

Compensation Claim Decision
Under section 3702 of title 31, United States Code

Claimant: [name]

Organization: [agency component]
U.S. Immigration and Customs
Enforcement
U.S. Department of Homeland Security
[city & State]

Claim: Overtime Pay

Agency decision: Denied

OPM decision: Denied

OPM file number: 09-0004

//Judith A. Davis for

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

1/19/2010

Date

On August 20, 2008, the U.S. Office of Personnel Management's (OPM) Center for Merit System Accountability received a claim for overtime compensation from [claimant]. The claimant was employed by U.S. Immigration and Customs Enforcement (ICE), U.S. Department of Homeland Security, from June 26, 2006, to May 26, 2007, initially as [position], later reassigned to a [position], on January 21, 2007. He requests compensation for 418 hours of overtime work allegedly performed between June 2006 and April 2007. For the reasons discussed herein, the claim is denied.

Because the claimant did not specify whether he was requesting overtime pay under the Fair Labor Standards Act (FLSA) or under the premium pay provisions of section 5542(a) of title 5, United States Code (U.S.C.) and its implementing regulations (see sections 550.111-113 of title 5, Code of Federal Regulations (CFR)), frequently called title 5 overtime pay, we requested copies of the position descriptions (PD) for the two positions he occupied during the claim period from the employing agency. Both PDs were designated as exempt from the FLSA. We also contacted the claimant by letter dated October 20, 2008, requesting he clarify which claims process he intended to pursue, and notified him that under 5 CFR 178.102(a)(3), OPM will not accept a title 5 premium pay claim until the agency under which the claim arose has issued an agency-level denial of the claim. By letter dated October 31, 2008, the claimant informed OPM he was requesting overtime pay under the premium pay provisions of title 5. He attached copies of his Notification of Personnel Action Forms (SF-50's) for the claim period verifying the two positions he occupied were officially designated as exempt from the FLSA. He also attached a copy of the agency denial of his claim dated September 24, 2008.

Since the claimant's position during the claim period was designated as exempt from the FLSA and he does not dispute the exemption status, this claim is properly adjudicated under the compensation and leave claims settlement provisions applicable to Federal civilian employees under 31 U.S.C. §3702(a)(2). The claimant was an employee as defined in section 5541(2) of title 5, United States Code (U.S.C.) and, as such, was covered by the overtime pay provisions of 5 U.S.C. §5542(a) and 5 CFR 550.111(a) and (c) which apply to employees whose work is exempt from the overtime provisions of the FLSA.

With respect to overtime allegedly worked, 5 U.S.C. § 5542(a) provides for payment for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek." Section 550.111(a) of 5 CFR specifies that "overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is officially ordered or approved and performed by an employee." Section 550.111(c) of 5 CFR further specifies that overtime work "may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated."

Recent judicial decisions have upheld a strict interpretation of the pertinent statute and regulations. The United States Court of Appeals for the Federal Circuit concluded that earlier judicial precedent broadly interpreting the phrase "ordered and approved" to include inducement, encouragement, and expectation were no longer good law. Doe v. United States, 372 F. 3d 1347 (Fed. Cir. 2004), rehearing and rehearing en banc denied (2004), cert. denied, 544 U.S. 904, 125 S. Ct. 1591 (2005). The Federal Circuit concluded, in this regard, that the regulatory requirement for a written order was not invalid on the grounds that it imposed a procedural requirement limiting the right to overtime compensation under the statute, or that it was inequitable. Id. The Federal Circuit further concluded that the regulatory writing requirement additionally served an important purpose of the statute; i.e., to control the Government's liability

for overtime. 372 F. 3d 1361. The Federal Circuit also found that recording of overtime hours actually performed might indicate official awareness of overtime worked but does not provide prior written authorization or approval of overtime work, and that the possibility of adverse personnel action resulting from an employee's refusal to work uncompensated overtime was not grounds for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation. *Id.* On March 7, 2005, the Supreme Court of the United States declined to review the Federal Circuit decision. 544 U.S. 904, 125 S. Ct. 1591. The Federal Circuit reaffirmed its decision upon appeal, 463 F. 3d 1314 (2006) and, on April 2, 2007, the Supreme Court again declined to review the Federal Circuit decision. 127 S. Ct. 1910.

With respect to the facts surrounding this claim, the claimant asserts he was expected to work overtime without compensation by remaining in the office additional hours beyond his normal quitting time. He submitted copies of sign-in sheets for days where he signed out past the normal 8.5 hour tour of duty, and copies of email exchanges between himself and his supervisor sent reportedly outside his regular duty hours and on Saturdays, as evidence he had worked overtime and his supervisor was aware of such. However, the claimant acknowledges this purported requirement was not issued in writing. He also asserts he worked Saturday, December 9, and Sunday, December 10, 2006, while in travel status, and as evidence submitted a copy of a travel authorization form (unsigned and undated) indicating departure from his residence to "Lubbock Naval TX" on Saturday, December 9, 2006, with return on Tuesday, December 12, 2006, (annotated "actually returned 12/13/2006") and an invoice from the Ashmore Inn in Amarillo, Texas, for room charges from December 11-13, 2006 (annotated "12/9 & 12/10 – stayed in Lubbock, TX.")

The agency counters the claimant failed to prove his entitlement to overtime compensation because while the documents he provided indicate he signed out after the end of his duty day, there is no verification he actually worked until that time, nor did he present any evidence the time was ordered by his supervisor.

The claimant bases his claim for overtime compensation on his assertion management was both aware he was working overtime and explicitly expected and induced him to do so. However, inducement to work overtime does not serve as the basis for an award of overtime pay pursuant to 5 U.S.C. § 5542(a) and 5 CFR 550.111(a) and (c). The fact that management was aware the claimant was performing overtime work, as evidenced by the receipt of email messages sent at times which could be reasonably inferred to be outside the claimant's normal tour of duty hours, is not sufficient under *Doe* to support a finding mandating payment under 5 U.S.C. 5542(a) and 5 CFR 550.111(a) and (c). Further, any purported inducement or expectation to perform overtime is also insufficient according to the *Doe* cases to require the payment of overtime pay. In regard to the December 9-10, 2006, weekend the claimant asserts he worked, an unsigned and undated travel authorization form does not serve as substantiating evidence of overtime work ordered in advance and subsequently performed. We further note the hotel invoice indicates the claimant's occupancy was from Monday, December 11, through Wednesday, December 13, 2006, inconsistent with the dates on the travel authorization form and the dates the claimant asserts he worked.

Under 5 CFR 178.105, the burden is upon the claimant to establish the timeliness of the claim and the liability of the United States. The settlement of a claim is based upon the written record only. OPM will accept the facts asserted by the agency, absent clear and convincing evidence to the contrary. The appellant has failed to meet this burden as discussed previously in this

decision. Therefore, the claim for overtime work allegedly performed between June 2006 and April 2007 is denied.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee's right to bring an action in an appropriate United States court.