

U.S. Office of Personnel Management  
Division for Human Capital Leadership and Merit System Accountability  
Compensation Claims and Fair Labor Standards Act Programs

Center for Merit System Compliance  
1900 E Street, NW  
Washington, DC 20415-6000

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

**Claimant:** [name]

**Agency classification:** Guide  
GS-0090-05

**Organization:** U. S. Department of Agriculture  
Forest Service  
Region 10  
[location]  
Admiralty National Monument  
[location]

**Claim:** Request backpay for time spent in training.

**OPM decision:** Payment due.

**OPM decision number:** F-0090-05-01

//signed//

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Marta Brito Pérez  
Associate Director, Division for Human Capital  
Leadership & Merit System Accountability

August 2, 2004

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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 Office of Personnel Management administers the Fair Labor Standards Act. 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]

[name]  
Director of Human Resources  
United States Department of Agriculture  
Forest Service  
Alaska Region Service Center  
P.O. Box 21628  
Juneau, AK 99802-1628

Director of Human Resources Management  
USDA-OHRM-PPPD  
U.S. Department of Agriculture  
J.L. Whitten Building, Room 302-W  
1400 Independence Avenue, SW  
Washington, DC 20250

## **Introduction**

On September 20, 2002, the Center for Merit System Compliance, of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name]. The agency's administrative report was received on March 13, 2003, and the claimant's response to the report was received on October 17, 2003. We accepted and decided this claim under section 4(f) of title 29 (FLSA), United States Code.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and her agency.

### **General Issues**

The claimant worked as a Guide GS-0090-05, unofficially titled Interpreter. The claimant does not dispute that her position is FLSA as nonexempt and is covered by the overtime provisions of the FLSA.

The claimant believes that she is entitled to pay for unpaid training hours not recorded as hours worked during the period of her summer employment with the agency from May 2000 through August 2002. She states that her employment involved training schedules that included unpaid hours of travel, mandatory unpaid hours of training, and forced forfeiture of hours worked. The claimant stresses that hours of annual travel and training trips to mandatory functions and lectures were not recorded as hours worked.

The claimant states that she was instructed not to report hours over eleven hours each day except when the ship was in Bellingham, Washington at which time she was instructed to report no more than eight hours for the day, and in no case more than 80-hours for the pay period, regardless of time actually worked. She says that she was told that her schedule was categorized as a maxiflex schedule, and as such, her hours were not subject to overtime requirements under any circumstances. The claimant further states that she was not permitted to add time to her accumulated credit hours beyond twenty-four hours when she worked a half-hour longer than was scheduled due to ferry slowdowns or unplanned passenger needs.

The agency stated that the claimant worked a maxiflex work schedule, for the claim period from September 2000 to October 2001. The agency administrative report stated, "The majority of the work performed in this position occurs aboard ship. Interpreters remain onboard the vessel, which travels from port to port, for the duration of the trip. When not working, employees are free to pursue their own interests within the confines of the vessel. Staterooms are provided. The interpreters have pre-scheduled days on and off the ferry. Interpreters must schedule a minimum of three hours in the office during the week they are not onboard in order to meet with supervisors, record trip reports, research and prepare presentations, submit timesheets and attend to any other business. The three hours are scheduled within the maxiflex 80-hour pay period."

The agency explained that the claimant was advised by her supervisor to schedule her workdays and limit work to 80-hours per pay period while onboard a vessel. Unless there

were extenuating circumstances, the claimant was advised to work within the specified limitations.

## **Evaluation**

The agency stated that the claimant's supervisors instructed the claimant to record training hours that exceeded the 80-hour pay period limit as credit hours. The agency said that this was erroneous information and the claimant will be paid the difference between credit hours, which were paid at base rate and overtime for pay periods in September 2000, October 2000, September 2001, and October 2001. As the agency noted, "attendance at training is not at the election of the employee, and, therefore, is not subject to credit hours." *See* 5 CFR 551.423. Therefore, OPM will not address the issue of the training hours since the agency has acknowledged the error and will pay the claimant back pay due with interest.

Section 6101 of title 5, United States Code (U.S.C.), requires agencies to establish a basic workweek of 40 hours of work performed within a period of not more than 6 of any 7 consecutive days. Section 6122 authorizing agencies to use flexible schedules and section 6127 authorizing agencies to use compressed schedules are exceptions to this requirement. Section 6121(3) specifies that for employees working on flexible and compressed work schedules, the basic work requirement consists of the number of hours, excluding overtime, which the employee must work or account for through leave or otherwise

According to section 6122 of Title 5 of the United States Code (U.S.C.), an agency may establish programs that allow the use of a flexible work schedule (FWS). 5 U.S.C. § 6122 specifies that FWS must include designated hours and days during which an employee must be present for work, as well as designated hours during which an employee may choose the time of his arrival at and departure from work, solely for such purpose. . Under 5 U.S.C. § 6121(5), the term "compressed schedule" means an 80-hour biweekly basic work requirement which is scheduled for *less than* 10 workdays. 5 CFR § 610.111(d) gives the head of an agency authority to establish a basic work requirement for each employee working a flexible or compressed work schedule and the basic work requirements must meet the Federal regulations for those alternative work schedules.

A flexible work schedule (FWS) is an alternative work schedule that consists of workdays with core hours and flexible hours. Core hours are the designated period of the day when all employees must be at work. Flexible hours are the part of the workday when employees may, within limits or "bands," choose their time of arrival and departure. A maxiflex schedule is a type of flexible work schedule that contains core hours on fewer than ten workdays in the biweekly pay period and in which a full-time employee has a basic work requirement of 80-hours for the biweekly pay period, but in which an employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization.

Credit hours are hours within a flexible work schedule that an employee *elects* to work, with supervisory approval, in excess of his or her basic work requirements so as to vary the length of a workweek or workday. (Emphasis added). Credit hours are not officially ordered and approved in advance by management, but elected by the employee consistent with agency policies. Credit hours must be worked within the established tour of duty. The

agency may place a limit on the number of credit hours an employee may earn during a pay period, a daily or weekly basis. 5 U.S.C. § 6126(a) limits the number of credit hours earned in a biweekly pay period to 24 hours for a full-time employee. An agency may establish limitations on how credit hours are earned and the number of credit hours that may be earned. See 5 U.S.C. § 6122(b).

Credit hours are distinguished from overtime hours in that they are not officially ordered and approved in advance by management. Credit hours must be worked within an employee's non-overtime tour of duty. According to 5 U.S.C. § 6121, overtime hours, when used with respect to flexible schedules under sections 6122 through 6126, means all hours exceeding eight hours in a day or 40 hours in a week that are officially ordered in advance.

Claims against the Government must be predicated, if at all possible, upon official records. Civilian Personnel Law Manual, Title I – Compensation, Section 4-44 states, "In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence." See *Francis W. Arnold*, 62 Comp. Gen. 187 (1983). See also 60 Comp. Gen. 354 (1981) and *Christine D. Taliaferro* (B-199783, March 9, 1981). The claimant stated in her response to the agency administrative report and in her interview, that she is unable to provide documents to reflect the specific hours and dates in question. Hence, the decision on this claim was based on the time and attendance documents submitted by the agency.

Our review of the claimant's time sheet for the claim periods revealed that the claimant routinely worked 11 hours in a day during the first week for many of the pay periods during the claim period. All hours exceeding 8 hours in a day during the first week of a pay period was used as credit hours to reach the required 80 hours for the pay period. Although the agency approved flexible work schedules for the Interpreters, the claimant actually worked according to an agency-controlled schedule that included work in excess of eight hours per day. The claimant did not have the option of choosing or declining to work the extra hours. Therefore, she did not work on a flexible work schedule. The cyclical schedule provided by the agency does not meet the statutory requirements for a compressed schedule because the basic work requirement for one biweekly pay period is ten days. Accordingly, the claimant did not work on a compressed schedule.

The record shows that the claimant was not working a maxiflex schedule as prescribed by law. Therefore, the agency must apply the basic workweek described in 5 U.S.C. § 6101 in computing the hours of overtime that the claimant worked. The claimant is covered by the overtime pay provisions in 5 U.S.C. § 5544(a), and as such, he is entitled to overtime pay for overtime work in excess of 8 hours in a day or 40 hours in a week. The agency is to compute the claimant's overtime pay in accordance with 5 CFR § 551.512, then pay the claimant the amount owed her, if any, for the claim period from May 2000 to August 2002.

## **Conclusion**

The Back Pay Act, 5 U.S.C. § 5596, applies to circumstances where an appropriate authority finds that an employee was affected by an unjustified or unwarranted personnel action and

that the personnel action resulted in the withdrawal or reduction of all or part of the employee's pay, allowances or differentials. 5 U.S.C. § 5596(b)(1)(A)(i) specifies that, on correction of the personnel action, an employee is entitled to receive for the period that the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials which she normally would have earned or received during the period if the personnel action had not occurred.\* The claimant is entitled to interest on the back pay that she is owed for overtime. Since the claimant was a full-time employee she is entitled to 40 hours of basic pay for each workweek and she may not be charged annual or sick leave for hours during which she was not scheduled to work. 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 OPM administers the Act. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with this decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM. There is no further right of administrative appeal. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit when receiving payment.

### **Decision**

Based on the above analysis, the claimant is owed compensation under the overtime provisions of the FLSA. Therefore, she is due pay under the Act. For each pay period in the claim period, the claimant is generally due FLSA overtime pay for the total hours of work exceeding 8 hours in a day or 40 hours in the week. Therefore, the agency is liable for payment at the overtime rate in effect when the claimant performed the work.

### **Compliance instructions**

Since we found no willful violation on the part of the agency, the claimant can receive back pay for two years from the date her claim was received by OPM, which was September 20, 2002. Therefore, she can receive overtime pay for the requested claim period from May 2000 through August 2002.

The agency should pay the claimant the total owed her. If the claimant believes that the agency has computed the amount incorrectly, she may file a new FLSA claim with OPM.

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\* OPM regulations, at 5 CFR 550.803, specify that the term "pay, allowances, and differentials" means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function. Section 550.803 also specifies that the term "unjustified or unwarranted personnel action" includes personnel actions and pay actions, alone or in combination.