

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

**Claimant:** [name]

**Agency Classification:** Engineering Technician  
GS-802-11

**Organization:** [name] National Forest  
Pacific Southwest Region  
U.S. Forest Service  
U.S. Department of Agriculture  
[location]

**Claim:** Change in exemption status from  
exempt to nonexempt and  
resultant overtime pay

**OPM decision:** Granted in part

**OPM file number:** F-0802-11-08 \*

\*previously numbered F-0802-11-07

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

4/30/08

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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 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.

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]

Manager, Workforce Solutions Center  
Pacific Southwest Region  
Regional Office, R5  
U.S. Forest Service  
U.S. Department of Agriculture  
1323 Club Drive  
Vallejo, CA 94592

Director of Human Capital Management  
USDA-OHCM  
U.S. Department of Agriculture  
J.L. Whitten Building, Room 302-W  
1400 Independence Avenue, SW  
Washington, DC 20250

## **Introduction**

OPM's Division for Human Capital Leadership and Merit System Accountability, Center for Merit System Accountability, received an FLSA claim from [name] on November 7, 2006. The claimant states he disputes his current classification as exempt from the FLSA. [name] retired from Federal employment in January 2007. During the period of the claim, he occupied an Engineering Technician, GS-802-11, position in [name] National Forest, Pacific Southwest Region, U.S. Forest Service (FS), U.S. Department of Agriculture (USDA), in [location]. We received the initial agency administrative report (AAR) on November 29, 2007, and additional information required to adjudicate the claim on February 4, 2008, and March 26, 2008. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision in this matter, we have carefully reviewed all information furnished by the claimant and his employing agency. For the reasons discussed herein, the claim is granted in part.

## **Background**

The record shows the claimant's work was determined to be FLSA exempt by the agency based on the administrative exemption criteria in force at the time of his claim (section 551.206 of title 5, Code of Federal Regulations (CFR)). These regulations were subsequently amended (Federal Register, Vol. 72, No. 179, Monday, September 17, 2007). However, the administrative exemption criteria did not fundamentally change: "As indicated in the proposed regulations...these changes update and clarify but do not fundamentally change the regulations in place...."

The claimant believes his work was nonexempt based on 5 CFR 551.202(e)(2) (tracked by 5 CFR 551.204(a)(2) in the current regulations) which indicates employees performing technician work in positions properly classified below GS-9 (or the equivalent in other white-collar systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent) are nonexempt because they do not fit any exemption category. In response to OPM's request for the AAR, the agency reviewed the work performed by the claimant when he encumbered the Engineering Technician, GS-802-11, position and reversed its earlier exemption determination, concluding the work performed by the claimant was nonexempt from the overtime pay provisions of the FLSA. Based on careful review of the record and interview with the claimant's former supervisor on April 14, 2008, we agree the claimant's work was nonexempt during the claim period. Therefore, we will restrict our remaining analysis to what monies, if any, the claimant is due based on the determination his work was nonexempt during the period of the claim.

## **Analysis**

### *Period of the Claim*

The record includes a July 21, 2005, memorandum from the claimant's supervisor stating: "With this letter I am filing a claim on behalf of [name] to dispute his current classification as "Exempt" from the Fair Labor Standards Act." The record does not show when this memorandum was received by the claimant's servicing human resources (HR) office, but it

includes a series of email exchanges between the supervisor and the HR office in January 2006 on this request. We contacted the agency to ascertain whether the claimant had designated his supervisor as his representative in writing or whether the agency record contained a signed claim request from the claimant prior to the signed claim request he submitted to OPM. We were advised the record did not contain a written designation of representation or a signed claim request from the claimant.

The FLSA claims process in 5 CFR part 551 includes the adjudication and settlement of claims for unpaid overtime. Any FLSA claim filed by a Federal employee on or after June 30, 1994, is subject to a two-year statute of limitations (three years for willful violations) contained in the Portal-to-Portal Act of 1947, as amended (section 255(a) of title 29 U.S.C.). In order to preserve the claim period, a claimant or a claimant's designated representative must submit 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 which 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.

The claim in this case accrued on November 7, 2006, the date OPM received a written and signed claim from the claimant. The claimant has not provided documentation showing he filed a **written** claim with his agency at any time or preserved such a claim as required by regulation prior to when he filed his claim with OPM. Without a written designation of representation (5 CFR 551.704), the claimant's supervisor was not authorized to act on the claimant's behalf. Therefore, the supervisor's July 21, 2005, letter seeking to file an FLSA claim on the claimant's behalf did not preserve the claim period. The record shows the claimant did not preserve his claim until it was received by OPM November 7, 2006.

#### *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 FLSA. Willfulness presupposes a violation of the FLSA has actually occurred. The regulation instructs that the full circumstances surrounding the violation must be taken into account. There is no question the agency initially erred in its interpretation of the regulation with regard to application of the administrative exemption criteria to the work performed by the claimant. However, error in the instant case does not reach the level of willful violation as defined in 5 CFR 551.104. We find, although the agency acted erroneously in interpreting the regulation, they did not knowingly or recklessly disregard the FLSA in applying this interpretation. Information provided by the agency indicates the agency was acting in good faith based on a lack of understanding and application of the administrative exemption criteria. Further, the agency acted in good faith by acknowledging its error when responding to OPM's AAR request. Since the agency did not knowingly or recklessly disregard the requirements of the FLSA, we find the agency's actions do not meet the criteria for willful violation as defined in 5 CFR 551.104.

**Decision**

The record shows the agency did not willfully violate the FLSA. The claimant is due compensation for the difference in overtime payment due under the FLSA and any overtime payment he received under title 5. The claim was received by OPM on November 7, 2006. The claimant is entitled to receive back pay for two years prior to that date and forward to the date of his retirement. 5 CFR 550.806 also states the claimant is owed interest on the back pay.

The claimant did not provide specific information on overtime hours worked with the claim period for purposes of applying the FLSA. He should provide the agency with the amount of overtime hours to which he believes he is entitled. The agency should pay the back pay for the difference between the FLSA overtime rate and any title 5 overtime paid and/or FLSA overtime pay for any hours of FLSA overtime work not compensable as overtime work under title 5. If he believes the agency has computed the amount incorrectly, he may file a new FLSA claim with this office.