniques and precedents outlined in agency standards. Assuming, *arguendo*, the claimant's hands-on equipment repair work is not

construed as manual work, it would also fail to meet this element since it relies on the application of standardized procedures and well-established techniques and precedents outlined in agency standards. The decisions the claimant makes for all aspects of his work are based on standard and prescribed procedures, rather than innovative techniques, or weighing the best alternative from among a broad range of possible actions.

The claimant's nonmanual work as discussed previously meets the second element of the nonmanual work test. As defined in section 551.104, *work of a specialized or technical nature* means work which requires substantial 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 education.

As a certified airways systems specialist, claimant must apply a substantial knowledge of that complex field including electronic theory and related maintenance and repair methods, techniques, processes, and procedures. As a coordinator and certified airways system specialist, development of such knowledge and skill results from considerable specialized formal and on-the-job training, and practical work experience covering many years in a variety of positions at different agency duty locations.

The discretion and independent judgment test is not met.

The claimant does not exercise the level of discretion and independent judgment to meet this test. As defined in section 551.104 (1998), *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 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 that on occasion the decisions are revised or reversed after review, does not mean 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.

- (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.

Although the claimant works independently in performing his daily activities, including planning, organizing, prioritizing and executing his assignments, he does not exercise the degree of discretion and independent judgment characteristic of this test. In performing both his direct equipment and systems support work and coordinator duties, his work is governed by and performed within the context of standardized agency parameters, procedures, and past precedents. These include agency processes for seeking technical guidance from FAA engineering components which are responsible for the types of decisions which meet this test. The decisions the claimant makes are not significant within the meaning of the regulation in that they affect the procedural details of his work (e.g., ensuring personally-performed and/or contractor-performed work meets established operating parameters; ensuring certified assigned staff are available to respond to customer requests; and ensuring parts, equipment, facilities support and other site-specific resourcing needs are met). The primary focus of work performed by the claimant or under direction is deciding whether equipment or systems are operating within clearly defined technical parameters.

The 80-percent test in 5 CFR 551.207(d) (1998) is not applicable.

Because the claimant’s position is classified above the GS-5 or GS-6 or equivalent grade level, this criterion does not apply to the claimant’s work.

B. 2007 Regulations

The current regulation under 5 CFR section 551.206 (2007), describes the administrative exemption criteria, in relevant part, as follows:

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.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term “matters of significance” refers to the level of importance or consequence of the work performed.

(b) The phrase *discretion and independent judgment* must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and

independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

- (1) Has authority to formulate, affect, interpret, or implement management policies or operating practices;
- (2) Carries out major assignments in conducting the operation of the organization;
- (3) 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;
- (4) Has the authority to commit the employer in matters that have significant financial impact;
- (5) Has authority to waive or deviate from established policies and procedures without prior approval;
- (6) Has authority to negotiate and bind the organization on significant matters;
- (7) Provides consultation or expert advice to management;
- (8) Is involved in planning long-or short-term organizational objectives;
- (9) Investigates and resolves matters of significance on behalf of management;
- (10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

(c) The exercise of discretion and independent judgment implies the employee has authority to make an independent decision, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term *discretion and independent judgment* does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

(e) 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.

The claimant's work does not meet the administrative exemption criteria of the current regulation. Although he performs nonmanual office work in his senior worker/coordinator capacity as discussed previously, his primary duties do not include the exercise of discretion and independent judgment with respect to matters of significance also as discussed previously. While he must choose and apply appropriate methods and techniques to perform equipment and/or system maintenance and repair work, and ensure contractors do the same in bringing equipment and/or systems into defined operating parameters, these do not meet the discretion and independent judgment threshold with respect to matters of significance as described in the

ten factors of the regulation, summarized above. For example, he has no authority to formulate or implement major deviations to FAA orders, standards, or tolerances. Instead, if established methods do not suffice, the claimant is expected to contact higher-level organizations, including FAA engineering components, for guidance. Thus, his decision making does not affect the organization's operations to a substantial degree; he has no authority to commit his employer in matters having significant financial impact, cannot waive or deviate from established agency policies or procedures, and is not authorized to negotiate and bind his organization on significant matters. Although the claimant is very knowledgeable and experienced in his technical field, expert advice on such systems is vested in other FAA organizations as discussed previously. The claimant is not responsible for investigating and resolving matters of significance on behalf of management, and is not authorized to represent the organization in handling complaints, arbitrating disputes, or resolving grievances. Such matters are within the authority and responsibility of higher-level supervisors and managers and/or other FAA organizations. Although he works independently, free of immediate supervision and direction, in contrast to the application of discretion and independent judgment, the claimant uses skill in applying well-established intelligence collection and enforcement techniques which are clearly outlined and governed by specific agency operating standards and procedures.

Therefore, the claimant's work did not and does not meet the administrative exemption.

III. Professional Exemption Criteria

A. 1998 Regulations

Under the professional exemption criteria in effect at the time of the claim contained in 5 CFR 551.207 (1998), 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) *Primary duty test.* 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 the following:

- (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or
- (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- (iii) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (iv) A combination of the duties described in paragraphs (a)(3)(i), (a)(3)(ii), and (a)(3)(iii) of this section, the performance of which requires the same level of skills.

The primary duty test is not met.

The agency AAR's FLSA determination rationale appears to indicate the claimant's work meets the primary duty test in 5 CFR 551.207(a)(1), stating the work performed by the claimant meets the professional exemption "based in part upon the minimum qualifications that the employee is required to possess in order to work as an Airway Systems Specialist." The rationale states: "To be eligible for an SSC Coordinator position, an employee must possess either an advanced degree or specialized knowledge of engineering principles, techniques, methods, and precedents gained in a trade or craft." The AAR also indicates the SSC coordinator position requires a significant amount of experience and formal training in the technical aspects of the NAS.

The starting point for exemption under 5 CFR 551.207(a)(1) is that the work performed is in a recognized profession. However, as noted in the OPM Qualification Standards Operating Manual which formerly covered FAA employees, the Airways Systems Specialist Series, GS-2101, for FAA positions was covered under the Group Coverage Qualification Standard for Administrative and Management Positions, and not the Group Coverage Qualification Standard for Professional Positions. While certain types of education were qualifying for placement in these GS-2101 positions, such education was not mandatory. The occupation is not recognized as a profession for which a specific degree is a standard if not universal prerequisite. The agency's rationale further fails to properly apply 5 CFR 551.207(a)(1) in that experience in a trade or craft fails to reflect the prolonged course of specialized intellectual instruction and study underlying the professional exemption. The theoretical training received by trades and craft personnel, frequently obtained in a junior or community college setting, is substantially more limited than that required to obtain an advanced degree; i.e., baccalaureate or higher. This theoretical training is typically provided as an integral part of trades and crafts apprenticeship training which may not be construed as advance training within the meaning of 5 CFR 551.207(a)(1). The fact that crafts and trades work, specifically categorized as nonexempt under 5 CFR 551.204, is qualifying for placement in the claimant's job, further supports the conclusion the claimant's work does not require the knowledge requirements defined in 5 CFR

551.207(a)(1). This limitation, although not fully articulated, is recognized in *Davidson v. United States*, No. 98-535C (Fed. Cl. April 14, 2000). Contrary to the agency's assertions, we find *Davidson* applicable to the claimant's work. As discussed previously, the claimant contacts FAA's professional engineering staff when issues requiring the application of professional knowledge arise.

The position does not meet the intellectual and varied work test.

The agency states the SCC coordinator requires the employee to "exercise creativity in analyzing and evaluating the status of a wide variety of services, systems, and subsystems, and to make determinations as to the acceptability of that status." Where such operation is not acceptable, the SCC coordinator "determines the appropriate course of action to take to resolve the problem."

As defined in 5 CFR 551.207(b) (1998), the intellectual and varied work test is met when the employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance. This test pertains to the type of thinking which must be performed by the employee to do satisfactory work. For example, in professional occupations which rely on performing established tests, thinking is not limited to determining whether specific standards are met, but interpretation of the meaning of those tests, as a whole, and deducing the actions to take based on the problems surfaced. In contrast, the claimant's work entails determining whether services, systems, and subsystems are operating within clearly defined parameters and standards. The potential appropriate courses of action are also clearly defined, e.g., making arrangements to take a system off line so that the NAS is not compromised. Therefore, the claimant's work does not meet the intellectual and varied work test.

The discretion and independent judgment test is not met

The agency states the claimant's work "involves significant responsibility for exercising independent judgment in determining the status of services, systems and subsystems, and in resolving problems when minimal acceptable levels are not maintained or when failure occurs." The rationale states the work entails "judgment in determining the appropriate response to the problems including commitment of resources, initiation of back-up systems, and reconfiguration of systems and equipment to bypass problems."

The claimant does not exercise the level of discretion and independent judgment to meet that test defined in section 551.104 (1998), for the reasons previously discussed in this decision under the Administrative Exemption Determination. As discussed previously, the claimant does not have the authority to commit resources; this authority is vested in his supervisor and higher-level managers. Established agency standards and procedures form the basis for the technical decisions made by the claimant with regard to initiating backup systems and reconfiguring systems and equipment to bypass problems. The claimant's courses of action are clearly defined by FAA procedures, including contacting the engineering staff when applicable procedures do not suffice. Therefore, the claimant's work does not meet the discretion and independent judgment test.

The 80-percent test in 5 CFR 551.207(d) is not applicable.

In addition to the primary duty test which applies to all employees, General Schedule employees in positions properly classified at the 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.

Because the claimant's position is classified above the GS-5 or GS-6 or equivalent grade level, this criterion does not apply to the claimant's work.

The agency did not find 5 CFR 551.207(a)(2) or 5 CFR 511.207(a)(3) to be applicable to the claimant's work and, based on careful review of all information of record, we concur.

B. 2008 Regulations

The current regulation under 5 CFR 551.208(a) (2007), defines the criteria for learned professionals as follows:

(a) To qualify for the learned professional exemption, an employee's primary duty primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

(1) The employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level;

(2) The advanced knowledge must be in a field of science or learning which includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction which restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed

employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in unusual cases where a lawyer has not gone to law school, or a chemist does not possess a degree in chemistry. However, the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

As discussed previously, the 2101 occupation is not an occupation which has a recognized professional status or for which advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. In qualifying candidates for placement in 2101 positions who have “specialized knowledge of engineering principles, techniques, methods and precedent gained in a trade or craft,” the agency has established the claimant’s 2101 occupation is not one for which “specialized academic training is a standard prerequisite for entrance into the profession.” This is further supported by the previously cited Airway Systems Specialist Series, GS-2101, for FAA positions which provided for entry-level qualification based on the acquisition of appropriate knowledge from experience “in occupations such as computer specialist, electronics technician, telecommunications specialist, engineer, or other work related to the position to be filled.” Engineering is the only professional occupation in the list of occupations typically providing qualifying experience.

With regard to engineering, 5 CFR 551.208(f) (2007) states that engineers generally meet the duties requirements for the learned professional exemption. Such work typically involves the application of a knowledge of such engineering fundamentals as the strength and strain analysis of engineering materials and structures, the physical and chemical characteristics of engineering materials such as elastic limits, maximum unit stresses, coefficients of expansion, workability, hardness, tendency to fatigue, resistance to corrosion, engineering adaptability, and engineering methods of construction and processing. Exempt professional engineering work includes equivalent work performed in any of the specialized branches of engineering (e.g., electrical, mechanical, or materials engineering).

In addressing engineering technician work which is similar to electronics technician work in its nature, 5 CFR 551.208(f) states:

On unusual occasions [emphasis added], engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge may also be exempt. In such instances, the employee actually is performing the work of an occupation that generally requires a specialized academic degree and is performing substantially the same work as the degreed employee, but has gained the

same advanced knowledge through a combination of work experience and intellectual instruction which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

As discussed previously, FAA has not assigned professional engineering responsibilities to the claimant's organizational component. Instead, the claimant is tasked with contacting the appropriate engineering organization for professional engineering advice and assistance when established procedures and protocols do not suffice. Therefore, we find FAA's organizational and mission structures make clear the claimant's position is precluded from performing work approximating that assigned to degreed FAA engineers.

Therefore, we find the claimant's work did not does not meet the professional exemption.

Decision on FLSA Coverage

Based on the above analysis, and the principles provided in 5 CFR 551.202 (of both the previous and current regulations), the claimant's work does not clearly meet the criteria for executive, administrative, or professional exemption during the period of the claim and is, therefore, properly covered by the overtime pay provisions of the FLSA.

Willful Violation

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, the record shows FAA's exemption determination was based on an erroneous interpretation of the controlling FLSA exemption criteria. However, nothing in the record indicates FAA knew its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. Therefore, we also find that the agency acted in good faith and did not recklessly disregard the requirements of the Act. Accordingly, we find the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104 (of both the previous and current regulations).

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.

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 normally derives its remedy authority from the Back Pay Act, codified as 5 U.S.C. § 5596. However, the

Department of Transportation (DOT) Appropriations Act of 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436, 460 (1995), as amended by Pub. L. No. 104-122, § 1, 110 Stat. 876, 876 (1996) (the DOT Act), authorized the FAA to develop its own personnel management system (PMS). *See Diefenderfer v. Merit Systems Protection Board*, 194 F.3d 1275, 1277 (Fed. Cir. 1999). The DOT Act provides, in pertinent part, that the provisions of title 5, United States Code (U.S.C.) with certain listed exceptions, do not apply to the FAA PMS. 49 U.S.C. § 40122(g). The Back Pay Act, 5 U.S.C. § 5596, is not a listed exception to the general inapplicability of title 5 to the FAA PMS. 49 U.S.C. § 40122(g). *See also Gonzalez v. Department of Transportation*, 551 F.3d 1372 (Fed. Cir. 2009).

FAA has adopted further sections of title 5 for use in its PMS. David R. Hinson, *FAA Personnel Management System- Introduction* (1996), states: "FAA has the discretion to adopt the substance of any portion of title 5 as deemed appropriate. In some instances, [the administrator has] decided that FAA employees should be covered by the same provisions that apply to all other Federal employees." However, the record indicates FAA has not adopted the Back Pay Act under this discretion. Therefore, the remedy for the instant claim rests upon the provisions of FAA's PMS.

As discussed previously, under the terms of the BUA, OPM's claims adjudication procedure is recognized as the procedure to be followed in matters relating to overtime entitlement under the FLSA. For purposes of remedy, FAA must apply FAA's PMS make-whole provisions for two years prior to when the claim was received by OPM in June 6, 2002, and forward for the period of time the claimant continued to perform the work forming the basis of this decision such that the claimant is compensated for all overtime hours worked at the FLSA overtime rate. If the claimant believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.