

PH:OD:95-2fla

**OPM decision number:** F-1801-13-01  
PERSONAL  
[claimant's name]  
National Transportation Safety Board  
[address]

Dear [claimant's name]:

This is our decision on the claim that you and your co-workers filed with this office under the Fair Labor Standards Act (FLSA). Your claim indicates that you worked overtime without benefit of proper overtime compensation because your position was categorized incorrectly as exempt from coverage by the FLSA. We initially accepted the claim in a letter to [original lead claimant], who has relocated to another National Transportation Safety Board (NTSB) office. [Another claimant's name], the second complainant, no longer occupies the position at issue in this complaint. Due to your signature appearing third on the initial undated claim letter, and the on-site fact-finding conducted with you, we are issuing this decision to you as the current representative of your group on this matter.

#### Analysis and Decision

Our fact-finding confirmed that your initial claim concerns two distinctly different work functions; i.e., air safety investigation and highway accident investigation. As a result, we have severed [another claimant's] claim from this case and will issue a separate decision directly to him concerning the work he performs in his Highway Accident Investigator, GS-1801-13 position. This decision covers the work performed by you and your co-claimants in your capacity as Field Air Safety Investigators. The position at issue is Position Number 422335NERA, classified as Air Safety Investigator (Field), GS-1815-13, and is located in the NTSB, Office of Aviation Safety, [location].

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We have considered carefully the information you submitted, and other information gathered during our investigation of your claim. As a result of our investigation and evaluation, we have determined that your position is categorized properly as exempt from the provisions of the FLSA based on the administrative exemption criteria. Thus, we find you have no entitlement to FLSA overtime pay.

The FLSA rationale which you provided in the initial complaint letter is the:

Limited aspects of these [administrative exemption] criteria can be found in the Investigator (Field) position. However, these duties are not significant enough or grade controlling in any of the positions, to satisfy the intent of this exemption criteria.

You provided a similar rationale supporting your claim that your work is not covered by the professional exemption criteria. In addition, you discussed a portion of the since sunsetted Federal Personnel Manual Letter 551-7, dated July 1, 1974, stating:

The FLSA exemption provisions recognized as far back as 1975 that there would be groups of employees who would not fit any of the exemption categories. . . . included in this group [are] non-supervisory employees at any grade level in occupations requiring highly specialized technical skills and knowledge that can be acquired only through prolonged job training and experience. . . .

Applying this concept to your situation you added:

such as the Air Safety Investigator (Field) GS-1815, unless the employee is performing predominantly administrative functions rather than the technical work of the occupation.

In a claim decision, FLSA determinations are based on the actual duties being performed. As part of that process, a connection must be established between the position description (PD) of record and the actual duties being performed. The copy of your PD of record provided to this office has been certified by competent management authority as an accurate statement of the major duties and responsibilities assigned to your position. You and your co-claimants have also certified the PD as current and accurate. In addition, we conducted on-site fact-finding with you and [employee's name], as well as your supervisor, [supervisor's name], on July 30, 1996, in order to gain a better understanding of the work functions that you perform in your position of record. This fact-finding

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supplemented the documentation submitted by your agency at our request, the comments you and your co-claimants provided on that information, as well as the information provided by you and your co-claimants in further support of your FLSA rationale.

The regulations applicable in determining if work is exempt or nonexempt are contained in 5 Code of Federal Regulations (CFR) Part 551 - Pay Administration Under the FLSA, Subpart B - Exemptions. Although sunsetted as official implementing instructions, much of the guidance contained in Federal Personnel Manual Letter (FPM) 551-7 continues to reflect how the Office of Personnel Management (OPM) intends 5 CFR, Part 551 to be interpreted and applied.

Under the administrative exemption criteria, contained in 5 CFR Section 551.205, an administrative employee is one who is "an advisor, assistant, or representative of management, or a specialist in a management or general business function whose work meets the following criteria:

The first criterion is that the primary duty consists of work that:

- (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."

These alternatives apply to the work of your position as follows:

1. Significantly affects the formulation or execution of management policies or programs.

Established OPM guidance concerning work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals that are expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that are acted on by others. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or

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organizations, both within or outside the Federal government, or making significant determinations in furthering the operation of 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.

Your position is located in the NTSB, Office of Aviation Safety, [region], which supports major investigations of aviation accidents and selected incidents, as well as “field” accidents and incidents as defined by NTSB criteria. The purpose of NTSB air safety investigations is to develop proposed probable cause(s) of accidents; formulate recommendations to minimize their recurrence; and prepare detailed reports for use by other Government agencies, Congress, the transportation industry, and the traveling public. The purpose and nature of the NTSB air safety mission entail the ongoing evaluation of air operations safety, including compliance with established safety program requirements. From that process, the NTSB plans, develops, and promotes improved air safety practices.

You and your co-claimants have stressed the limited nature of the field investigations that you conduct in comparison with the major investigation “Go Team” which operates out of NTSB headquarters. You described the limited resources you control as Investigator-in-Charge (IIC), e.g., Federal Aviation Administration personnel, manufacturers’ representatives, and/or State and local government employees, and the fact that you frequently perform your investigations alone. You highlighted the fact that NTSB management policies and programs are controlled at a higher level in your agency, and that you do not have a “direct participation in the change of management policies or programs within the agency.”

As indicated previously, the location of your position in a field office does not change your primary and paramount function as NTSB representative executing the management policies of the NTSB in your role as accident and incident investigator in a field setting. The basic purpose of your agency, and your function within the agency, is to **administer** the laws, rules, and regulations pertaining to transportation safety. Your PD states:

Coordinates investigation with Federal, state and local officials but maintains overall control and leadership of the investigation. Surveys site and determines scope of investigation and the need for further investigation control and equipment. . . . Selects/appoints parties to the investigation. Follows Board policy when giving factual statements to the media, litigants, and insurers. . . . As group

chairman of a major investigation, conducts investigative activities within a particular specialty area, supervising and coordinating the efforts of highly skilled technical specialists. . . . Recommends a probable cause of the accident based on analysis of the findings of the investigation and, when applicable, recommends corrective measures that will best tend to prevent or eliminate recurrence of similar problems. . . . Selects and evaluates proper factual information regarding the accident for release on the scene to the press, radio, and television. Makes presentations to local groups as part of the NTSB safety promotion efforts. . . . Is responsible for the effective, economical, and efficient utilization of all resources committed to the investigation. . . . He/she requires minimal supervision and specific technical assistance is not generally required. Keeps supervisor informed of significant issues as they are developed in the course of the investigation.

These functions are evident in the performance elements for which you are rated; i.e., performing the full range of air safety accident and incident investigation, accident prevention, and program support functions. The fact that your recommendations are subject to review and change does not change the fundamental purpose of your position as the NTSB representative on assigned air safety matters. This work entails executing major components of the NTSB air safety management program. In addition, you perform program planning and development functions when you propose safety recommendations, notwithstanding the subsequent review and control process. These functions are performed within the overall policies, objectives, and requirements prescribed by NTSB regulations, guidelines, and procedures. As you and Mr. Hancock discussed during our on-site review, and our independent review confirmed, NTSB accident investigation manuals are very general in nature. You are relied upon to independently formulate and develop plans, procedures, and timetables to accomplish the desired work outcomes; e.g., a technically accurate, complete and thorough investigation, recommending a probable cause and to effect necessary coordination and integration with other organizations in accomplishing the NTSB air safety program execution functions of your position. Accordingly, we find that your position meets this criterion.

2. Involves general management or business functions or supporting services of substantial importance to the organization serviced.

Established OPM guidance is that in addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial

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management, work which meets this criterion includes support services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The guidance states that the organizational location does not change service functions into production functions. In order to warrant exemption from the FLSA, such work 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.

Your position is vested with authority to independently take control of accident/incident sites as well as plan and accomplish the investigation necessary to propose the findings eventually issued by NTSB. For almost all the investigations you conduct, you are the sole NTSB representative. As such, you have the authority to "select/appoint" parties to the investigation. You may be assisted by a Federal Aviation Administration (FAA) representative, usually for no more than a half-day. Depending on the nature of the situation, the engine and/or air frame manufacturer may provide a representative to assist in assessing specific technical data and conditions. Frequently, the sites you visit are distant from your office location. Although you maintain telephone contact with your supervisor, you are responsible independently for almost all investigation decisions. For example, you determine what witnesses and/or other factual information must be developed in order to formulate technical positions on the incident/accident. Within established monetary constraints (\$500, with higher authorized by your supervisor), you can authorize payment for necessary services, e.g., site preservation, transportation of wreckage.

You and your co-claimants stressed the "production" nature of your work in that you perform NTSB line program work; you do not function in a staff support capacity. The term "production" work does not appear in 5 CFR, Part 551. That term within the meaning of the FLSA is discussed in Department of Labor FLSA regulations (29 CFR, Part 541). It is not defined by whether the work is line or staff. For example, representation work directly related to management policies or general business operations frequently is an integral part of line employee work. Although Federal employees are not covered directly by Department of Labor FLSA regulations (29 CFR, Part 541), these regulations contain useful illustrations of fundamental FLSA concepts. As discussed in 29 CFR 541.205(c)(5), this criterion ("directly related to management policies or general business operations"):

is also met by many persons employed as . . . claims agents and adjusters . . . account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

As discussed in 29 CFR 541.205(c)(6):

It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

Your position, and the work you perform, are central to the purpose and reason for the existence of the NTSB; i.e., determining the probable cause(s) of transportation accidents/incidents and promoting transportation safety. The investigations you and your co-claimants conduct are the mission core of the NTSB and, thus, the decisions and recommendations that you make are of fundamental importance to the "business" of the NTSB.

These functions are performed within the overall policies, objectives, and requirements prescribed by NTSB regulations, guidelines, and procedures. As you and [employee's name] discussed during our on-site review, and our independent review confirmed, NTSB accident investigation manuals are very general in nature. You are relied upon to independently formulate and develop plans, procedures, and timetables to accomplish the desired outcomes and to affect necessary coordination and integration with other organizations in accomplishing the NTSB air safety program execution functions of your position. The very nature and purpose of your position are to represent the NTSB as management's on-site agent and voice.

You work under "minimal supervision." You are expected to keep your supervisor "informed of significant issues as they are developed in the course of the investigation." The very nature of your independent field work vests you with significant representational authority and responsibility, including "meets and deals with the public effectively under difficult circumstances." The performance of work of a predominately technical nature, i.e., accident/incident investigation and analysis and design, does not preclude the crediting of this criterion. Business and

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support services cover a variety of technical and more complex analytical functions as described above.

The investigation, analysis and related functions of your position reflect support services of substantial importance to the organization in which you work in that they affect the ability of the NTSB to accomplish its mandated program mission for air safety matters. This work entails executing major components of the NTSB air safety management program. You also perform program planning and development functions when you propose safety recommendations, notwithstanding the subsequent review and control process. Accordingly, we find that your position meets this criterion.

The second portion of the primary duty criterion is that 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 specialized training, experience, and knowledge.

These criteria apply to your position as follows:

1. Intellectual and varied in nature.

Established OPM guidance is that work of an intellectual nature is work involving general intellectual capability, such as perceptiveness, analytical reasoning, perspective and judgment applied to a variety of subject matter fields, or work involving mental processes which require 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.

Although not addressed in detail in your PD, we find that your investigative work requires intellectual capability, including perceptiveness, analytical reasoning, perspective and judgment to conceptualize the likely path(s) of productive fact-finding necessary to reconstruct probable accident/incident dynamics and sequence of events. You apply knowledge of a variety of subject matter fields, including the physical dynamics of flight, operating functions and processes of



aircraft systems, the biological impact of flight on human physiological and psychological behavior, and the impact of weather and other external conditions on the operating interrelationships of human beings and machines in identifying and analyzing accident/incident data. Your work involves substantial judgment based on considering, selecting, adapting and applying this wide variety of subject matter principles and concepts to the numerous variables present in each accident/incident in order to establish an objectively supportable theory of accident/incident dynamics and the sequence of events. You apply equivalent intellectual acumen in preparing safety recommendations and proposals based on an intensive analysis of similarly complex data.

The intellectual demands of your position are reflected in the responsibility to organize and plan your work; to determine the most appropriate means of completing your assigned position functions; and, to apply the breadth and depth of program and technical knowledges discussed above in the most effective way so as to accomplish your program functions effectively and efficiently.

Your rationale stressed the similarity of the knowledges and skills applied in your work to that of pilots who are non-exempt from the FLSA, and the physical demands of your field work as being FLSA non-exempt manual work. Although FLSA determinations may not be made by position-to-position comparison, we believe that these issues warrant clarification. Pilot positions that are engaged in actual aircraft operations as their primary duty are non-exempt. Pilot positions, however, that apply aviation knowledges and skills in performing aviation program analytical functions as their primary duty typically are exempt from the FLSA. Your rationale regarding the physical demands of your work; i.e., your on-site work entails exacting manual labor, and you are required to meet physical fitness requirements, does not address this FLSA criterion in context. Many inherently exempt positions entail substantial physical demands and manual skills, e.g., wildlife biologists, foresters, musicians, artists and physicians. These physical effort requirements, however, are ancillary to and do not change the fundamentally intellectual and/or creative nature of the work at the heart of those occupations. Thus, based on the above analysis, these functions reflect the scope of work and application of intellectual acumen which satisfy this criterion.

2. Of a specialized or technical nature that requires considerable specialized training, experience and knowledge.

Established OPM guidance is that work which meets this criterion requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject matter field.

These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject matter field, as distinguished from professional knowledges characteristically acquired through specialized academic training.

The duties described previously in this decision require substantial intellectual effort in order to analyze and apply subject matter of considerable difficulty entailed in the technical program work assigned to your position. These duties reflect work requiring substantial knowledge of complex subject matter which form the basis for classifying the position to the GS-13 grade level as stated in the Section 5104, Chapter 51, title 5, U.S. Code definition of GS-13 grade level work, i.e., "to perform, under administrative direction, with wide latitude for the exercise of independent judgment, work of unusual difficulty and responsibility along special technical, supervisory, or administrative lines requiring extended specialized, supervisory, or administrative training and experience." Accordingly, we find your position meets this criterion.

The third portion of the primary duty criterion is that the employee frequently must exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. Established OPM guidance is that the exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. 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 may be revised or reversed, does not mean an employee is not exercising discretion and independent judgment of the level required for exemption. There are three elements involved in the evaluation of this criterion:

1. The work must involve sufficient variables as to regularly require discretion and judgment in determining the approaches and techniques to be used, and in evaluating results.

Established OPM guidance is that employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern their actions would not meet this element.

Your position is vested with substantial independence of action since it operates independently in a field work situation, and is relied upon to independently formulate, develop and implement the specific processes and procedures

necessary to accomplish the desired accident/incident investigation or safety proposal outcome. You are delegated the authority to effect necessary coordination and integration with other organizations to accomplish your work. Discretion and judgment are reflected in such duties as planning, developing, coordinating, and controlling the investigative fact-finding and subsequent analytical processes, and applying the complex knowledges and skills required to perform that work. The day-to-day freedom of action with which your position operates in performing the above analytically demanding work, reflects sufficient variables as to regularly require the scope of discretion and judgment warranting the crediting of this element to the position.

2. The employee must have authority to make such determinations during the courses of assignments.

Established OPM guidance is that the intent of this element is to preclude exempting trainees who are in a line of work which requires discretion, but who have not been given authority to decide discretionary matters independently. Your position is not that of a trainee. The scope of authority which is exercised in accomplishing the work assigned, as discussed above, results in the crediting of this element to the position.

3. The decisions made independently must be significant.

Established OPM guidance is that this term is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, this 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.

As discussed above, the program decisions vested in your position extend beyond the procedural details of the position's work in that they significantly affect the ability of the NTSB to meet its mission responsibilities. The accident/incident investigation decisions you make, and the safety proposals that you formulate, are significant decisions which affect fundamental NTSB mission responsibilities and reflect the independent decisions of the degree of significance which result in the crediting of this element to your position.

### Summary

Based on the above information and analysis, your position meets the primary duty and associated criteria.

In addition to the primary duty criterion for administrative exemption which applies to all employees, General Schedule employees in positions classified at the GS-5 or GS-6 grade level must spend 80% or more of the worktime in a representative work week on administrative functions and work that is an essential part of those functions. Because your position is classified above these grade levels, this criterion does not apply to your position.

Based on the preceding analysis, we find your position is categorized properly as exempt from the overtime provisions of the FLSA under the administrative exemption category.

You disagreed with your agency's determination that your position also is exempt from the overtime provisions of the FLSA under the professional exemption criteria. In applying the professional exemption criteria contained in 5 CFR 511.206, your agency concluded that the extensive scientific reasoning, and analytical ability and originality in applying aerospace engineering related and meteorological knowledge, reflect the application of knowledge to perform work "comparable to that of a professional employee."

Established OPM guidance is that non-professional employees perform work falling under the professional exempt criteria if they apply, within a narrow field of specialization, both theoretical and practical knowledge of related disciplines and of new developments, in the independent performance of work that is very similar and comparable in level to that performed by professional employees in the field. Typical of such work are high graded engineering and electronics technicians who perform design, test and evaluation or equivalent work in a narrow area of technical specialization. We find that while your position entails applying a broad knowledge of aerospace engineering and related knowledge in order to analyze accidents/incidents, the work performed does not entail the intensity of theoretical knowledge or the performing of work comparable to professional aerospace engineers or other professional positions to warrant exemption under the professional exemption criteria. This type and level of expertise are resident in the specialty work tasked to NTSB headquarters scientific and specialist staff positions, e.g., Office of Research and Engineering. Therefore, while your position is not categorized properly as exempt from the overtime provisions of the FLSA

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under the professional exemption category, it is exempt under the administrative exemption category.

This is the final administrative level to which you have a right of review concerning the application of the FLSA to the position concerning which you filed your claim. If you disagree with this decision, you have the right to bring the matter to the appropriate U.S. Court.

Please inform your co-claimants of our decision.

Sincerely,

/s/ 1-2-97

Robert D. Hendler  
Classification Appeals Officer

cc:

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