

Fair Labor Standards Act Decision
Under section 204(f) of title 29, United States Code

Claimant: [name]

Position: Lead Electronics Technician
GS-856-12

Organization: Information Solutions Organization
Information System Management &
Chief Information Officer
Business Operations
U.S. Forest Service
U.S. Department of Agriculture
Bozeman, Montana

Claim: FLSA overtime rate of pay for
accumulated compensatory time

OPM decision: Granted

OPM decision number: F-0856-12-02

/s/

Jeffrey E. Sumberg
Deputy Associate Director
Center for Merit System Accountability

October 26, 2009

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 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 section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the 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:

[name and address]

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U.S. Forest Service
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Introduction

On March 3, 2009, OPM's Center for Merit System Accountability received a claim regarding a lump-sum payment for 174 hours of compensatory time. The claimant retired from the U.S. Forest Service (FS) on January 3, 2008. The request was initially docketed as a compensation claim under the provisions of section 3702(a) of title 31, United States Code (U.S.C.). However, based on further review of the agency administrative report (AAR) which we received on April 10, 2009, we will respond to this claim request under section 4(f) of the FLSA as amended (29 U.S.C. 204(f)).

Jurisdiction

The claimant occupied a bargaining unit position covered by a collective bargaining agreement (CBA) between the FS and the National Federation of Federal Employees. The CBA's negotiated grievance procedure (Article 9) specifically excludes claims under the FLSA. Therefore, OPM has jurisdiction to settle this claim.

Analysis

Period of the Claim

Section 551.702(a) of 5 CFR provides that all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (three years for willful violations). A claimant must submit a written claim to either the employing agency or to OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date that determines the period of possible back pay entitlement. The claim may be filed by the claimant (5 CFR 551.705) or by a representative who has been designated in writing (5 CFR 551.704). Under 5 CFR 551.702(c), the claimant is responsible for proving when the claim was received by the agency or OPM.

The claimant states he requested a "final determination in writing ...through my United States Senator" from the agency in November 2008. Instead, the record contains a copy of the agency's November 19, 2008, response to Senator Max Baucus of Montana, responding to the Senator's "letter of September 30, 2008," on behalf of the claimant "regarding his lump-sum payment of compensatory leave." When contacted regarding the conflict in the date of his letter to the Senator, the claimant emailed OPM a copy of his September 29, 2008, letter to the Senator "asking for...help in getting an official determination" so the claimant could "either collect the monies owed to [him] by the FS or appeal to the Office of Personnel Management." The claimant states he "would like that letter to be signed by a staff officer. If officially denied I can file under the FOIA to get my pay records and job description and appeal to the Office of Personnel Management."

Based on the foregoing, we find the claimant did not preserve his claim with his agency. The claimant has not provided evidence that he filed a signed, written claim with FS or that the aforementioned Senator was duly authorized to act as his representative (5 CFR 551.704). As noted in the Senator's November 25, 2008, letter to the claimant, he enclosed a copy of a

November 19, 2008, FS letter to him in response to his “inquiry” on the claimant’s behalf. Therefore, we find the claim was not preserved until it was received by OPM on March 3, 2009.

FLSA Exemption Determination

During the period of the claim, the claimant occupied a Lead Electronics Technician, GS-856-12, position. Both the claimant and the agency agree the claimant’s work during the claim period was nonexempt from the overtime pay provisions of the FLSA. Based on careful review of the record, we concur.

Evaluation of Compensatory Time Claim

The claimant believes that as a nonexempt employee, he should have been paid at the FLSA overtime pay rate (defined in 5 CFR 551.512 as the straight time rate of pay times all overtime hours worked plus one-half times the employee’s regular rate of pay times all overtime hours worked) for the 174 hours of compensatory time he had accrued at the time of his retirement. The agency disagrees and states:

Compensatory time is paid to an employee at the overtime rate in effect for the work period in which it was earned. To determine the overtime rate we must consider the employee’s grade. If an employee’s rate of basic pay is more than the rate of basic pay for a GS-10, step 1, the employee is entitled to the greater of the two: GS-10, step 1, hourly rate of pay multiplied by 1.5, or, the employee’s overtime rate as listed on the Office of Personnel Management’s salary tables. Mr. Dickey was a GS-12, step 7, and his hourly overtime rate of pay upon retirement was \$36.47. The hourly rate for a GS-10, step 1 was \$34.62. His overtime rate at \$36.47 exceeds the minimum overtime rate for a GS-10 at \$34.62; therefore, his overtime rate pay was used when computing his compensatory leave pay out. It is important to note that some of Mr. Dickey’s compensatory time was earned and paid out at 2005 and 2006 pay rates for his grade.

In support of its analysis, the agency cites (1) 5 CFR 550.113(b) and 5 CFR 551.531(g), (2) “OPM Q&A on compensatory time off in lieu of overtime pay, and (3) Forest Service Handbook 6109.11, chapter 30, section 39, paragraph 39.1.”

As stated in 5 CFR 550.101(c), employees who are subject to the overtime pay provisions of section 7 of the FLSA (29 U.S.C. 207) and 5 CFR Part 551 are not covered by 5 CFR 550.111, 550.113, and 550.114 except for the purpose of determining hours of work in excess of eight hours in a day. Therefore, as an FLSA nonexempt employee, the claimant’s rate of overtime pay is not covered by 5 CFR 550.113(b) as asserted by FS. Instead, the claimant’s rate of overtime pay for the compensatory time at issue in this claim must be computed in conformance with 5 CFR 551.512 and liquidated in conformance with 5 CFR 551.531(f) and (g).

Decision

The claimant is to be paid the difference between the lump sum for 174 hours of compensatory time he erroneously received under 5 CFR 550.113(b) and what he should have received under

5 CFR 551.512 and 5 CFR 551.531(f) and (g), and interest as provided for under 5 CFR part 550, subpart H. If the claimant believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.