

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

Claimant: [Name of claimant]

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

Organization: [Claimant's organization
and work location]
U.S. Border Patrol
U.S. Customs and Border Protection
Department of Homeland Security

Claim: Position should be nonexempt, thus
due FLSA overtime pay

OPM decision: Nonexempt. Due the difference between
FLSA and title 5 overtime pay

OPM decision number: F-1896-12-03

//signed//

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

June 24, 2009

Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the U.S. Office of Personnel Management (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 (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision and then pay the claimant the amount owed him. If the claimant believes the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

Decision sent to:

[Name and mailing address of claimant]
U.S. Customs and Border Protection

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Introduction

On September 5, 2007, OPM received an FLSA claim from [name of claimant]. He believes his work should have been nonexempt (i.e., covered) under the FLSA for the period dating from July 24, 2005, through June 23, 2007, and is entitled to FLSA overtime pay for that time. Effective June 24, 2007, his agency determined his position and identical additional positions were FLSA nonexempt. The claimant's position is classified as Lead Border Patrol Agent (Senior Intelligence Agent), GS-1896-12, with the [claimant's organization and work location], U.S. Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security, in [claimant's work location]. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and his agency, including the agency's administrative report which we received on February 5, 2008. To help decide this claim, we conducted a telephone interview with the claimant on June 25, 2008. We also conducted a telephone interview with the claimant's first-level supervisor on July 9, 2008.

Background

The claimant was promoted to his current GS-1896-12 position [position description (PD) [number] on July 24, 2005. At the time, the claimant's and other similar Lead Border Patrol Agent (LBPA) positions were not covered by the FLSA. However, CBP's Office of Human Resources Management conducted a study of the positions' FLSA exemption determinations. Their findings were summarized in a June 25, 2007, memorandum which concluded that LBPA positions like the claimant's were appropriately FLSA nonexempt. Consequently, effective June 24, 2007, the agency changed the FLSA designation of the positions to nonexempt.

Employees occupying affected LBPA positions were notified by the agency of their possible entitlement to back pay for FLSA overtime worked for periods prior to June 24, 2007, and advised of their right to file a claim with either CBP or OPM. The claimant subsequently submitted a claim to OPM. In its December 10, 2007, response to OPM's request for information, CBP's Compensation and Organizational Effectiveness Division reversed its June 2007 determination by indicating it now believed the claimant's position was exempt under both the executive (5 CFR 551.205) and administrative (5 CFR 551.206) exemption criteria of the FLSA. However, it indicated that all LBPA's would temporarily remain nonexempt pending a review of each individual claim either by the agency or OPM. [The claimant's] claim is part of that review.

Position information

As a Sector employee, the claimant's primary duties include directly gathering and analyzing intelligence information for the organization regarding attempts of persons to enter the United States illegally, alien smuggling rings, use of fraudulent or counterfeit documentation, aliens involved in narcotics trafficking and terrorism, and other activities detrimental to the national

security of the U.S. He disseminates intelligence information throughout the Sector's stations, and to agency headquarters as appropriate, consolidates intelligence information received from a variety of sources, writes reports, and conducts liaison with other domestic and foreign law enforcement and intelligence agencies. As a senior intelligence agent in the Sector, he also works closely with journey level Border Patrol Agents, GS-1896-11, from each station [locations of local stations] who are detailed for up to one year to perform intelligence functions at their respective stations. In that capacity, he provides training, guidance, and technical assistance, in the work methods, policies, procedures, guidelines, and techniques for identifying, collecting, disseminating and analyzing intelligence information. The claimant stated the preceding duties take up to 60 percent of his work time.

The claimant also performs a variety of enforcement functions involving reviewing, preparing and presenting cases for administrative and criminal proceedings on illegal entry, reentry, fraud, assault, and illegal possession of drugs. He uses a variety of techniques such as surveillance, undercover work, interviewing, record searches, examinations, and collection of information from other law enforcement agencies, concerning the criminal activities of aliens involved in alien smuggling, narcotics trafficking, terrorism, and organized crime. Additionally, he performs routine inspection duties of eligibility criteria concerning persons entering the U.S., and may serve on law enforcement task forces in conducting surveillance, obtaining and executing search warrants, and making arrests. The claimant indicated he spends about 40 percent of his work time performing the preceding duties.

Both the claimant and his supervisor certified to the accuracy of the claimant's PD [number] in effect during the period of this claim. However, we find that the PD is inaccurate because it describes "Leader" duties the claimant does not perform. Our fact-finding disclosed the claimant does not formally lead a team of border patrol agents engaged in the collection, analysis, and dissemination of intelligence information. Although he provides technical assistance to intelligence agents assigned to separate stations, he does not assign, monitor in progress, or technically review their completed work products. In addition, he does not make recommendations on leave requests, disciplinary actions, performance evaluations, promotion actions, awards, or any other personnel management-related issues, including resolving informal complaints, and keeping employees informed on health benefits and other administrative matters. Based on this information, the agency should correct the PD of record to reflect our findings, and ensure that these duties are not described in any future PDs, unless actually assigned and performed.

Evaluation of FLSA coverage

Sections 551.201 and 551.202 of 5 CFR require that an employing agency designate an employee FLSA exempt only when the agency correctly determines the employee's work meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles: (1) each employee is presumed to be FLSA nonexempt; (2) exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption; (3) the burden of proof rests with the agency which asserts the exemption; and (4) 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 exemption categories applied to Federal employees: executive, administrative, and professional. Neither the claimant nor the agency assert the claimant's work is covered by the professional exemption; and, based on careful review of the record, we agree it is not covered. Therefore, our analysis is primarily limited to the executive and administrative exemption criteria in effect during the claim period. Only the 1998 FLSA regulations in place during the claim period apply to this claim, but the following evaluation includes a brief analysis of the position against the current FLSA regulations, effected on October 17, 2007, in order to fully respond to the agency's coverage evaluation.

I. Executive Exemption Criteria

FLSA Regulations (1998)

Under the executive exemption criteria in 5 CFR 551.205 (1998) in effect at the time of the claim, an executive employee is a supervisor or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and customarily and regularly directs the work of subordinate employees and meets both of the following criteria: (a) the 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 that the claimant has no delegated authority to make, suggest or recommend the personnel changes listed under the first element of the primary duty test. Interviews with the claimant and his supervisor revealed that such authorities solely rest with the stations' Patrol Agents-in-Charge and their subordinate supervisors. As a Sector headquarters employee, the claimant's role is limited to providing technical assistance to journey level border patrol agents who perform intelligence functions for their assigned stations. As previously discussed, the claimant does not function as their team leader, and is not a member of their chain-of-command.

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 in 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. As noted above, the claimant has no subordinates.

(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.

The 80 percent test does not apply to the claimant's work.

The claimant's work does not meet the executive exemption criteria

FLSA Regulations (2007)

Under the current FLSA regulations (See Federal Register, Vol. 72, No. 179, September 17, 2007) (a) an executive employee is defined in 5 CFR 551.205(a) (2007) as an employee whose primary duty is management (as defined in section 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 section 5 CFR 551.104 (2007), *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 analysis above under the 1998 regulations which were applicable during the claim period determined the claimant's work did not meet the executive exemption criteria. We note the claimant's work also would not have met the executive exemption criteria under the current regulations. The current regulations make it apparent the claimant's work would not even satisfy the fundamental definition of an executive employee with "management" being the position's primary duty. 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 perform any of the activities listed. 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.

II. Administrative Exemption Criteria

FLSA Regulations (1998)

Under the administrative exemption criteria in 5 CFR 551.206 (1998) in effect at the time of the claim, an administrative employee is an advisor 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 (1998), *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 that are 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. While the [claimant's organization] Sector has established specific work goals and supporting staff resources in its organizational planning documents, 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 Sector [claimant's work unit] Unit and the agency. 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. His role is to act as an advisor to station intelligence agents, assisting them in the day-to-day methods of identification, collection and analysis of intelligence to assess its credibility and, as appropriate, take action to interdict criminal activities stemming from the intelligence information. He is not in a position to require compliance with Sector work objectives at the station level, and in no way makes significant determinations furthering the overall operation or accomplishment of Sector programs. Although he is concerned with the daily and immediate operating functions of the intelligence gathering process, responsibility for the overall operation and accomplishment of the intelligence program is held by the Sector [name of unit] Unit Patrol Agent-in-Charge. 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 (1998), such functions, 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 Sector headquarters and higher organizational levels within the agency.

The claimant 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 (1998), *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.

The nonmanual work test is met

Although the claimant performs office work, 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 (1998), *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 to collect, assess, analyze, and disseminate creditable intelligence information, his work is limited to a single subject-matter area (i.e., intelligence concerning border protection) rather than multiple subject-matter fields. Additionally, in gathering intelligence information and taking action to interdict alien smuggling, narcotics trafficking, or prevent use of fraudulent documentation, he relies on application of standardized procedures, and well-established techniques and precedents outlined in agency policy memoranda and intelligence operating manuals. Although conditions and circumstances leading to interdiction may vary, decisions made 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 work meets the second element of the nonmanual work test. As defined in section 551.104 (1998), *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 border patrol agent working primarily in intelligence, he must apply a substantial knowledge of that complex field including the laws, agency regulations, policies, methods and procedures governing the identification, collection analysis, and dissemination of intelligence information. As a senior worker, development of that 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 performing both intelligence and border security enforcement functions.

The discretion and independent judgment test is not met

The claimant does not exercise the level of discretion and independent judgment to meet that test. As defined in section 551.104 (1998), *discretion and independent judgment* means work which 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 that 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 that test. In collecting, analyzing, and evaluating intelligence information, and carrying out interdiction activities based on his assessment of that information, his work is governed by and performed within the context of standardized agency intelligence procedures, past precedents, and typical enforcement techniques which specifically govern his actions. These include agency guidelines and standard, established processes for dealing with smuggling, narcotics trafficking, use of confidential informants, limitations on sharing information with other Federal, State and local law enforcement agencies, and past practices to help determine when sufficient information is collected to carry out interdiction operations. His work is also governed by laws concerning the rights of accused, search and seizure, and a variety of immigration laws and guidelines applicable to admission and deportation, investigative techniques, rules of evidence, report writing, etc. The decisions he makes are not significant within the meaning of the regulation in that they affect the procedural details of his work (e.g., developing and using confidential informants, setting up a surveillance or anti-smuggling operation, formal processes for sharing intelligence information with concerned parties, elements of trend analysis), and primarily focus on deciding whether a given intelligence or potential enforcement situation conforms to and clearly meets applicable guidelines and accepted procedures to warrant interdiction.

The 80-percent test is not applicable to the claimant's work.

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

The claimant's work does not meet the administrative exemption criteria.

FLSA Regulations (2007)

The current regulation in 5 CFR 551.206 (2007), defines an *administrative employee* as one 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. The regulation states that (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.

Under the regulation, the exercise of discretion and independent judgment implies that 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 does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. Decisions made may consist of recommendations for action rather than the actual taking of action. The fact that they are subject to review and sometimes revised or reversed after review, does not mean the employee is not exercising discretion and independent judgment. The regulation notes that 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 analysis above under the 1998 regulations applicable during the claim period determined the claimant's work did not meet the administrative exemption criteria. We note the claimant's work also would not have met the administrative exemption criteria under the current regulations. Under the current regulations, the claimant's work does not meet the administrative exemption criteria. Although he performs office, non-manual work related to the [name of unit] Unit's operations, his primary duties do not include the exercise of discretion and independent judgment with respect to matters of significance. While he must choose between alternative intelligence collection methods and enforcement actions depending upon the circumstances, 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, affect, interpret, or implement management policies at his level; he carries out only very specific, short-term assignments, rather than major ones, related to immediate interdiction activities, which do 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 the intelligence field, his second-level supervisor (Patrol Agent-in-Charge of Sector [name of unit]) is tasked with providing consultation and expert advice to Sector management on intelligence matters, and is solely involved in planning and submitting long- or short-term organizational objectives to higher-level

management officials. 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 Station and Sector supervisors and managers.

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.

Conclusion

The claimant's work does not meet the executive, administrative, or professional exemption criteria. Therefore, it is nonexempt and properly covered by the overtime provisions of the FLSA. The claimant is owed compensation for the difference in overtime payment due under the FLSA and any overtime pay received under title 5.

Claim Period

Under the regulations applicable during the claim period, all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (and three years for willful violations). See 5 CFR 551.702 (1998). A claimant must submit a written claim to either the employing agency or OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date establishing the period of possible back pay entitlement. The appropriate date for preserving the claim period is September 5, 2007, when OPM received the claimant's request. Thus the claim's time period began on September 5, 2005, and ends on June 24, 2007, when the agency designated the position as nonexempt pending review by OPM of this and other claims filed by LBPA's assigned to PD [number].

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

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

5 CFR 551.104 (1998).

Clearly not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that CBP erred in the claimant's exempt status determination and those of other LBPA's. Based on fact-finding conducted as a result of an earlier LBPA FLSA claim, COED (then the Compensation Programs and Policy Division) determined the individual's work was nonexempt and awarded him back pay and interest. As a result of CBP's study, its June 25, 2007, memorandum found the LBPA's positions were appropriately nonexempt. Shortly

thereafter, the FLSA designations of affected LBPA positions were changed to nonexempt. In response to OPM's request for information, the CBP's COED, in an apparent reversal of the agency's June 2007 findings, provided an analysis determining the claimant's work is exempt under the executive and administrative criteria of the FLSA. However, COED indicated that all LBPA positions would nonetheless remain nonexempt pending OPM's review.

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

Decision

The claimant's work is nonexempt (i.e., covered by FLSA overtime provisions), and he is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on September 5, 2007, and the claimant can receive back pay only for two years prior to that date. We find no indication of willful violation by the agency. As stated in 5 CFR 550.806, the claimant is also owed interest on the back pay. The agency must follow the compliance requirements on page ii of this decision.

The claimant provided information with the claim on the number of overtime hours worked. The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime pay already paid. If he believes the agency incorrectly computes the amount, the claimant may file a new FLSA claim with this office.