

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

Claimant: [name]

Agency classification: Criminal Investigator
GS-1811-12

Organization: Investigations Field Office
Immigration and Customs
Enforcement
U.S. Department of Homeland Security
[location]

Claim: Overtime Pay for A Scheduled
Sixth Day of Training under the FLSA

OPM decision: Denied

OPM decision number: F-1811-12-01 (formerly 04-F0007)

/s/

Robert D. Hendler
Classification and Pay Claims
Program Manager
Center for Merit System Accountability

6/19/07

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, ensure that they are treated in a manner consistent with this decision. There is no further right of administrative appeal. This decision is subject to discretionary review only under conditions specified in 5 CFR 551.708. The claimant has the right to bring action in the appropriate Federal court if dissatisfied with this decision.

Decision sent to:

[name and address]

Ronnelle Rotterman
Director, Compensation Programs
and Policy Division
U.S. Customs and Border Protection
U.S. Department of Homeland Security
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Introduction

In his February 10, 2006, letter to OPM seeking to file an FLSA claim, [name] advised he had filed his FLSA “complaint” with the U.S. Department of Labor (DoL) on February 1, 2006. [name] enclosed a copy of a February 6, 2006, letter from DoL advising him OPM “is the agency which may be able to enforce the FLSA requirements.” The claimant also enclosed a copy of his February 1, 2006, letter to DoL requesting a determination for overtime pay “earned from February 25, 2003 through April 25, 2003.” We have accepted and decided this claim under section 4(f) of the FLSA as amended and OPM’s implementing regulations under 5 CFR part 551, subpart G. We received the initial agency administrative report on November 22, 2006, and the final report on March 14, 2007.

Background

The claimant’s request for FLSA overtime pay is based on his attending:

...the Criminal Investigator Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC). The class was actually scheduled well in advance (see enclosed class schedule) from February 25, 2003 through April 25, 2003. The training program included a sixth day of training (Mondays through Saturdays).

The claimant states he was employed as a “Special Agent (1811),” his workweek averaged 50 hours, and he was receiving Law Enforcement Availability Pay (LEAP).

General Issues

The claimant states:

Ironically, other students classified as 1811s with who[m] I attended training were paid overtime for the same training that I was undertaking. In addition, I heard that the other members of the class who were not paid have subsequently been paid for the sixth day (Saturdays) of training. No other legacy INS [Immigration and Naturalization Service] Agents that attended the training with me received overtime pay.

My employer informed me (and another agent who I was in class with) on September 29, 2004, via electronic mail that we would be paid on Pay Period #09 in 2005. When I did not get paid during that date, we were advised that they were reviewing our claim. Most recently, I received another electronic mail (See attached) that I would not be paid for the scheduled sixth days of overtime. The date of this electronic mail was January 17, 2006.

I do understand that the statute of limitations is two years unless there is a willful violation. I am not sure if this constitute[s] a willful violation situation but I would

have notified the Dept of Labor sooner if I had not been told to wait and had received a final determination from my employer.

We must make FLSA decisions by comparing the case facts to the FLSA and its implementing regulations and guidelines. We cannot compare the claimant's situation to others, who may or may not have been compensated appropriately, as a basis for adjudicating his claim. In reaching our decision, we have carefully reviewed all information furnished by the claimant and his agency.

Evaluation

Timeliness

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 255a of title 29, United States Code). 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 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.

The claim in this case accrued on April 25, 2003. Assuming willful violation attached, any claim for the FLSA overtime pay in question in this case would expire no later than three years after the claim accrued; i.e., April 25, 2006. The claimant is responsible for preserving his claim (see (5 CFR § 551.702(c))). However, 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 February 10, 2006, when he filed his claim with OPM. We note the September 29, 2004, e-mail he provided stating payment would occur "in P09 2005" is not addressed to the claimant; it is addressed to the co-worker with whom he attended FLETC. Although e-mail correspondence does not constitute a written claim, we also note that the first e-mail on payment for the hours at issue in this claim in which the claimant's name appears (as the author) is May 25, 2005. Therefore, based on the record, we find the claimant preserved his claim no earlier than February 10, 2006. Because the maximum three-year statutory limitation period for filing the claim with OPM had not yet run out on February 10, 2006, the claim is not barred from our consideration.

Coverage Under the FLSA

As noted by both the claimant and his employing agency, the claimant was receiving LEAP during the period of the claim. The FLSA, codified at 29 U.S.C. 213(a)(16) statutorily exempts: "a criminal investigator who is paid availability pay under section 5545a of title 5." OPM's FLSA regulations at 5 CFR § 551.210(a) reiterate that a criminal investigator receiving availability pay under 5 CFR 550.181 is exempt from the hours of work and overtime pay

provisions of the FLSA. Because the claimant is statutorily exempt from the overtime provisions of the FLSA, his FLSA overtime pay claim must be denied.

Evaluation of the Overtime Claim

Based on the information provided by the claimant and the agency, any claim for overtime pay while attending CIPT at FLETC must be adjudicated under the provisions of 31 U.S.C. 3702 and its implementing regulations in 5 CFR part 178 under which OPM is authorized to settle Federal civilian employee compensation and leave claims.

Overtime compensation for exempt employees is a form of premium pay (see 5 U.S.C. § 5542). Under the provisions of 5 U.S.C. 4118, OPM is responsible for prescribing regulations for the training of Government employees. As stipulated in 5 CFR § 401.402(a), an agency may not use its funds to pay premium pay to an employee engaged in training by, in, or through Government or non-Government facilities unless covered by one of the exceptions enumerated under 5 CFR §401.402(b). In this case, the claimant was permitted to *continue* receiving LEAP based on the exception in 5 CFR §401.402(b)(4):

Availability pay. An agency shall continue to pay availability pay during agency-sanctioned training to a criminal investigator who is eligible under 5 U.S.C. 5545a and implementing regulations. Agencies may, at their discretion, provide availability pay to investigators during periods of initial, basic training (See 5 CFR 550.185(b)).

The initial, basic training under 5 CFR § 550.185(b) includes “training usually provided in the first year of service.” The record shows the claimant received his appointment to a Criminal Investigator, GS-1811-5, position on December 1, 2002. Therefore, we conclude his employing agency exercised its discretion under 5 CFR § 550.185(b) to continue paying the claimant LEAP while he attended CITP at FLETC during his first year of service, and no additional premium pay, including overtime pay, is permitted.

Decision

The claim is denied for the foregoing reasons. Under 5 CFR § 178.107, this OPM settlement of the claim is final. No further administrative review is available within OPM. Nothing in this settlement limits the employee’s right to bring an action in an appropriate United States court.