

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

**Claimant:** [name], et al

**Agency classification:** Construction Representative  
GS-809-11

**Organization:** Department of the Army  
U.S. Army Garrison  
Directorate of Installation Operations  
Engineering Construction Division  
Construction Branch  
[location]

**Claim :** Back pay based on Reclassification  
from Exempt to Nonexempt Status and  
Willful Violation by the Agency

**OPM decision:** Nonexempt. Due the difference between  
FLSA and title 5 overtime payment, if  
any. Willful violation denied.

**OPM decision number:** F-0809-11-03

/s/

---

Kevin E. Mahoney  
Deputy Associate Director  
Center for Merit System Accountability

7/20/06

---

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 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:**

[names and addresses]

Civilian Personnel Operations Center  
USCHARA, Northeast Region  
914 Johnson Street, Bldg 314  
Aberdeen Proving Ground, MD 21005

Chief, Position Management and Classification Branch  
Office of the Assistant Secretary  
Manpower and Reserve Affairs  
Department of the Army, Attn: SAMR-CPP-MP  
Hoffman Building II  
200 Stovall Street, Suite 5N35  
Alexandria, VA 22332-0340

## **Introduction**

On December 10, 2002, the Office of Personnel Management (OPM), Division of Human Capital Leadership and Merit System Accountability, Center for Merit System Accountability, received a Fair Labor Standards Act (FLSA) claim from Mr. George Colletta who filed the claim on behalf of himself and the following individuals: [names]. All claimants occupy identical additional Construction Representative, GS-809-11, positions (hereinafter referred to as position). We received a partial agency administrative report on July 23, 2003, and conducted additional fact-finding to fully develop the record.

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

## **General Issues**

The claimants do not dispute the agency's designation of their identical additional positions as FLSA nonexempt or the duties and responsibilities as described in the Construction Representative, GS-0809-11, position description (PD) of record, number AG08428. They believe they are due compensation for overtime worked for the three-year period preceding the effective date of the FLSA designation change from exempt to nonexempt.

## **Background Information**

During the summer of 2000, the Department of the Army conducted an Army-wide review of FLSA exemption status for grades GS-7 to GS-12. This review included position description number AG08428, to which the claimants are assigned.

On August 1, 2002, an agency employee contacted the Aberdeen Proving Ground, Civilian Personnel Advisory Center (CPAC), and requested a review of the FLSA exemption determination for their position. The CPAC conferred with the Civilian Personnel Operation Center (CPOC), and it was determined that the position to which the claimants were assigned was nonexempt and subject to the FLSA.

## **Position Information**

The claimants work as Construction Representatives, GS-809-11, Department of the Army, U.S. Army Garrison, Directorate of Installation Operations, Engineering Construction Division, Construction Branch, Aberdeen Proving Ground, Maryland. The claimants' PD reflects that an incumbent is under the general supervision of the division chief who makes assignments covering overall objectives of the assignments and provides guidance on critical problems and policy matters. The incumbent exercises independent technical responsibility for developing solutions for all but the most unusual problems, referring to the supervisor only the more critical or controversial matters along with proposals for solution. He/she review plans and specifications during planning and design stages and upon finalization to become thoroughly familiar with job requirements, maintains a daily record on items of work inspected and work instructions, exercises surveillance to assure that contractor is conducting quality control operations to produce work in conformance with plans and specifications, inspects materials

being used to insure compliance with plans and specifications as to grade, composition, dimensions, consistency, value or other characteristics, assists in the preparation of sketches of design changes, and ensure cohesiveness with contractor quality assurance procedures for a variety of environmental issues which arise from construction projects.

The supervisor initialed the PD of record to certify as to its completeness and accuracy. We spoke with a CPOC staff member who verified that the only evaluation for the PD was included in the record. She stated that she most likely did a cursory review of the PD unless something unusual stood out. Otherwise the Army's review was accepted by the CPOC. To gather additional information about the actual duties of the claimant's position, we interviewed the lead claimant (hereinafter referred to as the claimant) and his supervisor by telephone.

The claimant explained that he is a construction representative who ensures that projects are built according to the specifications listed in the contract by inspecting phases of construction and keeping his supervisor and resident engineer informed of construction status and issues. Most projects concern the building of parking lots, dormitories, or office buildings being constructed for the Army and/or Air Force. He participants from the design standpoint through the physical construction cycle until project completion. Some projects take as little as six months to complete while others take several years. Through weekly staff meetings, he keeps his supervisor, the resident engineer, and his co-workers apprised on progress of his assignments. Additionally, he updates a daily report on the computer, which is accessible by management.

When a contract is signed, the claimant attends a preparatory meeting with the contractor and reviews the particulars. For example, he assures that the plans are in compliance with appropriate Maryland State regulations as well as Base regulations and that safety issues are addressed. They review the required materials so that specifications are noted.

Once the physical construction begins, he regularly inspects the work being performed to ensure that it is being done in compliance with the drawings. He inspects to ensure correct materials are installed properly. If a problem arises, he contacts the contractor and the resident engineer. When problems or disagreements occur on the work site, an attempt is made to resolve it informally with the contractors. For example, if a material being installed is the wrong color, he will bring this to the attention of the contractor. If the contractor disagrees, it will be elevated to higher levels. With more serious problems, the resident engineer will write to the general contractor to describe the problem, and negotiate a contract modification. Occasionally, the contractor will identify a problem not known at the time the contract was signed. This is described as a differing site condition and may result in a contract modification with more funding to the contractor. The claimant is not involved in contract modifications.

The claimant relies on other experts and technical support people in his organization to determine whether the contractor is adhering to the specifications. For instance, he calls upon mechanical and electrical engineers to review work and to ascertain whether it is in compliance with the contract. When a phase of the work is completed, he examines it to determine whether it complies with the contract specifications. If it does comply, the next phase can begin. For instance, drywall is erected with certain kinds of metal studs and tape joints. If this has been accomplished according to the contract, the work can continue. Periodically, he will enlist the

support of the mechanical or electrical engineer to inspect work with which he is not familiar. Examination of work that cannot be seen, such as foundations, loads, soil conditions, waste water plans, piers, etc., is completed by engineers and not by the claimant. With regard to the completion of the contract, higher level Corps of Engineers employees and users attend the close-out meeting with the contractor to accept the work. While the claimant usually attends these meeting, he is not empowered to accept the work.

### **Evaluation of FLSA Coverage**

Sections 551.201 and 551.202 of title 5, Code of Federal Regulations, require that an employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles. Each employee is presumed to be FLSA nonexempt. Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption. The burden of proof rests with the agency that asserts the exemption. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. There are three exemption categories applicable to Federal employees: executive, administrative, and professional.

#### Executive Exemption Criteria

Under the executive exemption criteria contained in 5 CFR 551.205, an executive 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. The claimants do not meet the definition of executive since they do not manage or supervise subordinate employees.

The executive exemption criteria were not met.

#### Administrative Exemption Criteria

Under the administrative exemption criteria contained in 5 CFR 551.206, a position is exempt if it meets administrative exemption criteria (a)(1), (2), or (3), known as the primary duty test, and (b) through (d).

##### *Primary duty test*

The primary duty test is met if the work meets criterion (a)(1), (2), or (3).

Criterion (a)(1) deals with work that significantly affects the formulation or execution of management policies or programs.

Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals 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 others act on. 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 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.

The claimant is not engaged in formulation or execution of management policies or programs, e.g., evaluating operating programs of the organization. He is not obtaining compliance with program policies or determining the accomplishment of program objectives. In contrast, he is responsible for the regular inspection of the construction of a building, assuring that the work being performed by contractors is in compliance with the contract. Program compliance and other major decisions are made by other positions in the claimant's organization. For these reasons, criterion (a)(1) is not met.

Criterion (a)(2) involves general management or business functions or supporting services of substantial importance to the organization serviced.

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, general management or support services include 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 organizational location does not change service functions into non-exempt production functions. 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. The claimant does perform support services by overseeing contractor-performed work. However, his authority to determine the acceptability of goods and services is limited as discussed previously. Therefore, we find that the claimant's work does not meet criterion (a)(2).

Criterion (a)(3) involves substantial participation in the executive or administrative functions of a management official.

Work involving participation in the functions of a management official includes employees, such as secretaries and administrative assistants, who participate 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 assistants must have knowledge of the policies, plans, and views of the supervisor and must be delegated and exercise substantial authority to act for the supervisor. The claimant does not perform this type of work. Therefore, we find that the claimant's work does not meet criterion (a)(3).

Based on the preceding analysis, the claimant's work does not meet the primary duty test.

*Nonmanual duty test*

The nonmanual work test is met when the employee performs office or other predominantly nonmanual work which meets either criterion (b)(1) or (b)(2).

Criterion (b)(1) covers work that is intellectual and varied in nature.

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work involving mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized 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.

According to the claimant, a large percentage of his work is based on standardized procedures or precedents. He is required to conduct inspections of construction activities and determine that the work is in overall compliance with contract specifications and Maryland and Base building codes. He selects from among prescribed solutions when problems are encountered. He is able to provide input based on his findings, but does not have the authority to make changes from prescribed procedures without approval of a supervisor or the resident engineer. The claimant has no authority to stop the contractor's work when a deviation from the contract is observed, and he has very little discretion within prescribed procedures to adapt techniques or be innovative.

The claimant's work does not meet criterion (b)(1).

Criterion (b)(2) covers work of a specialized or technical nature that requires considerable specialized training,

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. This knowledge set is characteristically 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 training.

The claimant's work requires experience in the construction of buildings, knowledge of building materials, and design requirements. This necessitates a practical understanding of the principles of building construction. The in-depth practical knowledge would typically come from several years of on-the-job training and experience. Accordingly, we find the position meets criterion (b)(2).

*Discretion and independent judgment test*

Work meeting this test (criterion (c)) requires the employee to frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work. 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.

The claimant works independently. However, he does not have the opportunity to exercise independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. Instead, he applies approved procedures and has limited discretion within those approved procedures. The work performed by the claimant involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment. Therefore, the claimant's work fails to meet criterion (c).

*Criterion (d)*

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative workweek on administrative functions and work that is an essential part of those functions. Because the claimant's position is classified above these grade levels, this criterion does not apply to the claimant's work.

The administrative exemption criteria are not met.

*Professional Exemption Criteria*

5 CFR 551.207 contains the criteria governing whether the claimant's position should be exempt from the FLSA under the professional exemption criteria. The position is exempt if it meets professional exemption criteria (a)(1), (2), or (3), known as the primary duty test and (b) through (d) in section 551.207.

Criterion (a)(1) deals with work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field. Criterion (b)(2) concerns work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention,



imagination, or talent of the employee. Criterion (a)(3) deals with work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering or other similar work in the computer software field. The work must consist of one or more of the items listed under 5 CFR 551.207(a)(3).

Criterion (b) deals with work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

Criterion (c) is the discretion and independent judgment test. An employee frequently exercises discretion and independent judgment under only general supervision, in performing the normal day-to-day work.

To meet criterion (a)(1), the claimant must perform work comparable to that performed by professional employees on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field. Our interviews with the claimant disclosed that the construction representative work that the claimant performs is not like that done by professional employees, and does not require the level of theoretical knowledge comparable to that applied by professional engineers gained through a bachelor's degree in engineering. Rather, the claimant's knowledge is a reflection of the many years of experience applying basic principles and in-depth practical knowledge in the construction field. His practical knowledge was gained through many years of on-the-job and classroom training provided by the Army Corps of Engineers. As further indicated by the claimant, theoretical knowledge and that of related disciplines and new developments in the field is applied by engineering professionals involved in structural changes and designs. The claimant does not meet (a)(1).

The claimant does not meet (a)(2).

The claimant's work is not in a field of artistic endeavor.

The claimant does not meet (a)(3).

The claimant's work is not in the computer software field. The claimant's position did not meet the professional exemption criteria of the FLSA.

The claimant's position does not meet (b).

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work involving mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized 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.

According to the claimant and confirmed by the supervisor, a large percentage of his work is based on standardized procedures or precedents. He is required to conduct inspections of construction activities and determine that the work is in overall compliance with contract specifications and Maryland State and Base building codes. The claimant selects from among prescribed solutions when problems are encountered. He is able to provide input based on his findings, but does not have the authority to make changes from prescribed procedures without supervisory (or resident engineer's) approval. The claimant has no authority to stop the contractor's work when a deviation from the contract is observed. He has very little discretion within those prescribed procedures to adapt techniques or be innovative.

The claimant's position does not meet (c).

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. The work must involve sufficient variables as to regularly require discretion and judgment; the employee must have the authority to make determinations or take action; and the decisions must be significant. 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. In addition, deciding whether a situation does or does not conform to clearly applicable criteria would not be considered making significant decisions.

The claimant works independently. However, he does not have the opportunity to exercise independent judgment in terms of analyzing and interpreting the situation, considering a variety of possibilities, and then deciding what should be done. Rather, he applies approved procedures and has limited discretion within those approved procedures. The work performed by the claimant involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment.

Criterion (d) is not applicable to the claimant's position.

#### Conclusion

The professional exemption criteria are not met.

#### **Decision on FLSA Coverage**

Based on the above analysis, the claimant's position did not meet the criteria for executive, administrative, or professional exemption and is therefore, properly covered by the overtime provisions of the FLSA.

#### Willful Violation

The claimants believe the agency willfully violated the FLSA ,but the agency disagrees. Accordingly, the next issue is whether the claim period should be extended to three years based

on the claimant's belief that their agency willfully violated the FLSA. The claimant's original request stated, that "most of the employees assigned to the Construction Representative, GS-809-11 position have held the position since the 1994-1995 time frames. This equates to eight years of incorrect overtime compensation." Therefore, they are requesting three years of back pay be approved. In additional documentation received from the claimants, they request "the maximum retroactive date be established for changing or correcting our FLSA designation and that we be reimbursed appropriately for all overtime hours worked (to include retroactive interest) for the three year period preceding this date)." They allege the documentation they provided will imply a willful intent by Department of Army and its personnel to delay, deceive, and defraud the claimants and other Department of Army employees from receiving correct overtime compensation. 5 CFR 551.104 defines "willful violation" specifically 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.*

Clearly, not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that the agency erred in the exempt status of the claimant. However, error alone does not reach the level of willful violation as defined in the regulations. A finding of willful violation requires that either the agency knew that its conduct was prohibited or showed reckless disregard of the requirements of the FLSA. The regulation further instructs that the full circumstances surrounding the violation must be taken into account.

In evaluating the circumstances surrounding the violation, it is important to consider the complex history of the exemption status of high-graded Federal technicians like the claimant under the FLSA. OPM regulations and policy regarding the exemption of these positions have changed over the years. In the initial period after extension of the FLSA to Federal employees in 1974, it was generally accepted that technician positions at GS-11 and above met the professional exemption criteria of the FLSA. The presumption of exemption at GS-11 and above was later withdrawn (see *AFGE v. OPM*, 821 F.2d 761 (D.C. Cir 1987)), and agencies were required to apply the full criteria to determination FLSA status. These changes, combined with the inherent complexity of applying the exemption criteria to high-graded technician positions tend to increase the possibility of error.

It is also important to consider the origin of the claim. As indicated earlier, Army was reviewing the FLSA determinations of GS-7 to GS-12 positions throughout the agency. Locally, during this same time period, a Construction Representative, GS-809-11, from the Engineering Division's Construction Branch inquired about his position's FLSA designation. The agency then conducted a review of the inquirer's PD and discovered a discrepancy caused by a miscoding in the agency's automated classification system, which incorrectly exempted the inquirer's position from the FLSA. The inquirer's position and status, along with those assigned to the same PD, were changed to nonexempt FLSA designations.

It is instructive to consider how the agency reacted when they discovered the erroneous FLSA designations. A nationwide review was conducted and findings reported through the major

commands to each installation. APG officials requested that the CPOC conduct its own review of the specified positions in question. The CPOC completed a review and identified 26 positions with erroneous exemptions. The December 12, 2002, memorandum from APG's Commanding Officer to the CPOC requested immediate correction of those designations. The memorandum, in itself, is evidence that the agency was making an honest attempt to correct all erroneous FLSA exemptions. To prove willful violation, there must be evidence that the agency showed reckless disregard of the requirements of the Act. Instead, we find that proactive steps were being taken to correct actions in accordance with the FLSA. For example, the memorandum specifically directed the Northeast Region's CPOC to correct the erroneous FLSA designations and to provide each affected employee with an SF-50 to serve as notification of the actions taken.

Based on all of the above, we find the agency erred in the claimant's exempt status under the overtime provisions of the FLSA. However, we also find that the agency acted in good faith by making a full and adequate inquiry once their attention was focused on the issue, and they took action to resolve the matter. In doing so, the agency did not recklessly disregard the requirements of the Act. In its administrative report, the agency acknowledged that it made errors in personnel action processing. However, such technical errors also do not rise to level of willful violation. The claimant's assertions in his May 11, 2003, and July 10, 2005, letters would require us to conclude the agency engaged in a series of actions based on animus and willful avoidance of its responsibilities. This is based, in large part, on the assumption the position's exemption status should have been changed immediately upon release of the Army FLSA study results "on 25 December 2000." However, as noted in this decision, FLSA exemption determinations must be based on the actual duties and responsibilities assigned to and performed by an employee. Given the hierarchical nature of the agency and its command structure, we decline to conclude the delays cited by the claimant rise to the level of willful violation. In summary, we find 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 the overtime provisions of the FLSA. Therefore, the claimant is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on December 10, 2002, and the claimants can receive back pay only for two years prior to that date. 5 CFR 550.806 also states that the claimant is owed interest on the back pay.

According to the claimants, they received retroactive money in their paychecks for pay periods ending August 10, 2002, and August 24, 2002. The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid. If they believe the agency has computed the amount incorrectly, they may file a new FLSA claim with this office.