

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

**Claimant:** [claimant]

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

**Organization:** [name] Construction Field Branch  
Field Engineering Division  
[name] Construction Office  
[name] Region  
Bureau of Reclamation  
Department of the Interior  
[city and state]

**Claim:** Nonexempt status, FLSA payment for overtime worked.

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

**OPM decision number:** F-0809-11-02

/s/

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Kevin E. Mahoney  
Deputy Associate Director  
Center for Merit System Accountability  
Human Capital Leadership  
and Merit System Accountability

May 9, 2006

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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. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with this decision. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this 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:**

[claimant's name and address]

Human Resources Officer  
[servicing HR office address]

Manager, Human Resources  
Bureau of Reclamation  
Department of the Interior  
Denver Federal Center  
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## **Introduction**

On July 15, 2004, we received a Fair Labor Standards Act (FLSA) claim from [claimant]. The claimant occupies a Construction Representative, GS-809-11, position in the [city name] Construction Field Branch, Field Engineering Division, [name] Construction Office, [name] Region of the Bureau of Reclamation (BOR), Department of the Interior, in [city and state]. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

## **Background**

The record indicates that the claimant held the position of Supervisory Construction Representative, GS-809-11, from November 4, 1990, until July 1, 2001. During that period, he was assigned to a variety of construction projects, and his subordinate staff varied with the size and phase of the projects assigned. During this time period, his position was determined to be exempt from the overtime provisions of the FLSA under the Executive exemption criteria. While the claimant believes this resulted in an inequitable overtime pay situation, he is not contesting that determination.

In June 2001, Construction Office management determined that the forecast projects and organizational structure no longer required the Supervisory Construction Representative position. The claimant was reassigned from the [name] Field Branch to the newly established [name] Construction Field Branch and his position was redescribed as a nonsupervisory Construction Representative, GS-809-11, effective July 1, 2001. The FLSA designation of the position as exempt was not changed. The [name] Region's Human Resources Office subsequently conducted a study of the FLSA designations of all their positions during the period from October to December of 2002. As a result of that study, the claimant's position was designated as nonexempt, effective February 23, 2003.

## **Position Information**

As stated in 5 CFR 551.202, the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. The following is a description of the duties performed by the claimant based on the written information provided by the claimant and the agency and that obtained in our interviews with him on March 27 and 29, 2006, and his supervisor on April 18, 2006.

Briefly, the position description of record, [number], indicates the claimant serves as construction representative overseeing construction of safety of dam repairs, acting as the chief inspector, and leading field work of lower-graded construction inspectors or materials technicians. He distributes and balances workload, trains lower-graded technicians, and assures timely and accurate accomplishment of assigned workload. The claimant serves as the primary contact between contractors' supervisors and BOR supervisors and inspectors. He is responsible for overseeing construction operations for compliance with plans and specifications; interpreting plans and specifications for contractors; informing contractors of requirements concerning construction scheduling, progress reporting, safety measures, wage and hour law observations, labor relations, payroll records, and general contract requirements. The claimant must ensure the

contractor's compliance with BOR's safety standards; assist in reviewing contractor's submittals; reject or disapprove contractors' method when they will not meet specifications; recommend contract changes and modifications that may be required; verify and document work that may be outside the scope of the original contract; review and approve contractor progress payments; and evaluate the contractor's inspection system.

The claimant stated that during the claim period, he was assigned to a new construction project at [name] Dam. This was a \$10 million dollar project to replace the original valves and pipes in the dam which also involved a considerable amount of new concrete on the face of the dam. Because of seasonal variation in water levels, the work was to be completed over a three-year period. During that time, the claimant had some oversight responsibility for two employees; i.e., entry-level engineers rotated for a three-month period from the [city name] office to gain construction experience and a technician from the laboratory responsible for testing the concrete. He was responsible for inspecting the quality and placement of the reinforcing steel used, the setting of forms for concrete, and the correct concrete mixtures to assure that the quality of materials and workmanship meets the contract specifications. The proper grade lines of the site had to be maintained, the new valves and pipes set and correctly aligned, and welding work x-rayed to assure proper quality.

In reaching our FLSA decision, we have carefully considered all the information furnished by the claimant and his agency, including information from telephone interviews with the claimant and his supervisor

### **Evaluation of FLSA Coverage**

Sections 551.201 and 551.202 of title 5, Code of Federal Regulations (CFR), 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. As stated previously, the designation of an employee'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.

#### 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 and meets the additional criteria of 5 CFR 551.205 (a) and (b).

The claimant does not contest his exemption status while the position included supervisory responsibilities. However, his Construction Representative position of record during the claim period does not meet the definition of executive as it does not involve management or supervision of employees. The executive exemption criteria are not met.

### Administrative Exemption Criteria

Section 551.206 of the CFR contains the criteria governing whether the claimant's position should be exempt from the FLSA under the administrative exemption criteria. The work 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*

Criteria (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 programs and policies 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 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, within or outside the Federal Government, or making significant determinations 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 does not obtain compliance with program policies or determine the accomplishment of program objectives. In contrast, he serves as the agency's representative in the day-to-day operations at a construction site involving repairs at the [name] dam. He deals with the contractor's supervisors and employees, BOR staff in the Construction Field Office and other BOR offices, and is responsible for overseeing/inspecting construction operations for compliance with contract plans and specifications which cannot be construed as significantly affecting the execution of management policies or programs. Such functions are vested in other positions in his organization. For these reasons, criterion (a)(1) is not met.

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

These functions, as distinguished from production functions, include the work of employees who provide support to line managers. Such support may be providing expert advice in specialized subject matters fields, such as management consultants or systems analysts; assuming facets of management functions, such as safety management, personnel management, or budgeting and

financial management; representing management in such functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or providing support services such as automated data processing, communications, or procurement and distribution of supplies. Neither the organizational location nor the number of employees performing similar work change management functions or supporting services functions into nonexempt production functions. To warrant exemption from the FLSA, the 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 agency report stated that although the claimant was no longer supervising employees, he remained involved in management functions such as safety management, financial management, contract execution and administration, and the identification of the need for contract modifications. It indicates that he was geographically separated from his immediate supervisor and was responsible for oversight of contractor operations during construction with the authority and responsibility to halt construction if serious errors, discrepancies, and/or other issues were discovered.

As indicated, the claimant performs support work by overseeing contractor performed work. He is responsible for monitoring the contractor's safety program, verifying the percentage amount of work completed for the contractor's progress payments, and discussing possible modifications to the contract when circumstances require work outside the original contract requirements. However, his authority to make decisions in these areas is limited. He will attempt to resolve matters with the contractor and will bring any serious or unresolved issues to the attention of the engineer. While he verifies the percentage of work completed, contractor progress payment requests must go through the engineer to the contracting officer for approval. While the supervisor was geographically separated, the worksite was approximately fifteen miles away; and the claimant indicated he was at the site one or two days per week. However, his authority to determine the acceptability of goods and services is limited as discussed previously. We find the claimant does not represent management or have the authority to make decisions at the level typical of the criterion (a)(2). The claimant's work does not meet (a)(2).

Criterion (a)(3) involves substantial participation in the executive or administrative function 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 responsibilities 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 position does not operate in this manner. The claimant's work does not meet criterion (a)(3).

*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. Such work requires creative, analytical, evaluative or interpretative thought processes for satisfactory performance. 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's work involves assuring the contractor's work is conforming to the specifications and conditions of the contract. He utilizes his many years of experience and standardized procedures and precedents in resolving problems. Deviations from specifications and contract conditions must be approved by others in the organization. While the agency report discusses the claimant's decisions to halt or continue construction, the supervisor stated that while he and the claimant could stop work in cases of a serious safety violation which had the possibility for a fatal or serious maiming accident, other conditions require the contracting officer's approval. The position does not meet criterion (b)(1).

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

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 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 training.

The claimant is required to have a practical knowledge of civil engineering concepts and practices; extensive knowledge of construction inspection practices, procedures, and techniques; a broad knowledge of a variety of trade and craft processes; skill in using measuring tools and devices; ability to read engineering drawings and specifications; and a working knowledge of BOR's safety and health standards. This in-depth practical knowledge would typically come from several years of on-the-job experience and training. 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. 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, precedent 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 does work 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. He applies approved procedures and has little 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 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 work week 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 is not applicable to the claimant's work.

Since the claimant meets only (b)(2) of the administrative exemption criteria, he cannot be considered exempt using those criteria.

#### Professional Exemption Criteria

5 CFR 551.207 contains the criteria governing whether the claimant's work should be exempt from the FLSA under the professional exemption criteria. The work 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. 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.

As indicated previously, the claimant must have a practical knowledge of civil engineering principles and construction inspection practices. The work involved in monitoring the progress and quality of work performed by contractors does require ability to interpret engineering drawings and knowledge of a variety of trades processes but does not meet the criterion of (a)(1).

Criterion (a)(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. The claimant's work is not in a field of artistic endeavor. Therefore, the claimant's work does not meet (a)(2).

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). The claimant's work is not in the computer software field. The work does not meet (a)(3).

Criterion (b) deals with work that is predominantly intellectual and varied in nature. The claimant's work does not meet criterion (b) as discussed under criterion (b)(1) of the administrative exemption analysis.

Criterion (c) is the discretion and independent judgment test. The claimant's position does not meet the criterion (c) as discussed under criterion (c) of our administrative exemption analysis.

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

The claimant's position does not meet the professional exemption criteria.

### **Decision on FLSA Coverage**

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

### **Evaluation of Overtime Claim**

The claimant is asking the agency to pay him the difference between overtime for an exempt and a nonexempt employee, for the overtime hours he worked plus appropriate interest accrued. He asks that this be done for the past 3 years, as the law allows. 5CFR 551.702 (b) addresses the time limits for FLSA claims and compliance. An FLSA claim filed on or after June 30, 1994, is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, USC), which imposes a 2-year statute of limitations, except in the case of willful violation where the statute of limitations is 3 years.

The claimant does not specifically address the issue of willful violation. The regulations define willful violation as 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.

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.

As a result of Bureau-wide questions and an arbitration case, FLSA training was provided in August 2002 as a refresher to HR specialists and supervisors throughout the Bureau. It was decided that as a result of the training and in view of the evolving understanding of the exemption criteria, the HR staff would review all their positions and document the FLSA determinations. The claimant's region conducted their review from October through December 2002. The FLSA status of the claimant's position was changed to nonexempt on February 23, 2003.

As indicated earlier, the claimant was assigned to a Supervisory Construction Representative position from November 1990 until July 2001, assigned to a variety of contract projects and supervising various numbers of subordinate staff. Supervisory positions are usually determined to be exempt under the executive exemption criteria. After his position was redescribed as a nonsupervisory Construction Representative in July 2001, the FLSA exemption was not changed. The agency believed that although he was no longer responsible for supervising employees, he did retain the role of serving as the agency's on-site representative. These duties are inherent at the higher levels of the GS-809 occupation. While we found that function did exist, we also determined, those duties did not meet the exemption under the administrative exemption criteria.

### **Decision on Overtime Claim**

We find the agency erred in the claimant's FLSA exemption status when his position was redescribed as nonsupervisory in July 2001. However, because of the circumstances, that error does not meet the level of willful violation as defined in 5 CFR 551.104. The claimant is due compensation for the difference in overtime payment due under the FLSA and any overtime payment he received under title 5.

The claim was received by OPM on July 15, 2004. The claimant is entitled to receive back pay for two years prior to that date and forward until the time that the agency changed his exemption

status to nonexempt on February 23, 2003. 5 CFR 550.806 also states that the claimant is owed interest on the back pay.

### **Compliance Instructions**

The claimant provided copies of pay records that covered the entire claim period. The agency's submission did not include records for pay periods 2002-21 – 2002-26 and included no records for 2003 pay periods. Based on our review, it appears the claimant worked 394.5 hours of overtime during this period.

The agency should compute and pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid. If the claimant believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.