

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

Claimant: [name]

Agency classification: Supervisory Equipment Specialist
YC-1670-2

Organization: Integrated Warfighter Support Services
Department
Naval Aviation Technical Data and
Engineering Service Command
Department of the Navy
Point Mugu, California

Claim: Exemption status

OPM decision: Exempt

OPM decision number: F-1670-02-01

/s/

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

January 11, 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 OPM administers the Act. The agency should identify all similarly situated current and, to the extent possible, former employees, ensure that they are treated in a manner consistent with this decision, and inform them in writing of their right to file an FLSA claim with the agency or OPM. 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.

Decision sent to:

[name and address]

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Introduction

The claimant requests the exemption status of his position be changed from exempt to nonexempt under the Fair Labor Standards Act (FLSA). He occupies the position of Supervisory Equipment Specialist, YC-1670-02, in the Integrated Warfighter Support Services Department, Naval Aviation Technical Data and Engineering Service Command (NATEC), at Point Mugu, California. We have accepted and decided this claim under section 4(f) of the FLSA, as amended.

We received the claim on January 26, 2009, and the agency's administrative report on June 3, 2009. In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency, and conducted telephone interviews with the claimant on October 28 and November 2, 2009.

Background

The claimant believes his position should be designated as FLSA nonexempt minus the 25 percent of time he performs supervisory duties. The claimant cites a 2005 lawsuit (Alderdice v. U.S., Fed. Cl. No. 03-722C and 03-2202C) settled in favor of a group of GS-11 technicians (presumably equipment specialists) employed by the Department of the Navy, to which the claimant was a party, wherein the technicians were reclassified as FLSA nonexempt and awarded the associated back pay for overtime work. The corresponding supervisory positions remained exempt under the executive exemption. The claimant, who has since been promoted to the YC-02 Supervisory Equipment Specialist position, asserts that 75 percent of his position is the same as the GS-11 nonexempt employees. He asserts he is not a "salary employee" and his primary duty is not "managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise."

General Issues

The claimant raises the issue that when he deploys aboard ship to repair aircraft, he does so as a "tech rep," not a supervisor, and may be deployed either alone or with other agency employees he does not supervise who are performing the same duties but getting paid overtime. However, the claimant clarified in the interviews that he has not been so deployed for the past three years and has been declining such assignments because of the denial of overtime pay due to his exempt status.

Section 551.702 of title 5, Code of Federal Regulations (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 which determines the period of possible back pay entitlement. The claimant's request was received by OPM on February 19, 2009, and the claim period is preserved as of this date.

Since any ship deployments and resultant overtime worked by the claimant pre-date this claim period, the claimant has not incurred a potential claim for money owed and we, therefore, will not consider this issue within the context of our decision.

Position Information

The claimant spends 75 percent of his time serving as a technical representative in the performance of nonsupervisory duties involved in the provision of technical advice and assistance on the acceptance, installation, operation, and maintenance of assigned aviation systems. This includes such duties as responding to work requests from customers for equipment installation or repair; providing formal and on-the-job training to personnel engaged in the installation, operation, and/or maintenance of equipment; and reviewing or revising installation, operation, and maintenance procedures for the assigned categories of equipment. He spends the remaining 25 percent of his time supervising a staff of three Federal employees and overseeing the work of four contract employees engaged in corresponding duties for their assigned equipment systems. These time percentages are documented in the claimant's position description and were confirmed by the claimant in his claim and the interviews.

Evaluation of FLSA Coverage

The FLSA regulations currently in effect were issued on September 17, 2007, and effective October 17, 2007. Since the claim period in the instant case extends back to February 19, 2007, the claim is covered by both the previous regulations (issued in 1997) for the period prior to October 17, 2007, and the current regulations for the period after that date.

Section 551.202 of title 5, Code of Federal Regulations (CFR) requires an employing agency must designate an employee FLSA exempt only when the agency correctly determines the employee meets the requirements of 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 unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria. 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. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. The designation of a position's FLSA status ultimately rests on the duties actually performed by the employee. There are three exemption categories primarily applied to Federal employees: executive, administrative, and professional, found in 5 CFR, Part 551, Subpart B.

The agency determined the claimant's work is exempt from coverage under the FLSA based on the executive exemption criteria and the administrative exemption criteria.

Current regulations

Executive Exemption Criteria

Under the executive exemption criteria contained in 5 CFR 551.205, an *executive employee* is an employee whose primary duty is management (as defined in 5 CFR 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who:

- (1) Customarily and regularly directs the work of two or more other employees.
- (2) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees, are given particular weight.

Management means performing activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or financial records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Recognized organizational unit means an established and defined organizational entity which has regularly assigned employees and for which a supervisor is responsible for planning and accomplishing a continuing workload. This distinguishes supervisors from leaders of temporary groups formed to perform assignments of limited duration.

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of an employee's work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of the work assigned and performed;
- (2) Is the reason for the existence of the position;
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

Customarily and regularly means a frequency which must be greater than occasional but which may be less than constant.

Criteria to determine whether an employee's suggestions and recommendations are given *particular weight* by higher-level management include, but are not limited to: whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. An employee's suggestions and recommendations may still be deemed to have particular weight even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

The claimant is an executive employee whose primary duty is management of a Federal agency or any subdivision thereof.

The claimant supervises a recognized organizational subdivision with a continuing function, i.e., the support services field site is an established and defined organizational entity with regularly assigned employees. He performs such management functions as participating in the interviewing and selection of employees; directing the work of subordinates; overseeing the assignment and completion of work by subordinates; evaluating employees' performance; hearing employee complaints and grievances; recommending pay raises, awards, and training; approving leave, overtime, and travel; and resolving work-related problems posed by subordinates, customers, or higher level management.

Although supervision comprises less than 50 percent of the claimant's time, it represents the primary duty of the position because it constitutes a substantial and regular part of the work, is the reason for the existence of the position, and is clearly exempt work in terms of the basic nature of the work, the frequency with which the claimant must exercise discretion and independent judgment, and the significance of the decisions made.

The claimant customarily and regularly directs the work of two or more other employees.

The claimant is responsible for supervising the work of three civilian Federal employees and overseeing the work of four contract employees on a customary and regular basis in that the direction he exercises is greater than occasional (i.e., it is done on a daily basis) although less than constant (i.e., 100 percent of the time).

The claimant's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

The claimant serves on recruitment selection panels and participates fully in interviewing and evaluating candidates. His recommendations for the hiring of employees for his unit are given particular weight in that it is part of his duties to make such recommendations and those recommendations are relied upon.

Based on the above, the claimant meets the executive exemption criteria contained in 5 CFR 551.205 under the current regulations.

1997 regulations

Executive Exemption Criteria

Under the executive exemption criteria contained in 5 CFR 551.205, an *executive employee* 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 and meets both of the following criteria: (a) the primary duty test and (b) the 80 percent test.

Customarily and regularly means a frequency which must be greater than occasional but which may be less than constant.

The claimant is a supervisor over a recognized organizational unit with a continuing function and customarily and regularly directs the work of subordinate employees.

The claimant is a supervisor over a recognized unit (i.e., support services field site) with a continuing function. He directs the work of subordinate employees on a customary and regular basis in that the direction he exercises is greater than occasional (i.e., it is done on a daily basis) although less than constant (i.e., 100 percent of the time).

The primary duty test is met

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of a position;
- (2) Governs the classification and qualification requirements of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

Although supervision comprises less than 50 percent of the claimant's time, it is considered a substantial, regular part of the position and governs its classification and qualification requirements, i.e., supervision is the basis for the grade of the position and the associated recruitment qualifications. These supervisory duties are clearly exempt work in terms of the basic nature of the work, the exercise of discretion and independent judgment, and the significance of the decisions made as discussed below.

(a) The primary duty test is met if the employee:

(1) has authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or has authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

The claimant's position meets (a)(1)

The claimant has recommended personnel changes, such as in the capacity of serving on recruitment selection panels and providing input on hiring decisions. Although there has not been occasion for him to recommend other personnel changes, such as removals or promotions, he has the authority to do so with the expectation that his recommendations would receive particular consideration.

The claimant's position meets (a)(2)

Discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Firm commitments or final decisions are not necessary to support exemption. The "decisions" made as a result of the exercise of independent judgment may consist of *recommendations for action* rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

(1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action.

(2) The employee must have authority to make such determinations during the course of assignments.

(3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

The claimant's supervisory duties regularly require discretion and independent judgment in work planning and organization; work assignment, direction, review, and evaluation; and other aspects of managing subordinates and personnel administration. He plans and organizes the work of the unit, making assignments based on functional expertise and arranging for the accomplishment of priority projects. He provides overall direction and review by ensuring there are no outstanding work requests, resolving problems involving repair work, closing out completed assignments, and reviewing customer feedback. He carries out a variety of personnel administration functions such as certifying time and attendance, approving leave requests, completing and signing performance evaluations as the rating official, recommending performance awards, recommending training requests, and is a designated authorizing official for travel authorizations and vouchers. These duties clearly require the exercise of discretion and independent judgment in that the claimant's actions are not specifically governed by established procedures or precedents; the claimant has the authority to make these determinations; and the decisions made are significant and extend beyond procedural details in that they directly impact the quality and efficiency of the technical support services provided.

The claimant's primary duty consists of supervision and the exercise of discretion and independent judgment, and thus meets the primary duty test for the FLSA executive exemption criteria in (a) above.

The 80 percent test does not apply to the claimant's position.

(b) The 80 percent test makes special provisions for supervisory employees in positions properly classified as GS-5 or GS-6; firefighting or law enforcement employees in positions properly classified at GS-7, GS-8, or GS-9 who are subject to section 207(k) of title 29, United States Code (U.S.C.); and supervisors in Federal Wage System (FWS) positions classified below situation 3 of Factor 1 of the FWS Job Grading Standard for Supervisors. These employees must spend 80 percent or more of the work time in a representative workweek on supervisory and closely related work.

The claimant's position is not classified at the GS-5 or 6 level, is not a firefighter or law enforcement position graded at the GS-7, 8, or 9 level subject to section 207(k) of title 29, U.S.C., and is not a supervisory position in the FWS.

Based on the above, the claimant meets the executive exemption criteria contained in 5 CFR 551.205 under the 1997 regulations.

Administrative Exemption Criteria

Because the claimant's work meets the executive exemption criteria, no further evaluation against other exemption criteria is necessary. However, we note the agency also designated the position as covered under the administrative exemption. The basis for this exemption determination is unclear as the specific aspects of the work cited by the agency appear to relate to the claimant's supervisory duties and are thus encompassed by the executive exemption.

Summary

The claimant's assertion that his position should be designated FLSA nonexempt rests on a misconstrual of the term "primary duty." As was discussed above, a position's primary duty is not determined by time percentage but rather by such other factors as whether the duty is the reason for the position's existence (current regulations) or governs the classification and qualification requirements for the position (1997 regulations). His assertion that he is not a salaried employee (an apparent reference to Department of Labor FLSA regulations not applicable to Federal civilian employees under OPM's FLSA jurisdiction) is incorrect and irrelevant to his FLSA exemption status. See *Billings v. U.S.*, 322 F.3d 1328 (Fed. Cir. 2003). In addition, the claimant's request that his nonsupervisory duties be designated nonexempt while his supervisory duties remain exempt is not permitted under the FLSA or its implementing regulations. The employing agency must review and make a determination on each *employee's* exemption status (5 CFR 551.201), and an *employee* who clearly meets the criteria for exemption must be designated FLSA exempt (5 CFR 551.202(d)). Further, 5 CFR 551.202(f) stipulates that failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work. In other words, FLSA exemption designations are assigned to *employees* based on the work they are assigned and perform rather than to individual sets of duties.

Decision

The claimant is properly designated as FLSA exempt.