

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

**Claimant:** [name]

**Agency classification:** Construction Inspector (Mechanical)  
GS-809-11

**Organization:** [name] Field Division  
Pacific Northwest Construction Office  
Pacific Northwest Region  
Bureau of Reclamation  
U.S. Department of the Interior

**Claim:** FLSA Overtime Compensation for  
Time Spent Traveling

**OPM decision:** Denied

**OPM decision number:** F-0809-11-04

/s/

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Robert D. Hendler  
Classification and Pay Claims  
Program Manager  
Center for Merit System Accountability

8/1/07

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

**Decision sent to:**

[claimant name and address]

[name]

[name] Construction Field Branch  
Pacific Northwest Region  
Bureau of Reclamation  
U.S. Department of the Interior  
[address]

Mr. Max B. Gallegos  
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## **Introduction**

On November 6, 2006, OPM's Center for Merit System Accountability, received an FLSA claim from Larry W. Mix. He occupies a Construction Inspector (Mechanical), GS-809-11, position with a duty station in [location]. During the claim period he was assigned to work at the [name] Dam (the Dam) in [location]. He believes he is entitled to compensation for time spent in travel status. He also believes the statute of limitations for his claim should be three years as a result of the agency's willful violation of the FLSA. We have accepted and decided his claim under section 4(f) of the FLSA, as amended.

In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency and conducted telephone interviews with the claimant and his project supervisor. We received the agency administrative report on March 5, 2007.

## **General issues**

The claimant's agency determined his position is nonexempt from the overtime provisions of the FLSA, and we concur. He believes he is entitled to compensation for travel hours while driving a Government vehicle to and from his temporary quarters to his worksite outside his regular duty hours between September 7, 2004, and February 17, 2005.

The claimant makes various statements relating to his agency and its compensation determinations. He requests we consider what he believes was an unfair reprimand and other treatment he received from one of his supervisors. OPM's FLSA functions do not include review of the exercise of disciplinary authority by agency managers. In adjudicating this claim, our responsibility is to make our own independent decision about how much FLSA overtime pay he is owed, if any. We must make that decision solely by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines. Therefore, we have considered the claimant's statements only insofar as they are relevant to our making that comparison.

The claimant also identifies "apparent discrimination" due to the fact that others in his agency performing similar work have received compensation for their travel time to and from work sites. However, since comparison to Federal regulations and other Federal guidelines is the proper method for making FLSA decisions, we cannot compare the claimant's situation to others as a basis for deciding his claim.

The agency is responsible for determining the right of employees to compensation consistent with FLSA regulations and OPM decisions. It also has primary responsibility for ensuring similarly situated employees are treated in a manner consistent with OPM decisions. If the claimant believes other similarly situated employees are being treated differently, he may pursue the matter by writing to his agency headquarters-level human resources office. In doing so, he should specify the precise organizational location, positions, and situations in question. If the situation is found to be basically the same as his, the agency must correct the compensation treatment to be consistent with this FLSA decision. Otherwise, the agency should explain to him the differences between his situation and the others.

## **Evaluation**

We will address each of the issues bearing on this claim.

### *Preserving the Statute of Limitations*

FLSA pay claims are subject to a two-year statute of limitations, except in cases of a willful violation where the statute of limitations is three years [section 551.702(b) of title 5, Code of Federal Regulations (CFR)]. In order to preserve the claim period, a claimant must submit a written claim either to the employing agency or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is responsible for proving when the claim was received.

The claimant states he sent a claim to his agency on October 10, 2006. However, the claimant did not preserve the claim period prior to his FLSA claim to OPM on November 6, 2006, by filing a written signed claim to his agency. The claimant originally submitted an e-mail request for wages for unreported driving time to the region's administrative officer in October 2006. Therefore, the claim period for this claim is November 6, 2004, two years prior to receipt of the claim by OPM, through January 14, 2005, his last work day at the Dam. Consideration of a three-year claim period due to willful and reckless conduct in violating the FLSA is not warranted as discussed later in this decision.

### *Uncompensated Overtime for Travel*

The claimant believes he is entitled to compensation for travel time to and from his worksite each day while working at a temporary duty location, the Dam. He was on authorized travel working at the Dam as an inspector of contract work there from September 7, 2004, to January 14, 2005, and was required to be on the project every hour the contractor was on duty. The claimant worked 10-hour days, 7:00 a.m. to 5:30 p.m., Monday through Thursday, consistent with those of the normal contractor work-hours, which were augmented by frequent overtime hours. The claimant indicates some workdays were of shorter duration due to worker or materiel availability. Overtime work is routine for projects and the contractor and claimant verbally agreed on overtime hours and notified management as required.

As an assigned duty, the claimant was required to be at the worksite to unlock the Government gate at 7:00 a.m. for contractors and to lock the gate when they left after their 10-hour, or altered, shift. His workday began and ended with unlocking and locking the gate. The claimant states it took extra travel time to get to the back and top side of the Dam, where the worksite gate was located, via a back road. The claimant's temporary office was physically located at the Dam, approximately one-quarter mile from the worksite. Each day he worked, the claimant commuted approximately 27 miles in a Government-furnished Ford 150 truck from his temporary quarters to the worksite and returned the same distance to his quarters after locking the gates at the site. While assigned to the temporary duty location, he states he did not identify or claim his daily time from temporary quarters to the worksite and back as hours worked because he was unaware at that time that he should report his travel time.

Depending on the FLSA exemption status of an employee, time spent traveling may be considered compensable hours of work as described in 5 CFR 550.112(g) and 551.422(a). Federal employees in FLSA nonexempt positions, such as the claimant's, fall under the provisions of 5 CFR 551.422(a), which states that time spent traveling shall be considered hours of work if an employee is required to:

- (1) travel during regular working hours;
- (2) drive a vehicle or perform other work while traveling;
- (3) travel as a passenger on an overnight assignment away from the official duty station;  
or
- (4) travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

Both FLSA nonexempt and exempt employees covered by chapter 55, subchapter V, of title 5, United States Code (U.S.C.), fall under the provisions of section 550.112(g). This section provides that time in a travel status away from the official duty station is hours of work if the travel:

- (1) is within an employee's regularly scheduled administrative workweek;
- (2) involves the performance of work while traveling;
- (3) is incident to travel that involves the performance of work while traveling;
- (4) is carried out under arduous and unusual conditions; or
- (5) results from an event that could not be scheduled or controlled administratively.

Section 551.422(a)(1) of 5 CFR is not applicable as the claimant requests payment only for hours beyond those of his regular work hours. Neither sections 551.422(a)(3) or 551.422(a)(4) are applicable because the claimant is not requesting payment for time traveling as a passenger on one-day or overnight assignments away from the official duty station.

Section 551.422(a)(2) of 5 CFR is also not applicable. An employee who travels from home before his or her regular workday and returns to his or her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. As specified in 5 CFR 551.422(b), time spent in normal home to work and work to home travel is not considered hours of work for FLSA purposes. This is true whether the employee commutes to work from home within his permanent duty station or from a hotel to the temporary worksite within the confines of a temporary duty station. An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration [5 CFR 551.422(d)]. The agency's *Handbook: Travel as Hours of Work* (used as a guideline throughout the agency and an enhancement of the *Reclamation Instructions*) notes the agency's limits for an official duty station as "within a 50-mile radius." The claimant's daily travel from temporary residence to the temporary worksite was approximately 27 miles, well within the official duty station limits of his temporary duty station.

Commuting time may be hours of work to the extent that an employee is required to perform substantial work under the control and direction of the employing agency. The fact that an employee is driving a Government vehicle in commuting to and from work is not a basis for determining that commuting time is hours of work. See *Jerry Bobo v. United States*, 136 F.3<sup>rd</sup> 1465 (Fed. Cir. 1998). The claimant's workday began and ended in locking or unlocking the worksite gate. He carried items he needed for work in his truck, e.g., small tools, test equipment, a personal computer, but did not perform substantial work while commuting to or from his temporary residence.

Section 550.112(g) of 5 CFR is not applicable to the claimant's travel because it did not occur away from his official duty station, which during the claim period, was the authorized temporary duty location. In applying the overtime pay provisions of 5 U.S.C. chapter 55, subchapter V, an agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel. An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration [5 CFR 550.112(j)]. The agency's *Handbook: Travel as Hours of Work* (used as a guideline throughout the agency and an enhancement of the *Reclamation Instructions*) notes the agency's limits for an official duty station as "within a 50-mile radius." The claimant's daily travel from temporary residence to the worksite was approximately 27 miles, well within the official duty station limits of his temporary duty station.

#### *Willful Violation*

The claimant states his uncompensated OT should extend back three years, because he believes actions taken by the agency constitute "willful violations" of the FLSA.

In order for the claimant to receive back pay for three years, in accordance with 5 CFR 551.702 (a and b), we must determine the agency knew its conduct was either prohibited or showed reckless disregard of the requirements of the Act. Willfulness presupposes a violation of the Act has actually occurred. The question of willfulness is moot because we find no FLSA violation occurred since he was not entitled to compensation under the FLSA for travel time as discussed in this decision.

#### **Decision**

The claimant is not entitled to compensation under the FLSA for travel time as discussed previously in this decision.