

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

Claimant: [name]

Agency classification: Criminal Investigator
GS-1811-13

Organization: Office of Investigations
U.S. Customs Service
U. S. Department of the Treasury
Washington, DC

Claim: Back pay for FLSA overtime
when employed as a nonsupervisory
Criminal Investigator, GS-1811-13

OPM decision: Denied; Time barred

OPM decision number: F-1811-13-07

/s/

Robert D. Hendler
Classification and Pay Claims
Program Manager
Merit System Audit and Compliance

May 17, 2010

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:

[name and address]

Introduction

On January 12, 2007, the U.S. Office of Personnel Management (OPM) received an FLSA claim dated January 6, 2007, from [name]. The claimant states he was employed with the “legacy U.S. Customs Service (USCS)” in a nonsupervisory Criminal Investigator, GS-1811-13, position from April 10, 1988, until 1996, which we initially construed to be the period of his claim. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

To help decide the claim, we requested clarifying information from the agency and the claimant. In reaching our FLSA decision, we have reviewed all material of record furnished by the claimant. In response to OPM’s request for a copy of any information on this matter, the U.S. Customs and Border Patrol headquarters human resources staff reported they were unable to locate any pertinent records.

Background

In his January 6, 2007, claim request, claimant refers to an April 25, 1995, USCS denial of his August 8, 1990, request to change his exemption status while in a Criminal Investigator, GS-1811-13, position from exempt to non-exempt:

I formally request that OPM, under the authority conveyed to OMB and re-delegated to OPM, reconsider this denial and grant me proper compensation for the period from the claim period identified by Mr. Tingley, August 14 [sic] 1988 forward to the closing date established by the federal [sic] ruling for GS-1811-13’s under Adams v. U.S.

Claimant states “[i]t is now public record that former Customs Service 1811-13 Special Agents were included in the Federal Judicial decision which determined them to be non-exempt from FLSA regulations.”

By letter dated March 23, 2007, OPM asked the claimant to submit any and all information he wished to present in support of his request within 25 days of the date of the letter. OPM received the requested information on April 19, 2007.

Jurisdiction

In his April 9, 2007, letter to OPM, the claimant stated the period of his claim extended from August 1988 forward until the establishment of Law Enforcement Availability Pay in October 1994. The claimant asserts his claim “was preserved in accordance with 5 CFR 551.702 when originally submitted to the USCS on August 8, 1990.” He also states he was advised by USCS that his August 8, 1990, request is “on file in [his] official personnel file, which is in the possession of OPM in Boyers, PA.” The claimant requests OPM reconsider his original claim in accordance with 5 CFR 551.708:

based on the recent developments in the [sic] Adams v United States. On or about November 27, 2006 the Department of Justice agreed to settlement of claims and affirmed that GS-1811-13’s in the USCS were erroneously classified as FLSA exempt and are entitled to reimbursement for additional overtime.

The claimant further states:

At the time of the original decision by the USCS, there was no basis to ask OPM to reconsider....This request for reconsideration is based on the November, [sic] 2006 settlement decision by the Department of Justice, as it did for GS-9/11/12, which conveys the agreements under *Adams v US* [sic], for the same consideration to me as a GS-1811-13, formerly with the USCS.

The record contains a copy of an April 25, 1995, USCS memorandum to the claimant responding to an August 8, 1990, letter from the claimant. The memorandum discusses “the Court’s decision in the Adams case” in which “the Court ruled that Customs Criminal Investigators at the GS/GM-13 level were properly classified as FLSA exempt.” The memorandum states the decision limits the retroactive period to two years prior to receipt of the claim, resulting in August 14, 1988, as the starting date for the claimant’s USCS claim. The memorandum further states:

A review of your official personnel file indicates you were promoted to GS-1811-13 effective April 10, 1988. Thus, as all of the time period covered by your appeal was served at or above the GS-13 level, your FLSA status appeal is denied.

Should you wish to appeal this decision further, you may do so by writing to the following address:

General Accounting Office
General Government Claims Division
441 G Street, N.W.
Washington, D.C. 20548

The record does not indicate whether the claimant pursued his claim with the General Accounting Office (GAO), now the Government Accountability Office.

A review of guidance issued by GAO, the agency formerly charged with settling compensation and leave claims under 31 U.S.C. § 3702, and which was responsible for settling such claims at the time claimant submitted his August 8, 1990, letter, is instructive. GAO decisions make clear GAO did not view its claims settlement authority as encompassing FLSA exemption status determinations. As provided in a decision issued by GAO:

We consider that the role granted to the Commission [now OPM] to administer the FLSA with respect to Federal employees, [sic] necessarily carries with it the authority to make final determinations as to whether employees are covered by the various provisions of the [FLSA]. Accordingly, this Office will not review the Commission’s determinations as to an employee’s exemption status.

However, we would point out that once a determination has been made that an employee is covered by the FLSA’s overtime provisions, this Office will consider questions, as it has in the past, concerning the propriety of making payments to employees under the FLSA.

B-51325 (October 7, 1976).

Under the provisions of section 204(f) of title 29, United States Code (U.S.C.), OPM established an administrative claims process by issuance of Federal Personnel Manual (FPM) Letter No. 551-9, on March 30, 1976, providing an administrative process for employees to challenge their FLSA exemption status. FPM Letter 551-9 stated:

[A]n employee alleging an FLSA violation has a right to file a complaint directly with the Civil Service Commission [the former CSC, now OPM]. The law itself also establishes the right for an employee to bring action in a U.S. district court either directly or after having received the CSC decision on his/her FLSA complaint.

FPM Letter 551-9 did not require agencies to notify employees of their right to file a complaint with the Civil Service Commission (or with OPM effective January 1, 1979).

Therefore, contrary to USCS's guidance to the claimant, claimant's filing with USCS regarding his FLSA exemption status did not preserve his exemption status claim. Further, USCS's advice that the claimant could appeal the USCS FLSA exemption status decision to GAO was erroneous.¹

Effective December 23, 1997, OPM promulgated regulations codifying the FLSA administrative claims process. In relevant part, section 551.702(c) of title 5, Code of Federal Regulation (CFR), provided that:

A claimant ...may preserve the claim period by submitting a written claim either to the agency employing the claimant during the claim period 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 by the agency or OPM.

Prior to June 30, 1994, FLSA pay claims were subject to a six-year statute of limitations. However, all FLSA pay claims filed on or after June 30, 1994, are subject to a two-year statute of limitations (three-years for willful violations). 5 CFR 551.702(a), (b). A claimant who receives an unfavorable decision from the agency may file with OPM, and a claimant may request his or her agency to forward the claim to OPM on the claimant's behalf. 5 CFR 551.705(a), (b). The regulations do not require agencies to notify employees of their right to file a claim with OPM.

The claimant's apparent attempt to revive his August 8, 1990, claim on January 6, 2007, with OPM under 5 CFR 551.702(a) (December 23, 1997, regulations in effect on February 20, 2007) is misplaced. Under the administrative claims procedures in place during the period of this claim, filing a claim with the employing agency on August 8, 1990, did not preserve the claim as

¹ It is also well established that a claim may not be granted based solely on misinformation that may have been provided by federal employees. The United States cannot be estopped from denying benefits that are not permitted by law, even where claimant relied on the mistaken advice of a government official or agency. *See OPM v. Richmond*, 496 U.S. 414 (1990); *Falso v. OPM*, 116 F.3d 459 (Fed. Cir. 1997); and 60 Comp. Gen. 417 (1981).

discussed previously in this decision. (See, e.g., OPM decision number F-0025-07-01, December 9, 2008).

Therefore, since OPM did not receive this claim until January 12, 2007, any claim for FLSA overtime pay expired on January 12, 2005, based on application of the two-year statute of limitations in effect for FLSA claims filed after June 30, 1994 (January 12, 2004, if willful violation had occurred). Therefore, any claim for FLSA overtime pay for work performed during the period of the claim described previously as alleged by the claimant is time barred.

Thus, the claim is barred from our consideration and may not be allowed. The FLSA does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order to be considered on its merits. OPM does not have any authority to disregard the provisions of the FLSA, make exceptions to its provisions, or waive the limitations it imposes.

Decision

The claim is denied since it is time barred.