

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

**Claimant:** [claimant's name]

**Agency classification:** Senior Program Analyst  
GS-343-14

**Organization:** Tax Refund Fraud  
Assistant Commissioner  
(Criminal Investigation)  
Deputy Commissioner (Operations)  
Internal Revenue Service  
U.S. Department of the Treasury  
[city and state]

**Claim:** Exemption status

**OPM decision:** Claim denied

**OPM decision number:** F-0343-14-01

/s/ Robert D. Hendler

---

Robert D. Hendler  
Classification and Pay Claims  
Program Manager

12/18/07

---

Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the U.S. Office of Personnel Management administers the Fair Labor Standards 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 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.

**Decision sent to:**

[claimant's name and address]

Jade Mariano  
Office of Human Resources Strategy and Solutions  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
ATTN: 1750 Pennsylvania Avenue, Suite 800  
Washington, DC 20220

Richard J. Cronin  
Director, Human Capital Office  
Talent, Hiring, and Recruitment Division  
Internal Revenue Service  
U.S. Department of the Treasury  
1111 Constitution Avenue, NW  
OS:HC:THR, Room 7207  
Washington, DC 20224

Shirley B. Wells  
Human Capital Office  
Talent, Hiring, and Recruitment Division  
Internal Revenue Service  
U.S. Department of the Treasury  
1111 Constitution Avenue, NW  
OS:HC:THR:PM, Room 7207  
Washington, DC 20224

## **Introduction**

On June 16, 2006, the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name] appealing the denial of the FLSA claim decision made by her agency on February 13, 2006. She believes her position should be nonexempt from the FLSA, and that she is owed payment for the period from January 26, 1992, until the date of the OPM decision. The claimant was assigned to a GS-343-14 Senior Program Analyst position in the Tax Refund Fraud, Assistant Commissioner (Criminal Investigation), Deputy Commissioner (Operations), Internal Revenue Service (IRS), U.S. Department of the Treasury, in [city and state]. On January 3, 2007, the claimant retired from her agency. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and her agency. To help decide this claim, we conducted a telephone interview with the claimant on May 14, 2007.

## **Background and general issues**

The record shows that negotiations between IRS and the National Treasury Employees Union (NTEU) resulted in GS-343 program analyst positions, at levels GS-12 and below, were determined to be nonexempt from (i.e., covered by the overtime pay provisions of) the FLSA. Consequently, the claimant received back pay and liquidated damages for improperly capped overtime earned while occupying GS-343 positions classified at GS-12 and below from 1988 to January 25, 1992, when she was promoted to the grade 13 level.

In a June 2002, memorandum, the IRS and NTEU jointly notified employees occupying GS-343 program analyst positions at levels GS-13 and higher that they may potentially be affected by a supplemental grievance settlement between the agency and NTEU. Both parties agreed to examine the duties performed by GS-13 and higher program analysts to determine whether their work was properly exempt from the FLSA. Employees occupying those positions from August 8, 1988, to June 25, 2002, were directed to complete a questionnaire if they wanted to file a claim with the agency. IRS received the claimant's questionnaire on February 28, 2003.

We noted the claimant's claim to IRS, under the supplemental settlement agreement, indicated she had been performing FLSA nonexempt work at the GS-13 and above level since January 26, 1992. As a result, the agency considered the FLSA exemption status of the claimant's positions dating back to 1992. On February 13, 2006, IRS's Talent, Hiring, and Recruitment Division determined the work performed by the claimant from January 26, 1992, to February 8, 2003, was exempt from the FLSA, and denied her claim.

FLSA 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 as stated in 5 CFR 551.702(b). 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 entitlement to back pay. As the record shows, the claimant attempted to file a claim as a grievance through her supervisor. The supervisor told her an FLSA claim was not grievable and

incorrectly advised that the IRS had no procedures for FLSA claims and she would have to file with OPM. The date that IRS received the claimant's request was September 13, 2002, and this date is appropriate for preserving the claim period. The record is not clear as to what legal basis the IRS relied upon to consider a longer period than provided in the FLSA. Although the agency used a longer time period in their review of these positions, we are not bound by the IRS agreement and must adhere to the provisions of the FLSA and its implementing regulations in 5 CFR 551.702.

In addition, the claimant said she performed work similar to other positions later found to be FLSA nonexempt. However, OPM must make its decision solely by comparing the claimant's duties and responsibilities to Federal regulations and guidelines. Since comparison to Federal guidelines is the exclusive method for making exemption decisions, we cannot compare the claimant's position to others, which may or may not be properly nonexempt, as a basis for deciding her claim.

### **Job information**

IRS provided OPM with the official position descriptions (PD) covering the claimant since January 26, 1992, the effective date of her promotion to a GS-343-13 position. The claimant also provided us with her performance plans, standards, and appraisals for the same timeframe. As discussed previously, the two-year statute of limitations applying to this claim limits the claim period from September 13, 2000, until her retirement on January 3, 2007. During this period, the record shows the claimant was assigned to PD number [number] (GS-343-14) from August 18, 1996, to April 20, 2002, and PD number [number] (GS-343-14) from April 21, 2002, to her January 3, 2007, retirement date.

The agency and claimant agree the claimant was unknowingly and incorrectly assigned to PD number [number], which describes project manager duties. We note this is an IRS Standard PD for GS-343-14 positions describing generic project manager work rather than individualized PD describing the claimant's work in the Tax Refund Fraud function ([PD number]). Both claimant and agency say she continued performing the duties and responsibilities described in PD number [number]. Consequently, our evaluation will focus on when the claimant occupied the GS-14 position described in PD number [number] and other documents pertaining to the claim period. The claimant said the duties she performed at the GS-13 and GS-14 levels were identical. In fact, the claimant's position was upgraded on June 18, 1996, from GS-13 to GS-14 following a desk audit.

The claimant was a program analyst for the Questionable Refund Program (QRP). Briefly, QRP is a nationwide multifunctional program designed to identify fraudulent returns, terminate payments of fraudulent refunds, and refer fraudulent refund schemes to Criminal Investigation Branch (CIB) field offices. QRP teams are located on each of the 10 IRS campuses where individual tax returns are filed and processed. The teams review questionable tax returns identified by manual or computerized screening techniques. According to PD number [number], the claimant, as the senior program analyst, spent 30 percent of her time serving as the primary point of contact by providing staff with technical advice, guidance, and assistance on the CIB and QRP. For example, a campus tax examiner might contact the claimant for assistance on

stopping a payment for a fraudulent refund. Each issue required the claimant to determine the proper course of action, but this work generally required her to thoroughly research the issue, identify the relevant process and policies, and develop recommendations for problem resolution.

The claimant spent 20 percent of her time assembling, analyzing, and/or summarizing statistical data for all levels of management. She also spent 15 percent of her time establishing and maintaining liaison with other IRS components and Government agencies. The claimant spent the remaining 35 percent of the time performing several duties and responsibilities, which each individually occupied no more than 10 percent of her time. Nonetheless, these duties included assisting in developing technical and procedural guidelines for the Internal Revenue Manual and Law Enforcement Manual; participating in research studies aimed at improving IRS's efficiency and effectiveness; reviewing legislative proposals and recommendations for systemic changes to assess their impact on CIB operations; evaluating employee suggestions for the incentive awards program; preparing correspondence for signature by higher-level officials; and providing technical advice, guidance, and assistance to lower-graded employees. The claimant performed these duties and responsibilities under the general supervision of the Director of Investigations (Tax Refund Fraud).

## **Evaluation**

To determine whether the claimant is owed overtime under the Act, the normal process is to first determine whether the work performed is exempt or nonexempt from the FLSA provisions. According to 5 CFR 551.201 and 5 CFR 551.202, an agency may designate an employee FLSA exempt only when the agency correctly determines the employee meets one or more of the exemption criteria. There are three exemption categories applied to Federal employees: executive, administrative, and professional.

The claimant believes the duties she performed as a GS-13 and GS-14 program analyst do not meet the exemption criteria described in the FLSA since her duties were not supervisory and primarily technical in nature. In their December 18, 2006, response to OPM's request for information, the IRS disagreed and said:

This position required the ability to independently establish priorities, identify meaningful objectives, exercise good judgment, accurately analyze problems and initiate corrective action. [Appellant's name] worked under the general supervision of the Director of Investigations (Tax Refund Fraud) with latitude for independent decision making. Her assignments were frequently self-generated and usually completed with little to no supervision.

IRS concluded the claimant's position met the administrative exemption criteria. The claimant has not addressed any of the exemption criteria in her rationale, and the agency has relied exclusively on the administrative criteria in making its FLSA exemption determination. Based on our review of the complete record, we conclude the claimant's work does not meet the executive or professional exemption criteria. Our comparison of the claimant's duties and responsibilities to the administrative exemption criteria follows.

### 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 who meets all four of the following criteria:

- (a) The employee's primary duty consists of work that:
  - 1) Significantly affects the formulation or execution of management policies or programs; or
  - 2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or
  - 3) Involves substantial participation in the executive or administrative functions of a management official.
- (b) The employee performs office or other predominantly nonmanual work which is:
  - 1) Intellectual and varied in nature; or
  - 2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.
- (c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

#### The claimant's work met (a)(1) and (a)(2).

OPM defines the formulation or execution of management programs and policies, in (a)(1), as work involving management programs and policies which 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 significantly affect the execution of management policies or programs typically when the work involves obtaining compliance with such policies by individuals or organizations, inside or outside the Federal Government, or making significant determinations in 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, promotion, coordinating, controlling, or evaluating operating programs).

Work that involves general management, business, or supporting services, in (a)(2), 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 supply distribution.

As the QRP's senior program analyst, the claimant indirectly participated in the policy decision process by developing proposals acted on by others. In July 2001, for example, she prepared a legislative proposal with the goal of saving staff resources for the Exam and Criminal Investigation branches and improving customer service. The proposal was eventually approved by the IRS Commissioner and forwarded to the U.S. Department of the Treasury. The claimant regularly solicited feedback or suggestions from many IRS functions (e.g., Information Systems, Exam, Submission Processing, Customer Service, Taxpayer Advocate Office, etc.). She reviewed their proposals to determine whether they would improve QRP's efficiency and effectiveness, and, if so, occasionally drafted the official proposals for final approval by higher level officials.

The claimant assisted in accomplishing program objectives by making recommendations to re-direct staff resources, e.g., by pulling queries to identify which Centers were ahead of or behind program goals in order to direct the workload as appropriate. The claimant pulled daily queries on the Center's workload activities, which, on the surface, would not appear to meet (a)(1) criterion as long as the data pull constituted her sole duty. The claimant, however, used the queries as a means to monitor the Centers' QRP work and to make assessments on, among other things, the Centers' volume of QRP returns, monitor the effect of QRP delivery, and evaluate effects from program-wide changes. This work involved performing several phases in QRP maintenance and management; therefore, her position fully met (a)(1) criterion.

As a program analyst, the claimant also served as an advisor to management and QRP staff. For example, she assembled, analyzed, and summarized statistical data and other information for management. The claimant's work also required making decisions or recommendations with significant affect in furthering QRP's operations and accomplishing program objectives. For instance, the claimant updated written procedures for reviewing returns and referring scheme packages, which positively impacted the quality and timeliness of the Centers' operations. Criterion (a)(2) is, therefore, met.

The claimant's work did not meet (a)(3).

The criterion describes work involving participation in the functions of a management official, which includes employees (such as secretaries and administrative assistants) who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all work aspects. To support exemption, such assistants must have knowledge of the supervisor's policies, plans, and views and must be delegated and exercise substantial authority to act for the supervisor. The claimant's position did not operate in this manner.

The claimant's work met (b)(1).

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, 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 required intellectual capabilities, like perceptiveness, analytical reasoning, perspective, and judgment, to analyze the efficiency and effectiveness of the QRP. The intellectual demands of the claimant's work were alluded to in the performance elements for which the claimant was rated. Specifically, under the *program leadership* element, it states:

Successfully promotes organizational change and exhibits leadership in ensuring accomplishment of assigned program objectives. Demonstrates a proactive approach to assigned program areas by persuasively making recommendations to improve the efficiency and effectiveness of those work assignments. Effectively identifies systemic problems, determines causes, and recommends feasible solutions.

We conclude the claimant's work did not rely on standardized procedures or precedents. Accomplishing the above work entails executing major components of the QRP within a framework of policies, objectives, and requirements prescribed by IRS's and CI's regulations, guidelines, procedures, and instructions. As stated in PD number [number], "Technical guidelines are often ill defined or contradictory and require the incumbent to be resourceful, use initiative, and interpret law, regulations, or statistical data to resolve complex technical and/or legal issues."

The claimant also reviewed suggestions for program improvement from Centers, as well as other Branch staff, IRS components, etc. The work required general intellectual abilities since it involved considering several variables, e.g., the proposal's viability, potential program-wide effects, steps required to achieve desired results, and likelihood of gaining higher-level approval. This work required evaluating a variety of conditions to recommend the "best" solution, so the claimant's position met the (b)(1) criterion.

The claimant's work met (b)(2).

OPM guidance indicates that work of a specialized or technical nature requiring considerable specialized training, experience, and knowledge means specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject matter field. These knowledges characteristically are 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 education.



The duties described previously in this decision require substantial intellectual effort in order to analyze and apply subject matter of considerable difficulty required by the technical program work assigned to the claimant's position. Those duties reflect work requiring substantial knowledge of complex subject matters, which formed the basis for classifying the claimant's position to the GS-14 grade level. Section 5104(14) of title 5, United States Code, defines GS-14 work, i.e., "to perform, under general administrative direction, with wide latitude for the exercise of independent judgment, work of exceptional difficulty and responsibility along special technical, supervisory, or administrative lines which has demonstrated leadership and unusual attainments." Accordingly, we find the claimant's work met this criterion.

The claimant's work met (c).

According to established OPM guidance, the exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making decisions 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.

The claimant's work required exercising discretion and independent judgment in taking action or making decisions after considering various possibilities. Positions excluded from the (c) criterion typically apply standardized techniques or procedures to govern their actions, so the appropriate course of action is oftentimes apparent. In contrast, the claimant served as a technical expert on the QRP, so Center staff and others regularly contacted her with critical issues or questions that could not be resolved locally by reviewing established procedures. Since established procedures were not applicable, the claimant conducted thorough research to determine the proper course of action, made appropriate contacts, communicated findings, and/or developed recommendations for resolution. She also used independent judgment to streamline the procedures used by the Centers which resulted in the improvement in response time and issuing of refunds to valid taxpayers.

The claimant said her work was limited to developing recommendations which were forwarded to her supervisor for review and approval. To meet this factor, it is not necessary for the claimant to make firm commitments or final decisions since her recommendations were usually accepted with only occasional revision or reversal. The recommendations made by the claimant were not limited in impact to, e.g., the procedural details of her own work. Instead, her recommendations had significant affect on the entire QRP. For example, the claimant was involved in taking steps to change ineffective procedures by eliminating a scoring formula used to weed out suspected fraudulent refunds. After the change was implemented, the claimant pulled queries to monitor its QRP-wide effects, which was a decrease in approximately 627,000 returns for mandatory review. Consequently, the claimant's work fully met (c).

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

### Conclusion

The claimant's work met all of the administrative exemption criteria. Because the claimant's position meets the administrative exemption criteria, no further evaluation against other exemption criteria is necessary.

### *Willful Violation*

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 since the claimant's work was exempt from the overtime pay provisions of the FLSA.

### **Decision**

Based on the above analysis, the claimant's work met the administrative exemption criteria and was, therefore, exempt from FLSA overtime pay provisions.