

U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and FLSA Programs

Office of Merit Systems Oversight and Effectiveness
1900 E Street, NW
Washington, DC 20415-6000

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

Claimant: [the claimant]

Agency classification: Computer Specialist
GS-0334-12

Organization: [agency's name]
[agency's address]

Claim: Exemption status.
Due back pay for overtime worked.

OPM decision: Exempt.
No overtime payment due.

OPM decision number: F-0334-12-01

/s/

Deborah Y. McKissick
FLSA Claims Officer

4/9/02

Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which Office of Personnel Management administers the Fair Labor Standards Act. The agency should identify all similarly situated current and, to the extent possible, former employees, and ensure that they are treated in a manner consistent with this decision. There is no right of further administrative appeal. This decision is subject to discretionary review only under conditions and time limits specified in 5 CFR 551.708 (address provided in 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

Decision sent to:

Claimant

Defense Logistics Agency
Attn: J-1
Nancy Ward
8725 John Fay Kingman Road
Ft. Belvoir, VA 22060

Ms. Mary Ann Skocik
Personnel Officer
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Defense Supply Center, Columbus (DSCC)
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Ms. Bonnie J. Brandon
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Dallas Oversight Division
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Introduction

On April 17, 2001, the Dallas Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes that the FLSA exemption status of his position should be nonexempt, and that he is owed payment for overtime worked for the period beginning three years prior to September 28, 2000 to the present. The claimant works in the [agency's address]. The claimant is a Computer Specialist, GS-0334-12. Because of program changes in OPM, the Dallas Oversight Division sent the claim to OPM's Office of Merit Systems Oversight and Effectiveness for processing on July 9, 2001. We have accepted and decided his claim under section 4(f) of title 29 (FLSA), United States Code.

As is customary with our analysis of an FLSA claim, we reviewed the position description of record and other information provided by the claimant and the agency. We also interviewed the claimant and the claimant's supervisor.

General issues

The claimant references the settlement agreements with certain American Federation of Government Employees (AFGE) locals and the [agency's name] and the AFGE and the Veterans Health Administration concerning FLSA status of certain bargaining unit positions. The claimant notes that GS-12 computer specialist positions in other agencies have been found to be FLSA nonexempt. However, we must make our decision solely by comparing claimants' duties and responsibilities to Federal regulations and other Federal guidelines. Since comparison to Federal guidelines is the exclusive method for making exemption decisions, we cannot compare the claimant's position to others as a basis for deciding his claim.

The claimant believes that his duties and responsibilities as a Computer Specialist, GS-0334-12, do not meet the primary duty test as described in section 551.206(a) of Title 5 of the Code of Federal Regulations (5 CFR). The claimant based his belief on the fact that he is not a supervisor, a team leader, or a member of management. The claimant states that he provides technical expertise and support to the agency; not management, general business or support functions. The claimant also believes that his duties and responsibilities fail to meet the discretion and independent judgement test outlined in 5 CFR 551.206(c). The claimant believes this is true because his supervisor, who is also his team leader, uses a "hands-on" supervisory style.

Job information

The FLSA designation exemption status of the claimant's position is classified as exempt. The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee (5 CFR 551.202). According to the position description for the claimant's position, Computer Specialist, GS-0334-12, the claimant performs work as a team member and his major duties include, but are not limited to,

- analyzing the needs of the users requirements;

- providing advice on the impacts, risk and risk mitigations of software development decisions, plans, designs, and specifications;
- designing/modifying software applications for assigned Automated Information Systems (AIS) and/or subsystems; and
- providing advice on technical matters and interface issues.

The claimant stated that he performs technical work on computer systems and he perceives his work to be based on standardized procedures and precedents. The claimant stated that even though the following responsibilities are listed in his position description, it is not his responsibility to

- develop and implement procedures for administration of databases and applications of assigned database management systems, as described in his position description;
- monitor adherence to applicable standards and procedures;
- ensure that changes in work under a contract are not implemented until written authorization or modification is issued by the contracting officer, or
- recommend standard hardware reuse, software component reuse, software development environment reuse, component upgrades and software engineering methods.

The claimant stated that he does not perform his duties under general supervision as indicated in his position description, because his team leader is also his supervisor. The claimant also stated that a baccalaureate degree (BS, BA) in computer science is not required for his position.

The claimant's supervisor stated that the claimant is performing his duties under general supervision. The supervisor stated that the claimant works independently, but he, the supervisor, requires a regular update on projects because he has the final responsibility for the projects. The supervisor also stated that the claimant analyzes the system programs, plans the stages of the requirements (the life cycle of projects), establishes priority of project development plans, writes test cases, and provides the process to implement proposed changes for the systems. The supervisor also explained that the claimant prepares and presents preliminary presentations regarding the systems, when needed.

The agency provided their rationale as to the determination of the claimant's FLSA status as exempt. The agency's analysis reads:

GS-334-12

Meets the primary duty test under administrative exemption criteria in 5 CFR § 551.206(a)(2), involving supporting services. Provides expert advice in specialized computer services or support services for automated data processing, which meet (1)(i) or (iv), respectively, under the definition of management or general business functions or supporting service found in 5 CFR § 551.104. Also meets (2), substantial discretion on matters of enough importance that actions and decisions have a noticeable impact on effectiveness of the organization represented or serviced, under the same definition in 5 CFR § 551.104.

The agency provide rationale similar to the collective bargaining agreement (CBA) - - covering other [agency] positions. However, it appears they only applied one of the three required exemption criteria.

Evaluation

The statute of limitations for FLSA claims are explained in 5 CFR § 551.702(b). There is a 2-year statute of limitations on FLSA claims filed on or after June 30, 1994, except in cases of a willful violation committed by the agency. There is a 3-year statute of limitations on FLSA claims when an agency commits a willful violation. Hence, OPM must determine if the cause or basis of the claim was the result of a willful violation on the part of the agency. A review of the documents that were submitted and interviews with the claimant and his supervisor, did not disclose evidence of any willful violation committed by the agency. Therefore, only the 2-year statute of limitations may be applicable to this claim.

Sections 551.205, 551.206, and 551.207 of title 5, Code of Federal Regulations (5 CFR) contain criteria governing whether the claimant's position should be exempt from the FLSA. The executive exemption criteria in 5 CFR 551.205, define an "executive" as 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 claimant's work does not meet the exemption definition of executive criteria as described in 5 CFR 551.205.

Our application of the other two criteria follows.

Administrative Exemption Criteria

Under the administrative exemption criteria contained in 5 CFR 551.206, 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 who meets all of the four required criteria:

(a) The employee's 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.
- (b) 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) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

The claimant does not meet (a)(1).

OPM defines the formulation or execution of management programs and policies as 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 proposals that are acted on by others. Employees significantly affect the execution of management policies or programs typically when the work involves obtaining compliance with such policies by individuals or organizations, 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 provides technical advice on Automated Information Systems (AIS) and/or subsystems. The claimant is not engaged in formulation or execution of management policies or programs, e.g., evaluating operating programs of the organization. The claimant does not perform any of the phases of program management.

The claimant does meet (a)(2).

Work that involves general management, business, or supporting services includes a wide variety of specialists who provide support to line managers by providing expert advice in specialized fields, such as that provided by management consultants or systems analysts; by

assuming facets of the overall management function, such as personnel management or financial management; by representing management in business functions, such as negotiating contracts; or by providing support services, such as procurement and distribution of supplies.

The claimant is a systems analyst that provides support services to customers that use the AIS and/or subsystems. The claimant's supervisor stated that he bases many of his decisions regarding the AIS and/or subsystems on the claimant's advice.

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

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 this 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 the duties of a secretary or administrative assistant, nor is he authorized to act for the supervisor.

The claimant does meet (b)(1).

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.

The claimant performs requirements analysis, risk analysis, software design and uses a variety of application programming languages and programming tools to write applications and interface software to satisfy users requirements. The claimant prepares Software test Descriptions and test data for Computer Software Configuration Item Testing. The claimant's supervisor stated that the claimant does not rely on standardized procedures, but analytical reasoning, judgment and perception to analyze the system programs, to plan the stages of the life cycle of projects, to establish priority of project development plans, to write test cases, and to provide the process to implement proposed changes for the systems.

The claimant does meet (b)(2).

OPM guidance indicates that work which is of a specialized or technical nature requiring considerable specialized training, experience, and knowledge means specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject matter field. That knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject matter

field. The in-depth practical knowledge required by the claimant to provide technical assistance would typically come from several years of on-the-job training and experience.

The claimant's work is of a specialized and technical nature in the computer software field. He obtained his knowledge of the AIS and subsystems through considerable on-the-job training and completing computer courses. Confirmed by our fact-finding, the claimant must have working knowledge of assigned AIS and application processes sufficient to recognize potentially unworkable changes in existing or planned systems and applications that could result from proposed alternatives, to analyze software problems and to estimate cost of changes to assigned area. The claimant has broad knowledge of the costs and benefits of alternate computer technologies potentially applicable to the assigned application area sufficient to perform studies and advise on whether new systems or changes in existing and planned systems are desirable. He also has knowledge of life cycle management principles and skill in accepted systems analysis and design techniques to define and document system operational concepts.

The claimant does 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 that specifically govern their actions did not meet this element. In addition, deciding whether a situation does or does not conform to clearly applicable criteria is not considered making significant decisions.

The supervisor explained that he serves as the claimant's team leader and supervisor, and in his capacity of team leader, he requires regular updates on all determinations or actions taken by the team members. The claimant works independently and has the authority to make determinations or take action. The claimant's supervisor stated that the claimant exercises discretion and independent judgment based on regulations and knowledge of the computer systems and subsystems. The claimant works under general supervision, and either makes determinations or actions on his own or provides recommendations that are used as the basis for the supervisor's decisions. Therefore, the claimant's actions meet this element.

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

The claimant meets all of the administrative exemption criteria.

Professional Exemption Criteria

Under the professional exemption criteria in 5 CFR 551.207, a professional employee is an employee who meets all of the criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or

educational establishment. A professional employee may also be an individual that performs 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 meets the following criteria:

- (a) Primary duty test. The primary duty test is met if the employee's work consists of :
 - (1) 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; or
 - (2) 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; or
 - (3) 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 following:
 - (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or
 - (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
 - (iii) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - (iv) A combination of the duties described in paragraphs (a)(3)(i), (a)(3)(ii), and (a)(3)(iii) of this section, the performance of which requires the same level of skills.
- (b) Intellectual and varied work test. The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance.

- (c) Discretion and independent judgement test. The employee frequently exercises discretion and independent judgement, 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 comparable white-collar pay systems), must spend 80 percent or more of the worktime in a representative workweek on professional functions and work that is an essential part of those functions to meet the 80-percent test.

The claimant does meet (a)(1).

To meet (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 and the claimant's supervisor disclosed that the claimant's work is of a specialized and technical nature. The claimant's work requires substantial specialized knowledge of the AIS computer system and of the principles, techniques, practices, and procedures associated with computer systems. The claimant's knowledge was acquired through considerable on-the-job training and experience and is equivalent to the professional knowledge characteristically acquired through specialized academic education.

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

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

The claimant does meet (a)(3)(i)-(iv).

OPM guidance indicates 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)(i) – (iv).

The claimant's position meets 5 CFR § 551.207(iv). His duties include application of systems analysis techniques and procedures, including consulting with users to determine hardware and software of system functional specifications.

The claimant does 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 judgement 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 and recommending the best alternative from among a broad range of possible actions.

The claimant performs requirements analysis, risk analysis, software design and uses a variety of application programming languages and programming tools to write applications and interface software to satisfy users requirements. The claimant prepares Software test Descriptions and test data for Computer Software Configuration Item Testing. The claimant's supervisor stated that the claimant does not rely on standardized procedures, but analytical reasoning, judgment and perception to analyze the system programs, to plan the stages of the life cycle of projects, to establish priority of project development plans, to write test cases, and to provide the process to implement proposed changes for the systems.

The claimant does 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 that 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 supervisor explained that he serves as the claimant's team leader and supervisor, and in his capacity of team leader, he requires regular updates on all determinations or actions taken by the team members. The claimant's supervisor stated that the claimant works under general supervision, and either makes determinations or actions on his own or provides recommendations that are used as the basis for the supervisor's decisions. Therefore, the claimant's actions meet this element.

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

The claimant meets all of the professional exemption criteria.

Decision

Based on the above analysis, the claimant's position does not meet the executive exemption criteria. However, the claimant's position meets both the professional and administrative exemption criteria, and is therefore, exempt, i.e., not covered by the provisions of the Fair Labor Standards Act.