

120 Howard Street, Room 760
San Francisco, CA 94105



**Fair Labor Standards Act Decision
Under Section 4(f) of the Act as Amended**

Claimants:	[three claimants]
Position:	Supervisory Firefighter GS-081-9
Organization:	Department of the Navy U.S. Naval Activities Guam
Claim:	Exemption status
Decision:	Claim denied
OPM decision number:	F-0081-09-01

Signed by Denis J. Whitebook

DENIS J. WHITEBOOK
CLASSIFICATION APPEALS OFFICER

May 28, 1997

DATE

There is no right of further appeal from this decision. The Director of the U.S. Office of Personnel Management may at his discretion reopen and consider the case. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision.

Decision sent to:

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Introduction

On December 5, 1996, the San Francisco Oversight Division of the U.S. Office of Personnel Management (OPM) received Fair Labor Standards Act (FLSA) claims from [three appellants]. The claimants believe their positions should have been nonexempt under the Act since September 29, 1996, the date they were placed into their current positions classified as Supervisory Firefighter, GS-081-9, downgraded from Supervisory Firefighter, GS-081-10. The claimants believe that their positions do not meet the executive exemption criteria, primarily because it does not involve 80 percent or more of their worktime in a representative workweek on supervisory and closely related work, and they do not have the authority to interview prospective workers and recommend selections. The agency believes the claimants are exempt because their positions meet the executive exemption criteria. During the claim period, the claimants have worked in the Federal Fire Department, U.S. Naval Activities, Department of the Navy, Guam. We have accepted and decided their claims under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimants and their agency, including their official position description (PD) E6742.

General Issues

The claimants make various statements relating to their agency and its exemption determinations. In adjudicating their claim, our only concern is to make our own independent decision on the exemption status of the position. We must make that decision by comparing claimants' duties and responsibilities to criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimants' statements only insofar as they are relevant to making that comparison.

Position Information

The claimants' PD, certified by them as current and accurate, indicates that during the claim period they directly assist the Fire Chief and Deputy Fire Chief in providing fire protection and fire prevention programs for all naval commands and their tenants on the Island of Guam. This includes planning, directing and supervising the function of a battalion composed of several engine companies. Supervision includes four lead firefighters and twenty driver operators/firefighters. As stated in their PD, they schedule and approve leave, sign time/labor cards, initiate and effect disciplinary actions, recommend action to the Fire Chief and/or Deputy Fire Chief in more serious cases, and initiate commendatory awards, promotions, recruitment and transfer of subordinate personnel. They counsel employees, and adjust informal complaints and grievances through discussion with employees and union representatives. They establish performance standards and evaluate assigned employees of official performance ratings. They actively support the command's special emphasis programs, i.e., safety and EEO, and communicate support of these policies to subordinates. They assure a safe working environment and equality in determining qualifications, selections, assignments, training, promotion, details, discipline and awards.

Evaluation

Administrative, professional, and executive positions are exempted from the provisions of the FLSA. The claimants' positions do not meet the administrative or professional FLSA exemption criteria. As GS-9 supervisory firefighters, the claimants' positions must be compared to the executive exemption criteria to determine their exemption status. Neither the agency or claimants disagree.

Section 551.204 of title 5, Code of Federal Regulations contains the criteria governing whether the claimants' supervisory position should have been exempt from the FLSA during the claim period under the executive exemption criteria. The position should have been exempt if it met executive exemption criteria (a)(1), (a)(2), and (b) in section 551.204.

As defined in section 551.204, an "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee--

(1) Has authority to select or remove, and advance in pay and promote, *or* make any other status changes of subordinate employees, *or* has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; (*emphasis added*) 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.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent in other wage systems), employees at the GS-7 through 9 level subject to section 207(k) of title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

Evaluation of criteria (a)(1) and (a)(2)

As summarized in the Position Information, above, the claimants' PD describes their supervisory duties and responsibilities, including their delegated personnel management authorities. A memorandum to the claimants from the Fire Chief dated December 10, 1996, clarifies and reaffirms the claimants' supervisory duties and responsibilities, including supervising crew chiefs and firefighters (drivers/hosemen). The Fire Chief's memorandum also lists delegated personnel management authorities including the authority to interview prospective workers and recommend

selections, as appropriate. The claimants dispute having all the authorities cited in the Fire Chief's memorandum, stating that they do not have authority to interview prospective workers and recommend selections and this is one reason why their positions should be nonexempt. The claimants also cite an internal memorandum that indicates the command, not the complainants, will determine awards.

As quoted above, criterion (a)(1) provides that the authority to suggest and recommend actions with consideration given to these suggestions and recommendations is sufficient for it to be met. It is not specifically required that an individual have authority to interview prospective workers and recommend selections, or to approve awards, to meet criterion (a)(1). Given the overall number and range of personnel management authorities delegated to the claimants that are described in their PD and clarified in the Fire Chief's memorandum, and the consideration given to their suggestions and recommendations as supported by the agency's material of record, even if the examples occurred prior to being downgraded, we judge that the terms and spirit of criterion (a)(1) are met.

From our review of the material of record, including the claimants' PD and the Fire Chief's memorandum, we judge that the claimants' positions meet criterion (a)(2). Neither the claimants nor the agency disagrees.

Evaluation of criterion (b)

The claimants state that they do not spend 80 percent of their worktime on supervisory and closely related work. In support of their claim, the claimants cite two major duties from their PD that are not supervisory or closely related work and that total 25 percent of their time. The first of these two major duties cited by the claimants, which takes 5 percent of their work time, is responding to all fires, alarms, and other emergencies. We will refer to this work as major duty number 2. The second major duty cited by the claimants, which takes 20 percent of their work time, is conducting training and participating in drills (live pit fires, etc.) and courses such as fire safety, hazardous materials, etc. We will refer to this work as major duty number 5. The claimants also refer to the Fire Chief's assessment of their duties as supporting evidence. The Fire Chief's memorandum states that 25 percent of the claimants' work time is spent on nonsupervisory duties such as driving rescue van, responding to alerts and participating in fire suppression, performing rescue, working hazardous material incidents, etc., participating in drills, attending classes, inspecting field conditions, etc.

With respect to the claimants' belief that major duty number 2, which takes 5 percent of their time, is not supervisory or closely related work, their PD describes this duty in the following way: "Responds to all fires, alarms and other emergencies and assumes command until arrival of the Fire Chief/Deputy Fire Chief exercising his authority in techniques and methods required to accomplish rescue of entrapped personnel or victims of fires, control and extinguish fires and eliminates existing or potential fire hazards." Accepted OPM guidance provides that a basic test for identifying closely related work is whether or not the work contributes to effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. We judge that responding to fires and assuming command until arrival of the Fire Chief/Deputy Fire Chief

contributes to effective supervision and the smooth functioning of the unit; i.e., it is in the claimants' role as a supervisor that they respond to a fire or emergency to assume command and exercise their authority as a supervisor to gain control and direct operations. This is what makes these functions closely related to supervisory work.

With respect to the claimants' belief that major duty number 5, which takes 20 percent of their time, is not supervisory or closely related work, their PD describes this duty in the following way: "Conducts training and participates in drills (live pit fires, etc) and courses such as fire safety, hazardous materials, fire control, helo crash and rescue operations, CPR and other fire related training. Keeps abreast of new developments to ensure effective fire suppression and rescue methods. Determines training requirements and evaluates effectiveness of training." We judge that a substantial portion, if not all, of this work contributes to effective supervision and/or to the smooth functioning of the unit. For example, determining, conducting and evaluating training contributes to the smooth functioning of the unit by identifying training needs of subordinates and helping to ensure that they are properly trained to accomplish their work. Participating in drills and courses and keeping abreast of new developments to ensure effective fire suppression and rescue methods contributes to effective supervision by providing claimants with the knowledge and practice in the proper and safe methods of fire suppression and rescue operations to properly oversee and direct subordinates engaged in such activities.

We find, and the claimants do not disagree, that the other 75 percent of work described in their PD is supervisory or closely related. This undisputed 75 percent, together with the 5 percent in responding to and assuming command of fires and emergencies, referred to as major duty number 2, and a substantial portion of the work involved in conducting training and participating in drills, referred to as major duty number 5, which we found to be all or mostly supervisory or closely related work, totals more than 80 percent of the claimants' time.

With respect to the Fire Chief's statement that 25 percent of the claimants' worktime is performing nonsupervisory duties, he describes this 25 percent in the following way, "Performs non-supervisory duties such as driving rescue van, responding to alerts and participating in fire suppression, performing rescue, working hazardous material incidents, etc: participates in drills, attends classes, inspecting field conditions, etc." As discussed above, we found that much, if not all, of this work time contributes to effective supervision and/or the smooth functioning of the unit and therefore judged it to be supervisory or closely related work.

As discussed above, we find that the claimant's positions meet criteria (a)(1) and (a)(2), and (b). Therefore, their positions have been properly exempt under the FLSA during the claim period.

Decision

The claimants' positions have been properly exempt from the FLSA since September 29, 1996. They are due no overtime pay under the Act.