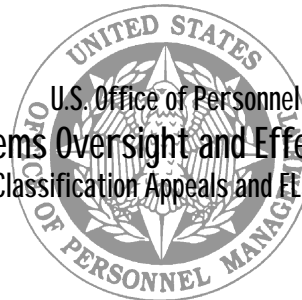


U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and FLSA Programs



San Francisco Oversight Division
120 Howard Street, Room 760
San Francisco, CA 94105

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

Claimant: [The claimant]

Position: Ship Surveyor
WD-5334-8

Organization: [The claimant's installation]
U.S. Department of the Navy

Claim: Not paid for 10.5 hours of overtime work
performed while on official travel

OPM decision: Claim denied

OPM decision number: F-5334-08-01

Carlos A. Torrico
FLSA Claims Officer

November 3, 1999

_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, and 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 (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:

[The claimant's address]

[The claimant's servicing personnel office]

Director, Plans, Programs, and Diversity
Office of the Deputy Assistant Secretary
of Navy, Civilian Personnel (CP/EEO)
Department of the Navy
800 North Quincy Street
Arlington, VA 22203-1998

Chief, Classification Branch
Field Advisory Services Division
Defense Civilian Personnel Management
Service
1400 Key Boulevard, Suite B-200
Arlington, VA 22209-5144

Introduction

On May 28, 1998, the San Francisco Oversight Division of the Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes that he is due 10.5 hours of overtime pay for official travel he performed on April 10, 1998. The claimant is a nonsupervisory Federal Wage System employee classified as a Ship Surveyor WD-5334-8. He is, therefore, nonexempt (i.e., covered) by the overtime provisions of the FLSA. The claimant works in the [claimant's installation], U.S. Department of the Navy. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

In reaching our decision we have carefully considered all of the information of record. In addition, in order to obtain clarifying information regarding the nature of the equipment transported, and more precise information concerning the travel, a representative of OPM spoke to the claimant by telephone on October 1, 1999.

Background

The essential facts surrounding this claim are not in dispute.

C The claimant's permanent duty station is [the claimant's installation]. His regular duty hours are 6:00 a.m. to 2:30 p.m. Monday through Friday. He was assigned to temporary duty in Guam for the period April 10, 1998 through April 21, 1998.

C On April 10, 1998, the day the claimant was scheduled to travel to Guam, the claimant reported for work at his normal time of 6:00 a.m. The claimant's plane to Guam was scheduled to leave at 1:45 p.m. Sometime before 1:45 p.m., the claimant left his work site for [assigned city] International Airport. In his possession were several work-related items:

- an air filter cartridge the approximate size of a car oil filter (three inches by eight inches);
- a bomb sample kit (air sampler) in a plastic case with handle weighing 10 pounds;
- a water pump shaped like a flat disk 6 inches in diameter and 2 inches thick (3 or 4 pounds);
- three medium sized three-ring binders containing technical manuals (3 pounds).

The claimant transported the air filter cartridge as carry-on luggage, the remaining items were transported as part of the claimant's checked baggage.

C The flight to Guam was delayed, and did not depart until 4:00 p.m. The plane arrived in Guam at 11:00 p.m. [assigned city] time. The claimant cleared customs at approximately 12:15 a.m. [assigned city] time, rented a car and arrived at his hotel at approximately 1:00 a.m. [assigned city] time on April 11, 1998.

The claimant believes that his transportation of equipment from [assigned city] to Guam constituted work under the provisions of the FLSA. He believes he is due overtime from the time his regularly scheduled shift ended at 2:30 p.m. to his arrival at his hotel in Guam 10.5 hours later. The agency disagrees. The agency believes that the claimant's transportation of these items was

incidental to his travel, and he was not personally required to accompany, protect, or perform work on or with the materials, nor, in the true meaning of these terms did he do so.

Evaluation

Five Code of Federal Regulations (CFR) 551.422 contains the regulations describing when time spent traveling may be considered hours of work under the FLSA. These regulations state:

(a) time spent traveling shall be considered hours of work if:

(1) an employee is required to travel during regular working hours;

(2) an employee is required to drive a vehicle or perform other work while traveling;

(3) an employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) an employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonwork days that correspond to the employees regular working hours.

Under the FLSA, travel may be considered hours of work only if one of these four criteria are met. Because the claimant did not travel during his regular working hours or during hours corresponding to his regular working hours, criteria (1) and (4) cannot be met. Because the claimant was not on a one-day assignment, but rather on assignment extending over a period of several days, criterion (3) cannot be met. Thus, our evaluation will center on whether the claimant's travel met criterion (2). The question before us is, was the claimant required to drive a vehicle or perform other work while traveling?

Nearly every time a government employee travels, some item of government property accompanies the traveler. In some cases, it is clear that the travel involves actual work and should be compensated. For example, travel while transporting a prisoner is clearly work, and should be compensated. In contrast, the transport of some incidental piece of government property, such as a pen, represents a minimal intrusion that could not be reasonably characterized as "work" and so would not be compensated. The circumstances of this claim fall between these extremes. Reasonable judgment must be applied. OPM has held in a past case that employees who transport relatively heavy and complex equipment important to mission accomplishment while traveling are performing work for FLSA purposes. Specifically, we found that employees required to safeguard and transport between job sites a relatively complex collection of tools and test equipment weighing 70 pounds should be paid for travel time when they actively carried and safeguarded the kits. However, our decision also found that a tool kit was not being actively carried and safeguarded when it was in the cargo hold of an airplane or bus, the luggage compartment of a taxi

or limousine, or checked in at an airport. We judge that this rationale remains sound and should be applied to the case before us.

We find that for the time period that the equipment transported by the claimant was checked in with the airline it was primarily under the custody and control of the airline. The claimant performed no work with the articles, did not have access to the articles, nor could he influence the safety of the articles. The decision by the claimant to keep the air filter cartridge in his custody as part of his carry-on baggage does not meet the definition of work under the FLSA for four reasons: the decision to carry-on the item was his own; the air filter cartridge did not require special handling or protection; the claimant performed no work with the air filter cartridge; and, most importantly, the small size and light weight of the item presented only the most minimal intrusion on the claimant's time. Thus, the claimant performed no work under the FLSA while the subject equipment was checked with the airline, or while he carried the air filter cartridge as part of his carry-on baggage.

Based on the timeline provided by the claimant, transportation of the equipment from the work site to the custody of the airline occurred while the claimant was on the clock. We reach this conclusion because the claimant's flight to Guam was originally scheduled to depart at 1:45 p.m. Though we understand that the flight was ultimately delayed until 4:00 p.m., we judge that the claimant was at the airport with his baggage checked well before 2:30 p.m. when he went off the clock. Even if the claimant maintained control of the equipment after his work day ended, we would still find this did not constitute work under the provisions of the FLSA for the identical reasons as those detailed in the next paragraph.

The subject equipment was under the custody and control of the claimant from the time he retrieved his baggage in Guam to the time he arrived at his temporary residence. Therefore, we need to determine if the transportation of the equipment during this time period constituted work under the FLSA. We find that it did not for the following reasons. First, we estimate from the information in the record that the total weight of equipment transported by the claimant was 18 pounds. We judge that 18 pounds of extra equipment considered in the context of the amount of personal property needed for an 11 day assignment represents a minimal burden. Second, the claimant performed no work with the subject equipment. Third, the transportation of this equipment was incidental to the claimant's travel, not his primary function. And fourth, while we recognize that all government officials are required to exercise due diligence in safeguarding government property, we find no evidence that the property in this case required any special safeguarding (for example, equipment requiring special security precautions, equipment requiring special handling, or equipment of extraordinary value). We note that the claimant states that his transport of the subject equipment resulted in delays clearing customs for which he should be compensated. According to the timeline provided by the claimant, his plane arrived in Guam at 11:00 p.m. [assigned city] time and he cleared customs at 12:15 a.m. We assume, then, that during an hour and 15 minute period the claimant deplaned, walked to baggage claim, waited to retrieve his baggage, and cleared customs. An hour and 15 minutes to complete these tasks does not appear excessive. Any time added by the subject equipment must have been minimal.

The claimant cleared customs at approximately 12:15 a.m., rented a car, and drove the car to his hotel, arriving at approximately 1:00 a.m. We assume that the claimant's travel orders authorized car rental at government expense, and that use of a rental car was primarily for the government's benefit rather than for the personal convenience of the claimant. If these assumptions are correct, the claimant was required to drive a vehicle from the airport to his hotel and thus met the requirement of the regulation that actually driving a vehicle is work under the provisions of the FLSA. The second assumption is particularly important. Driving a rental car primarily for the benefit and convenience of the employee likely does not meet the definition of work under the FLSA.

The actual time spent driving was less than 45 minutes because the 45 minute figure included time at the rental counter and time spent retrieving the car. In our telephone call, the claimant estimated that the drive from the airport to his hotel took 20 to 30 minutes. The island of Guam is only 30 miles long and 12 miles wide at its widest point. We judge that the actual time spent driving from the airport to the hotel was most likely at the lower end of the claimant's estimate.

Five CFR 551.422(b) states that:

When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

Thus, the claimant's normal work to home travel time must be deducted from hours of work we awarded him under (a)(2) of section 5 CFR 551.422. According to the claimant, his normal work to home travel takes approximately 15 minutes depending on traffic. While recognizing that estimates of work to home travel are necessarily imprecise, we judge it reasonable to conclude that the claimant's drive from the airport in Guam to his hotel was approximately equal to his normal work to home travel. Further, 5 CFR 551.521 allows work time to be rounded to the nearest quarter of an hour for irregular or occasional overtime work. Therefore, even if the claimant's driving time from the airport to his hotel slightly exceeded his normal work to home travel time, the time would be small enough to properly drop from hours of work. Thus, no additional overtime pay is due under the provisions of the FLSA.

Decision

The claimant is not due any additional overtime pay under the provisions of the FLSA.