

U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and US Programs



Philadelphia Oversight Division
600 Arch Street, Room 3400
Philadelphia, PA 19106-1596



Fair Labor Standards Act Decision
Under Section 4(f) of the Act as Amended

Affected Employee: [affected employee's name]

Position: Export Compliance Assistant
GS-1802-7

Organization: [name]
Office of Export Enforcement
Bureau of Export Administration
U.S. Department of Commerce
[location]

Claim: A third party received no overtime pay for work performed during lunches, before and after business hours, and on weekends

OPM decision: Overtime pay is due
OPM decision number: F-1802-07-01

Robert D. Hendler
FLSA Claims Officer

/s/ 10-29-98

Date

There is no right of further appeal from this decision. The Director of the U.S. Office of Personnel Management may at her discretion reopen and consider the case. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision. However, she may do so only if she does not accept back pay. All back pay recipients must sign a waiver of suit when they receive payment.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed her. If the claimant believes that the agency has computed the amount incorrectly, she may file a new FLSA claim with this office.

Decision sent to:

PERSONAL

[claimant's name]

Office of Export Enforcement

U.S. Department of Commerce

[location]

Human Resources Manager

U. S. Department of Commerce

Eastern Administrative Support Office

200 World Trade Center

Norfolk, VA 23510-1624

Ms. Debra M. Tomchek

Director for Human Resources Management

U.S. Department of Commerce

14th and Constitution, NW.

Washington, DC 20230

Introduction

On October 9, 1996, the Philadelphia Oversight Division of the U.S. Office of Personnel Management (OPM) received a request by [claimant's name] to file a third party Fair Labor Standards Act (FLSA) claim on behalf of a co-worker. He claimed that the "office secretary" ([name]) "never works just an eight hour day. . . [but] averages a twelve hour work day and works almost every weekend." He stated she received "some compensatory **hours** when she first starting working," but the hours granted did not cover the actual overtime worked.

In a telephone conversation on October 23, 1996, [claimant's name] clarified his request for anonymity in his initial letter, stating [affected employee's name] and 7 of the 10 special agents in the office would give sworn statements without being afforded anonymity and the remaining three employees would give sworn statements if afforded anonymity. In a the letter dated November 15, 1996, the division advised [claimant's name] of additional information he needed to present. In a letter dated December 3, 1996, [claimant's name] also claimed [affected employee's name] "works through her lunch hour practically every day."

After receiving the requested information, the claim was accepted on January 9, 1997 for the entire period of her employment beginning on October 31, 1994. The employee who is the subject of this claim works in the [location name], Office of Export Enforcement, Bureau of Export Administration, U.S. Department of Commerce, [location]. Her initial position was classified as Export Compliance Assistant (Trainee), GS-1802-6. [Affected employee's name] subsequently was promoted to the position of Export Compliance Assistant, GS-1802-7. Both positions are nonexempt from the FLSA. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

To help decide the claim, an Oversight Division representative took affidavits on-site at the Staten Island, NY office on August 17, 1997, from [affected employee's name] and her co-workers [four co-workers' names]. An affidavit taken from [supervisor's name], the affected employee's supervisor, on that same date, was signed by her on October 29, 1997, after review by her attorney. Additional fact-finding was conducted by telephone with former co-workers [name] on January 23, 1998, [name] on May 5, 1998, and [name] May 11, 1998. Additional information was supplied by the claimant during multiple telephone conversations and written comments. In reaching our FLSA decision, we have reviewed information gained from these affidavits, conversations, and all material of record furnished by the claimant and the employing agency.

General issues

The claimant made many statements relating to his agency and the actions of the supervisor, including [affected employee's name] "doing 'personal' jobs for [supervisor's name], and refusing to abide by agency instruction" resulting in "[affected employee's name] working illegally during the [1995] furlough." In adjudicating this claim, our only concern is to make our own independent decision about how much FLSA overtime pay, if any, she is owed. We must make that decision by comparing the facts in the case to criteria in Federal regulations and other Federal guidelines.

Therefore, we have considered the claimant's statements only insofar as they are relevant to making that comparison.

Evaluation

The claimant believes that the affected employee performed work during her 30-minute lunch periods for which she should be paid under the FLSA, performed work before and after her hours on the days of her normal tour of duty, and performed work on weekends. The affected employee's normal tour of duty was 8:00 AM to 4:30 PM Monday through Friday. The shift was changed to 8:30 AM to 5:00 PM in January 1997. Official records support the conclusion that the affected employee was present in the office for periods of time outside of her normal tour of duty. They consist of Time and Attendance Daily Reports (T&A Reports), NYFO Clerical Attendance Sheets (NYFO Sheets), and Daily Close of Business Security Checks (Security Sheets, changed to Activity Security Checklist in August 1995). Time and Attendance Daily Reports cover the standard two week pay period. The NYFCO Clerical Attendance Sheets show daily sign in and sign out times by month. Until the end of July 1995, the security sheets showed the signature of the last person to leave each day and the time they left the office. Security sheets after that time contain employee initials and the sign out time.

We reviewed a sample of 41 work days and 16 weekend days from March 1995 through September 1995. The sample showed [the affected employee]: (1) signed in early on all workdays from 2 minutes to 1 hour and 50 minutes prior to 8:00 AM and, (2) signed out from 5 minutes to 8 hours after the 4:30 PM end of her tour on days with no overtime/compensatory time recorded on her T&A Reports. These records also show that she was in the office 6 out of 16 weekend days for time periods ranging from 3 hours and 30 minutes to 7 hours and 7 minutes. The work days for which we can perform complete calculations show that the average early arrival period was 51.3 minutes. The daily range for weekly or equivalent clusters of time ranged from 6.4 minutes to 1 hour and 46.2 minutes. The average later departure time for this same sample was 57.1 minutes. The daily range for weekly or equivalent clusters of time ranged from 35 minutes to 3 hours and 56.3 minutes. The latter cluster included two days for which the affected employee was credited with compensatory time. Our calculations show, however, that the employee was present in the office from 2 hours and 50 minutes to 3 hours and 14 minutes longer than the compensatory time credited on the T&A sheets.

Our analysis of the facts must consider the organizational work context. The record shows the affected employee did work officially approved overtime for which she usually received compensatory time, and was paid overtime at other times. The affected employee initially was one of two clerical employees in the office. Of the ten people interviewed, most reported the other clerical employee left the organization in the middle of calendar 1995, interrupted by a short period of return before "leaving for good." The claimant and two other interviewees reported the affected employee performed "personal work" for the supervisor. They also claimed the affected employee extended her work hours so as to complete her regular work and the work she absorbed from the

other clerical employee's workload, and the affected employee felt her failure to do so would lead to her termination.

Integral to this claim is the credibility of the interviewees. The claimant and former employees interviewed were frank in expressing their lack of good relations with the supervisor. The supervisor shared a similar view of the claimant. After filing the claim, the claimant was reassigned to the Chicago, IL agency office.

The supervisor stated that, after being contacted by the servicing personnel office in January 1997 subsequent to the filing of this claim, she had instructed the affected employee to adhere to her official tour of duty. Her description of events was the configuration of the office precludes her from seeing where the affected employee is or what she is doing. Her frequent absence from the office or working with her door closed, and her later starting time than the affected employee created a situation in which she could and would not routinely observe the employee's work. She claimed that the affected employee's knowledge that "I would have approved any time that was needed to accomplish the work," that her review of sign in/sign out sheets only to check where an agent could be found; and, the fact that no one reviews the security log, reflect a setting in which she did not know, had no reason to know, and had no opportunity to prevent the affected employee's performing unauthorized overtime.

Our on-site fact finding was conducted in a tense atmosphere. The affected employee was agitated. She claimed that she has adhered to her established tour of duty since January 1997 after she and her supervisor were contacted by the servicing personnel office regarding the filing of this claim. Other co-workers, however, did not distinguish between the affected employees work practices before January 1997 and after that date. That is, they did not report that she ceased answering the telephone during lunch or that she no longer started work as soon as she entered the office. This can be explained by the layout of the office. The affected employee sits in an area next to the main door around the corner from her co-workers' desks. The supervisor's office does not have a clear line of sight to the affected employee's primary work desk. Passing by that desk during lunch would be restricted to entering or leaving the office, and entering or leaving the conference room door that has a direct line of sight to the affected employee's primary desk. A buzzer entry system at that desk controls office entry. Therefore, we have no reason to believe that the affected employee had made every effort, between January 1997 and the time of our on-site visit, not to work through lunch, start work early, or work past her official ending time.

The complainant and several other sources, however, claimed the affected employee continues to work through lunch, start work early, work late, and come in on weekends; had been told by her supervisor that she no longer is permitted to sign the security log, and may annotate sign in/sign out sheets with her authorized work hours, including any pre-approved overtime or compensatory time. No records or other objective proof are available for us to corroborate these claims. We will, however, address this issue in greater detail later in this decision.

The affected employees sign in/sign out sheets and security logs, as discussed previously, establish specific periods of time that she was present in the office. Neither her time cards nor any other such official agency records show whether she performed work. Several Comptroller General decisions including one concerning Christine D. Taliaferro (B-199783, March 9, 1981) indicate that in this situation, the affected employee is due FLSA overtime pay if two criteria are met:

1. it can be shown that the affected employee performed overtime work under the FLSA for which she was not paid; and
2. the claimant produces enough evidence to show the amount and extent of that work as a matter of reasonable inference.

Our discussion of each criterion follows.

1. Did the claimant show that the affected employee performed unpaid FLSA overtime work?

To decide if the affected employee performed unpaid overtime work under the FLSA, we must first determine whether she performed any work during her lunch periods, before her normal tour of duty, after her normal tour of duty, and on her days off that was “suffered or permitted” under the Act. Section 551.102 of title 5, Code of Federal Regulations (CFR) shows that she performed such work if:

- a. she performed work, whether requested or not, during those time periods;
- b. her supervisors knew or had reason to believe the work was being performed; and
- c. they had opportunity to prevent it from being performed.

We discuss the three conditions below.

a. Did the affected employee perform work during those time periods?

According to accepted OPM guidance, bona fide meal periods are not considered “hours of work” under the FLSA. However, to be so considered the employee must be completely relieved from duty for the purpose of eating regular meals. When an employee’s meal periods are uninterrupted except for rare and infrequent emergency calls, the meal periods can be excluded from working time.

The description of lunch hour telephone coverage and filing performed by the affected employee discussed previously cause us to conclude that she performed work, whether requested or not, during her lunch periods in that telephone calls were frequent and related to the regular on-going work of the office. Affidavits show the affected employee’s former clerical co-worker routinely left the office for lunch, particularly before the office location changed from 26 Federal Plaza, in Manhattan, to the current Staten Island location in or around February 1995. Affidavits further show the affected

employee routinely ate at her desk and routinely performed work as she ate. The only time the affected employee was fully relieved from handling incoming telephone calls was when she asked a co-worker to watch the phones when she went to the rest room and on the rare occasions that she attended staff luncheons outside the office. Given these points, we judge that during her lunch periods the claimant performed tasks, whether requested or not, beyond answering rare and infrequent emergency calls. Therefore, we conclude she performed work during her lunch periods.

As proof that the affected employee performed work after her normal work hours, the claimant provided copies of two E-mail messages from the affected employee to other staff members late in the evening that discussed administrative work matters. The dates of the messages, however, fell on days that time sheets showed her working approved compensatory time. Affidavits show the affected employee discussed working on weekends with other staff members. As discussed previously, sign in/sign out logs and security logs confirm that she was present in the office before and after her normal tour of duty and on weekends during the claim period. Presence in an office, however, cannot lead automatically to a conclusion that work was performed.

Several points, however, are critical in this case in determining whether work was performed. First, the substantial number of hours of approved overtime and compensatory time and the management decision not to backfill the second clerical support position point to an office environment in which the affected employee likely could not complete all her work during normal business hours. Second, affidavits show that she routinely worked during her lunch hour, began work when she entered the office, and continued to work after the end of her official tour of duty. Affidavits show the affected employee enjoyed and was committed to her job, and believed her ability to take planned leave and her continued employment depended on her completing her work, even if it meant working beyond her official tour of duty. Given these points, we judge that the affected employee performed tasks, whether requested or not, during the times the documentation discussed above shows she was present in the office outside her normal tour of duty from the beginning of the claim period through January 1997. The record, however, is insufficient for us to conclude, at this time, that the affected employee continued to work suffered and permitted overtime after January 1997.

b. Did the affected employee's supervisor know or have reason to believe the work was being performed?

Previous OPM decisions indicate that a supervisor has reason to believe work is being performed if a responsible person in the supervisor's position would find reason to believe that this was the case.

Based on the nature of the law enforcement work and presence of sensitive records in the office, we conclude there was a need to assure control over office access at all times as typified by the security log. Given the need to assure telephone coverage, and the fact that the other clerical employee routinely left the office for lunch, it is reasonable to conclude that the supervisor knew or had reason to believe work was being performed in that no arrangements were made to relieve the affected employee from telephone or door buzzer coverage. In addition, anyone passing by her desk,

including the supervisor and co-workers, would have observed her working while eating. Therefore, we do not find credible the supervisor's statement that she did not pay attention to what the affected employee was doing during lunch hour. Given these considerations and the points in the preceding section, we judge that her supervisor knew or had reason to believe that she was performing tasks during her lunch period, whether requested or not, beyond answering rare and infrequent emergency calls. Therefore, the supervisor had reason to believe that she was performing work during her lunch periods.

Based on the nature of the law enforcement work and records control needs discussed previously, we do not find credible the supervisor's claims regarding her inattention to the security log and sign in/sign out sheets. The fact that the clerical and administrative support needs of the office were being met despite not backfilling the other clerical position, and the supervisor's previous need to approve overtime and compensatory time to accomplish that work, reflect a work situation in which the supervisor had reason to believe work was being performed outside the affected employee's normal tour of duty. The supervisor's claim that she would have approved overtime or compensatory time off had the affected employee requested it does not affect our conclusion in this matter that the supervisor knew or had reason to believe work was being performed.

c. Did the affected employee's supervisor have opportunity to prevent the work from being performed?

Previous OPM decisions indicate that the supervisor had opportunity to prevent the work from being performed unless:

- (1) she did not know or have reason to believe that the work was being performed;
- (2) the work occurred so seldom that it was impossible to prevent; or
- (3) they tried by every reasonable means to prevent the work from being performed, such as directing the employee not to perform the work, counseling the employee about adverse consequences that might result from performing such work, controlling work hours more strictly, or taking other appropriate management actions.

As discussed previously the affected employee's supervisor knew or had reason to believe that the work was being performed. As indicated above, her work during lunch did not occur so seldom that it was impossible to prevent. Review of sign in/sign out logs and security logs also show that work did not occur so seldom that it was impossible to prevent. With respect to criterion (3), the record shows the supervisor took no action prior to the filing of this claim to prevent the affected employee from working during her lunch period or outside her normal tour of duty. Therefore, none of the above three criteria is met. The affected employee's supervisor had opportunity to prevent her from working during her lunch periods and outside her approved tour of duty.

Based on the discussion in the preceding pages, conditions a-c that we listed earlier are met: The affected employee performed work, whether requested or not; her supervisor knew or had reason to believe the work was being performed; and the supervisor had opportunity to prevent it from being performed. Therefore, we find the affected employee performed work during her lunch periods, before her normal tour of duty, after her normal tour of duty, and on weekends that was “suffered or permitted” under the FLSA.

Five CFR 551.401 shows that all time spent by the affected employee performing suffered or permitted work was “hours of work” under the FLSA. Therefore, the affected employee has worked overtime hours under the FLSA for which she was not paid.

The above conclusion is based largely on evidence provided by or through the efforts of the claimant.

This includes written statements, copies of administrative documents sent to us, affidavits from former co-workers, and statements made over the telephone by former co-workers whose names and numbers the claimant provided. The claimant, therefore, has shown that the affected employee performed FLSA overtime work for which she was not paid.

2. Is there enough evidence to show the amount and extent of overtime work as a matter of reasonable inference?

We must now decide if the claimant has produced enough evidence to show the amount and extent of her overtime work as a matter of reasonable inference. To do this, we first examine what evidence we have concerning the amount and extent of the affected employee’s overtime work. The claimant has submitted copies of the sign in/sign out sheets, security logs, and official payroll records discussed previously in this decision, specifying hours for which the affected employee was paid, hours of leave taken, and hours of compensatory time earned and taken, and hours of overtime paid, and hours she worked but did not receive compensation. Affidavits show she worked during lunch for almost all workdays of the claim period through January 1997 except when she took sick, annual, or other leave during the lunch period. Based on all the above evidence considered together, one can make a reasonable inference that during the claim period, the affected employee performed work during lunch essentially every workday except when she took leave that included the lunch period.

Given the affidavits, the affected employee’s time cards, security logs, and other available evidence, one can make a further reasonable inference as to the amount and extent of overtime hours worked by the affected employee during the claim period beginning in 1994, before and after her normal tour of duty and on weekends, up through January 1997. The evidence on which the above inferences are based was provided largely by the claimant who, therefore, has provided enough evidence to show the amount and extent of the affected employee’s overtime work as a matter of reasonable inference.

The claimant reported that beginning in October 1995 the affected employee stopped logging in the correct hours on her T&A sheets, but continued to work past those hours; the affected employee was told by the supervisor that she could earn a maximum of four hours compensatory time each pay

period, but was not instructed to only work those hours of approved overtime; the affected employee was told she could no longer sign out on the security log; and the affected employee:

continued to work an average of 12 hours a day and occasionally on Saturdays and Sundays without showing these actual hours worked on her sign in, sign out log or be credited with these hours on her T&A. . . . [the supervisor] works a 9:00 AM-5:30 PM shift and was in the office late at night 90% of the times that [the affected employee] worked overtime contrary to her [the supervisor's] memorandum.

We concur with the claimant's analysis of the available records that uncompensated overtime before and after the affected employee's normal tour of duty and on weekends is not readily apparent. Security logs are not available for January, September, November, and December 1995, February 1996, and December 1996 through June 1997. In addition, the change from signatures to initials on the security logs makes it difficult to determine the actual identity of signers whose initials appear similar.

We do not, however, find the affected employee worked an average of 12 hours per day as reported by the claimant. Affidavits and information provided during telephone conversations corroborate the claimant's position that the affected employee regularly was working at her desk by 7:00 AM.

Approximately 30 percent of those contacted described the affected employee as "sometimes" working late; i.e., after her normal tour of duty. Another 40 percent stated she rarely left before 5:30 PM, modified by estimates of an average of four days per week. Several corroborated the claim that the affected employee told them she had been informed by the supervisor that she could only be paid for up to four hours of overtime each week. These same current and former co-workers reported that she worked these hours through December 1996. Information from those co-workers most knowledgeable of her hours of work cause us to conclude her weekend work was at the frequency described previously from May through September 1995, and was sporadic thereafter.

Based on the above, it is reasonable to infer that the affected employee worked one hour before and one hour after her normal tour of duty four days each week from the beginning of the claim period through January 1997. We also find it reasonable to infer that the affected employee worked one-third of the weekend days from May through September 1995, for an average of 5 hours per day.

What overtime pay is due?

We must now consider what overtime pay the affected employee is due. We find that the affected employee is entitled to back pay from the beginning of the claim period through January 1997 for the hours of uncompensated work performed as discussed in this decision, subject to the compliance instructions that follow.

Decision

For each workweek in the claim period, the affected employee is generally due FLSA overtime pay for her total overtime hours worked as discussed in this decision.

Compliance instructions

The agency is directed to reconstruct the hours of overtime owed for work performed before and after the affected employee's normal tour of duty and on weekends as described above. These calculations are to be offset by hours of overtime for which the affected employee received overtime pay or compensatory time, days for which her time cards show that she was on leave or otherwise relieved of duty. These calculations must adhere to the requirements contained in 5 CFR, Part 551 and implementing instructions issued by OPM's Workforce Compensation and Performance Service and its predecessor organizations. Five CFR 550.806 shows that the affected employee also is owed interest on the back pay discussed above. Therefore, the agency is to compute that interest as described in the regulation and implementing instructions.

Due to the security controls at the Staten Island location and its swipe card access, we are directing the agency to review available data for the entire claim period. If records can be developed to establish the actual time each day that the affected employee entered and/or left the building, including interviews with employees who signed the security log as closing the office, these times are to be used to clarify the hours of overtime pay due as discussed in this decision. This includes establishing the actual days and hours the affected employee was in the office and can reasonably be inferred as having worked, including whether she has continued to perform suffered and permitted work at her desk during her lunch period. These data are to be used to determine whether the affected employee has been suffered and permitted to work after January 1997 and, if so, to calculate the hours of overtime pay due her. The agency is instructed to send us all computations and supporting documentation for review within 30 days from the date of this decision. The affected employee should not be paid until after we have reviewed these computations.

The agency should pay the affected employee the total amount owed her. If she believes that the agency has computed the amount incorrectly, she may file a new FLSA claim with this office.