

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



San Francisco Oversight Division  
120 Howard Street, Room 760  
San Francisco, CA 94105

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

**Claimant:** [The claimant]

**Position:** Electronics Technician  
DT-856-3

**Organization:** [The claimant's installation]  
U.S. Department of the Navy

**Claim:** Exemption status.

**OPM decision:** Nonexempt. Due the difference between  
FLSA overtime payment and title 5 overtime  
payment received, if any, plus interest on  
back pay.

**OPM decision number:** F-0856-12-01

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Carlos A. Torrico  
FLSA Claims Officer

November 8, 1999

    
\_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 OPM administers the 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 further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708 (address provided in 5 CFR 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision. However, he may do so only if he does not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed to him. If the claimant believes that the agency has incorrectly computed the amount owed, he may file a new FLSA claim with this office.

### **Decision sent to:**

[The claimant's address]

[The claimant's servicing personnel office]

Director, Plans, Programs, and Diversity  
Office of the Deputy Assistant Secretary  
of Navy, Civilian Personnel (CP/EEO)  
Department of the Navy  
800 North Quincy Street  
Arlington, VA 22203-1998

Chief, Classification Branch  
Field Advisory Services Division  
Defense Civilian Personnel Management  
Service  
1400 Key Boulevard, Suite B-200  
Arlington, VA 22209-5144

Honorable William M. Thomas  
Member of Congress  
U.S. House of Representatives  
4100 Truxtun Avenue #220  
Bakersfield, CA 93309

## Introduction

On September 21, 1998, the San Francisco Oversight Division of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes that his FLSA exemption status should be nonexempt. The claimant worked in the [claimant's organization] U.S. Department of the Navy, until his retirement on December 31, 1996. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

### *General issues*

The claimant has filed a claim covering the period June 1, 1991 to December 31, 1996, when he retired from Federal service. By law, a claim is retroactive for 2-years from the date the written claim is received by the claimant's agency or OPM. Retroactivity may be extended for a total of 3-years for willful violation of the FLSA (see 5 CFR 551.702). We received this claim on September 21, 1998. However, the record is clear that the claimant began written inquiries with his agency concerning his exemption status several months earlier. Included in the record is a memorandum dated April 27, 1998 from the [head of the claimant's installation] to NAVAIR responding to an April 13, 1998 telephone request from NAVAIR for an analysis of the claimant's exemption status in order to respond to a letter from the claimant. On further inquiry with the agency, we obtained a copy of a letter from the claimant and addressed to the Navy Inspector General concerning his claim dated March 20, 1998. Therefore, the claimant submitted a written claim to his agency no later than March 20, 1998. The burden of proof for establishing when a written claim was filed rests with the claimant. If the claimant has records showing he submitted a written request to change his exemption status earlier than March 20, 1998 he should submit this evidence to us and his agency within 15 days from receipt of this decision. In the absence of such additional information, this decision is retroactive to March 20, 1996.

The determination of the exemption status of high graded technician positions has historically been complex. OPM regulations and policy regarding the exemption of positions like the claimant's have changed over the years. These changes combined with the inherent complexity of applying the exemption criteria to high graded technician positions tends to increase the possibility of error. While we will find below that the agency was mistaken in exempting the claimant's position, there is no evidence of willful violation. Thus, this claim is retroactive for 2-years only.

The claimant believes that employees paid on an hourly rate are nonexempt from the FLSA. He cites a legal decision in a case apparently involving county government employees. Salary and wage tests are not used to determine the exemption status of Federal employees. The exemption status of Federal employees is determined solely by reference to the regulations contained in 5 Code of Federal Regulations (CFR) Part 551. Legal decisions and guidance applied to non-Federal employees cannot be used to determine the exemption status of Federal employees.

In reaching our decision, we have carefully reviewed all of the information furnished by the claimant and his agency.

### *Job information*

The agency submission contains the agency's FLSA exemption determination for the claimant's position. Included is a full description of the claimant's duties. The education and job information section of the agency analysis reads as follows:

*{Claimant's name} has taken some classes at the local community college, however, his training has come primarily from on and off center classes.*

*{Claimant's name} works as an Electronics Technician, DT-856-3 in the [claimant's unit]. His performance plan reflects that he assists with the maintenance, diagnosis and/or repairs on all equipment in the branch. If problems are encountered, {claimant's name} may take the lead in providing assistance if it is in his area of expertise, or assists other technicians if they have the lead. Type of systems {claimant's name} works on includes the Range Control Center's Sun computer system and the UNIX file system associated with it. (50%).*

*Employee maintains and has an in-depth knowledge of the total RIPS system by providing maintenance support when called on. This includes troubleshooting the SEL 32/77 real-time computer system and its peripherals and also performing various preventative maintenance on the equipment. Applies his up to date knowledge of the system to assist operators and range customers in the use of the system. Employee works on the RCC RUSCO card entry system which enables personnel proper access to designated areas.*

*Employee monitors tests that are run from the RIPS system to ensure smooth testing. Troubleshoots problems if they occur and work with the problem until a solution is found. This involves notifying other personnel and working with them to find the solution. Assists operators and customers in solving operational problems. Monitors RIPS data products to ensure that the contents meet customer requirements and standards.*

*Employee works with the following equipment in order to test, calibrate and obtain recorded data: Volt/ohm meters, oscilloscopes, CRT color analyzers, modems, ISDN I/F units, Sony CRT alignment units, 8 mm helical scan tape drives, 4 mm helical scan tape drives, tape drives, disk drives, printers and video monitors.*

*Employee ensures that software upgrades are installed on ASC and ensures that the system is still operational. Maintains the UNIX file system on the ASC computer system. At times has to provide advice on the computer systems and peripherals that he has been trained on. Maintains a database of branch test equipment and RIPS preventative maintenance.*

*While the supervisor monitors the work of the branch on a daily basis at times suggesting certain directions to take in resolving problems, {claimant's name} is given discretion in carrying out day-to-day tasks. He decides which tasks to work on and in which order and his supervisor knows that he has the in-depth knowledge needed to maintain the operating equipment.*

The claimant's Performance Plans for Fiscal Years 1996 and 1997 include the following essential tasks:

- Preventative maintenance and repair of equipment
- Proper completion of maintenance logs and records
- Equipment checks to insure proper operation prior to and during tests
- Personally repairs or contacts appropriate personnel to assure that equipment operates correctly
- Provides technical evaluations and reports for both new and existing equipment/systems.
- Evaluates documentation, performs acceptance testing, and provides input on improving process
- Assists in the installation and check out of the RIPS replacement system.

The range control center mission/functional statement submitted by the agency contains the following description of the claimant's duties:

*{Claimant's name} is assigned to this function. His principal duty is to maintain the computer system operational. When the computer system is not in working order, testing operations are canceled or not scheduled. Canceled operations means loss of time and money. The claimant is the principal technical computer employee who functions as the System Manager to keep the computer system operational. He is the lead; another employee, {employee's name}, assists in and fills in for the claimant. When something with a software program, that runs the graphics program mentioned above, is not functioning properly, the claimant is responsible to fix it or arrange for it to be fixed by the contractor/vendor who is on call via a contract. To provide an idea of the claimant's technical competence: when the most recent hardware and software computer change took place, the employee was the principal contact with the vendor/contractor, making or ensuring that all the arrangements were made to allow for a smooth transition for the new system to be installed. The claimant is responsible for installing the new operating system in the new computer hardware (Sun Sparc Workstations), as well as, the new applications program that runs the graphics seen on the screen of the CRT's mentioned above. The important element is that the claimant functions independently; he assists the employees who watch the monitors on operating the graphics program; he solves problems; and ensures that everything stays in good working order.*

While the documents quoted above are consistent in the characterization of the claimant's primary duties as the repair and maintenance of complex electronic equipment, the claimant's Personal Activities and Capabilities (PAC) form (this document is equivalent to a position description) leaves

a somewhat different impression of the claimant's duties. The PAC is an automated document compiled from a series of stock choices selected from a menu. As such, the document is intended to be quite general in nature and does not contain the type of specific information about the claimant's duties that is detailed in the documents quoted at length above. The claimant's PAC does include some items that appear to suggest that the claimant's duties extend beyond repair and maintenance. Specifically, the PAC includes the following statements (emphasis added):

*Includes performances of laboratory environmental tests and studies; field tests; design, development, and/or operation of instrumentation and test facilities.*

*Involves design, development, test, evaluation, operation, and maintenance of various types of range electronic systems for use in support of systems testing.*

*Participates in design studies on the feasibility, suitability, adaptability, and operational utility of systems and concepts.*

*Designs and develops improvements for subsystems, systems, facilities, and/or equipment.*

*Recommends solutions to complex design problems.*

These statements are not sufficiently specific to assist in the exemption determination for the claimant's position. However, the terms design and development appear often. Design and development work is often associated with engineering work. To clarify what specific duties are referred to, we interviewed the claimant's former supervisor [name of former supervisor]. [Name of former supervisor] provided the following insights into the claimant's actual duties and responsibilities:

-Sixty to 70 percent of the claimant's work time was devoted to repair, maintenance, and system administration.

-The remaining 30 to 40 percent of the claimant's time was spent working on the installation and troubleshooting of the new equipment that was being installed in the 1995/1996 time frame.

-Design and development work related to the installation of the new equipment centered on providing technical insights and suggestions for improvements to the contractors responsible for system design. The supervisor stated that the claimant was able to provide these insights and suggestions because of his long experience in the field and with the equipment. The claimant was not involved in design changes other than making suggestions.

In summary, the claimant's primary duties were to repair and maintain complex electronic equipment to assure that the equipment continued to perform as designed. He either repaired the equipment himself, or if he could not, he contacted a co-worker or contractor who could. For something less than 30 percent of his work time he participated in the design and development

process by making suggestions for equipment improvements. Suggestions were based on the claimant's long experience working with the equipment. As an experienced technician, the claimant was substantially free from technical supervision.

## **Evaluation**

Five CFR 551.201 and 5 CFR 551.202 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. And, 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 main exemption categories applied to Federal employees: professional, administrative, and executive.

### Professional Exemption Criteria

The agency believes that the claimant's position meets the professional exemption criteria. We do not agree.

Under the professional exemption criteria contained in 5 CFR Section 551.207, a professional employee is an employee who meets all of the following criteria:

(a) The employee's primary duty 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 items listed under 5 CFR 551.207(a)(3).

- (b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.
- (c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

A position must meet criteria a, b, and c in order to be professionally exempt from the FLSA.

Turning to criterion (a), the claimant does not possess a bachelors or higher engineering degree. Thus, such a degree was not required to perform his duties. The claimant's duties were not in a recognized field of artistic endeavor. The claimant's duties did not require theoretical and practical application of highly specialized knowledge in computer systems analysis, programing and software engineering as listed in 5 CFR 551.207(a)(3). The agency believes that the claimant's work is 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. The agency FLSA evaluation states in pertinent part:

*One of {claimant's name} primary duties is to maintain the Sun computer system and the RIPS test equipment. He has attended several formal Sun Microsystems training classes on the system in both hardware and system administration, in order to stay up to date with changes in the system. He provides the technical expertise on the Sun system, the RIPS and UNIX system by installation, testing, and problem solving. Accordingly, he is performing work comparable to that of professional engineers; his work requires application of both theoretical and practical knowledge of other related disciplines and of new developments in the field; and he has acquired this knowledge through special training and experience. Thus, the first criterion is met.*

The agency analysis is insufficient. First, the maintenance of the Sun computer system and the RIPS test equipment is not necessarily engineering work. Viewed in the context of the job information, performance plan, and our interview with his former supervisor, the claimant's primary responsibility was repairing broken or poorly performing equipment to assure it operated within design parameters. Maintenance and repair work (as contrasted, for example, with the development and writing of repair and maintenance instructions) is most closely associated with blue collar and technician work, rather than professional engineering work. Second, while the claimant has clearly attended training on the operation and maintenance of complex electronic systems, the agency provides no evidence that this training included, or the claimant's work required a knowledge of electronics engineering theory equivalent to that possessed by a professionally trained electronics engineer. Rather, the evidence in the record suggests that training was primarily concerned with the operation, maintenance, and repair of complex electronic equipment. Third, training in the operation, maintenance, and repair of new equipment about to be installed at the installation is not equivalent to receiving training on new developments in the field. Training on new developments in the field would typically mean training in changes and

refinements to the central theories of electronics engineering or computer science, leading edge technologies, or state of the art equipment. The training would not center on operation and maintenance, but would instead center on the scientific and engineering principles on which the new technology was based. The purpose of attending such training would be professional development, gaining new knowledge to help solve engineering problems, evaluation of new equipment, etc., not operation and repair. Finally, providing suggestions for improvements is part of the design process, but not necessarily equivalent to professional work. The value the claimant brought to the design process was grounded on the practical experience gained from many years in the field working with this and similar equipment in an operating environment. This type of expertise is critical to successful design work, but is not based on the theoretical knowledge the regulations envision for professional or equivalent work. The claimant's knowledge is precisely that of a highly skilled and experienced technician. Even if we had found that the claimant's design work was equivalent to the work performed by professional engineers or computer scientists, the work was not the claimant's primary duty because it did not constitute a substantial, regular part of his position as required by 5 CFR 551.104.

In summary, bearing in mind the principles that exemptions must be narrowly construed, and that the burden of proof rests with the agency, we find that the agency has not made a convincing case that the claimant performed work comparable to that performed by a professional engineer or computer scientist. Our own review of the record suggests that the appellant's duties were primarily repair and maintenance. Repair and maintenance work is typically performed by blue collar and technical positions rather than professional engineering positions. The claimant's responsibility to suggest improvements, and identify design issues and flaws was based on his long experience and practical knowledge of how complex electronic systems work in an operating environment, not on professional or equivalent knowledge.

A central point of the agency analysis is the wide latitude and freedom from supervision exercised by the claimant. We do not dispute this point. However, wide latitude for independent action and freedom from supervision can be characteristics of both exempt and nonexempt positions. It is only when this wide latitude and freedom from supervision is exercised in the context of duties that are professional or comparable to professional work that the point becomes relevant. Inasmuch as we have found above that the claimant's work was not comparable to professional work as this term is defined in the regulations, the first criterion for professional exemption has not been met. That the claimant may act with substantial freedom from supervision is not enough to support professional exemption.

The claimant's position did not meet the professional exemption criteria of the FLSA.

#### Administrative Exemption Criteria

Under the administrative exemption criteria, contained in 5 CFR 551.206, an administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service. The claimant was an electronics technician

responsible for the operation, maintenance and repair of complex electronic equipment. He was not an advisor, assistant, or representative of management. 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 did not perform such work.

The administrative exemption criteria were not met.

#### 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 claimant's position did not meet the definition of executive since it did not involve management or supervision of employees.

The executive exemption criteria were not met.

#### *Decision*

- C Based on the above analysis, the claimant's position did not meet the criteria for executive, administrative, or professional exemption and was, therefore, properly covered by the overtime provisions of the FLSA.
- C The claimant is due compensation for the difference between any overtime payment he received under Title 5 and the overtime payment due under the FLSA.

*Compliance instructions*

This claim is retroactive for two years from the date the written claim was received by the agency or OPM. As explained under General Issues above, this claim is retroactive 2 years from the date the claimant submitted a written request to change his exemption status. We have established March 20, 1998, as the earliest date the claimant submitted a written claim to his agency. Therefore, he can receive pay for the claim back to March 20, 1996. If the claimant has evidence that he first submitted a written claim before this date he should submit documentation to us and his agency. The agency shall calculate any FLSA pay due the complainant for the period two years retroactive from the agency's receipt of the claimant's written claim, until the claimant's retirement on December 31, 1996. If the claimant does not provide documentation supporting an earlier date within fifteen days from receipt of this decision, the agency shall use the date of March 20, 1998 as the recording date for this claim.

The claimant's FLSA overtime pay must be computed in accordance with the regulations in 5 CFR 551 Subpart E-Overtime Pay Provisions. The claimant's overtime pay must be calculated on a workweek basis; therefore, for each workweek in the claim period, the agency is to compute the claimant's pay entitlement using the guidance in the applicable FLSA regulations. The claimant is due this amount minus whatever he has already been paid for the week.

The agency is to compute any interest due as described in 5 CFR 550.806.

We note that for the period covered by this claim the claimant worked under a compressed work schedule. Hours worked in excess of 8 in a day or 40 hours in a week as part of a compressed work schedule are not overtime hours under the FLSA [see 5 CFR 551.501(a)(6)].

The agency should pay the claimant the total amount owed him. If the claimant believes that the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.