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

Claimant: [name]

Agency Classification: N/A

Organization: Department of the Army
Army Pentagon
Washington, DC

Claim: Pay for services rendered
since January 22, 1970.

OPM decision: Denied; Lack of standing and
lack of jurisdiction

OPM file number: F-0000-00-01

/s/

_____

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

5/18/09

_____

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). 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.

Decision sent to:

[name and address]

Introduction

On October 17, 2008, the U.S. Department of Labor (DoL) forwarded what it characterized as a "complaint from an individual regarding allegations of Fair Labor Standards Act violation(s) affecting a federal employee" which was received by OPM's Center for Merit System Accountability on October 29, 2008. Claimant's October 8, 2008, letter to DoL states he previously filed a complaint on February 6, 2006, with DoL (no copy furnished), "requesting compensation for [his] participation in the Human Medical Research Program from the U.S. Army and the U.S. Department of Defense." Claimant states since that time he has requested termination of his participation but has "not been released or terminated from the program," and thus "[t]he U.S. Department of Defense (DoD) is in violation of the 13th amendment of forced involuntary Servitude [sic]." Claimant also states the program is not properly supervised or regulated and violates Constitutional law. We accepted and decided his claim under 29 USC § 204(f) and 5 CFR part 551, subpart G.

Background

Our November 4, 2008, letter advised the claimant his October 8, 2008, letter did not provide the information required in title 5, Code of Federal Regulations, Part 551, to file an FLSA claim and did not include a copy of his February 6, 2006, claim or any other complaint claimant states he filed with DoL. We indicated it was unclear whether the claimant was attempting to file an FLSA claim and whether he was a Federal employee for purposes of the FLSA or any other Federal pay law, since research participants frequently receive stipends rather than salaries. Our letter advised that Constitutional claims are not reviewable under the FLSA claims process and are outside OPM's jurisdiction.

In an undated letter received by OPM on January 21, 2009, the claimant provided additional but incomplete information, but identified his request as an FLSA claim. Our January 30, 2009, letter advised the claimant of the information still needed before OPM could respond to his claim request. We received the claimant's February 11, 2009, response on March 3, 2009. In reaching our decision in this matter, we have carefully reviewed all information furnished by the claimant and all other information of record.

Analysis

Jurisdiction (Subject Matter)

In his February 11, 2009, letter, claimant states his claim is that the "employers" have failed to issue payment for services rendered since January 22, 1970. Claimant asserts he was: "scheduled to receive the deferred payroll compensation and benefits in 2005 and was not paid. Since 2005 the employee has been working for the U.S. Army and the Department of Defense without being paid thus violating the U.S. Department of Labor's FLSA." Claimant states the remedy he seeks is "punitive damages and the loss from income and include benefits [sic] medical benefits, compensation for free travel that I was promised. free [sic] travel." Claimant asserts willful violation and requests: "Punitive damages of $25,000,000.00 and Liquidated damages of $650,000.00."

Under 29 U.S.C. § 216, Federal courts have substantial discretion in fashioning remedies for violations of the FLSA, including liquidated damages. Unlike the courts, OPM's

administrative claims process derives its remedial authority from the Back Pay Act, codified as 5 U.S.C. § 5596. Under the Back Pay Act, a claimant can receive back pay and interest for FLSA covered work performed within the claim period. See also, 5 CFR part 550, subpart H. There is no provision in the Back Pay Act for liquidated damages or punitive damages. Therefore, OPM lacks jurisdiction to act on the claimant's requests regarding these matters.

The FLSA, as previously stated, pertains to the payment of minimum wage and overtime pay. It does not cover medical benefits or free travel. Therefore, OPM also lacks the jurisdiction to act on the claimant's requests regarding these matters.

Jurisdiction and authority to settle the claim

The FLSA claims process in 5 CFR Part 551 pertains to the adjudication of claims for minimum wage and overtime pay under the FLSA. Under 5 CFR 551.705, a claimant may "file an FLSA claim with either the agency *employing* (emphasis added) the claimant during the period of the claim or with OPM…." Therefore, the first step in the FLSA claims adjudication process is to determine whether the claimant was an employee for purposes of coverage under 29 U.S.C. 204(f) and whether he performed work subject to the minimum wage and overtime pay provisions of the FLSA.

In our January 30, 2009, letter to the claimant, we stated:

> The minimum wage and overtime pay provisions of the FLSA apply to employees who perform FLSA nonexempt work. Thus, we need to establish if the employee performed nonexempt work during the period of the claim and, therefore, is covered by the FLSA claim process. Therefore, please provide specific information and documentation on the: (1) work functions you performed during the period of the claim and why you believe the work performed was FLSA nonexempt, (2) the hours of work you performed by date or, if you worked a set work schedule, the schedule during the period of the claim, and the level of compensation you received during the claim period, indicating whether it was hourly or salaried, (3) the physical location where you performed the work and the names, addresses, phone numbers and other contact information for people who can confirm where and when you worked and the nature of the work you performed and, (4) copies of any and all documents supporting your claim, including documentation supporting your assertion that you were "to receive the deferred payroll compensation and benefits in 2005…."

In his February 11, 2009, response to this request, claimant states:

> On the question of weather [sic] I performed non-exempt work. The work is and always has been to perform my daily schedule of normal living. Weekdays there are stress test [sic], mind exercise, trips to the library to gather information, and many hours on the home computer looking for research information. The reason that I believe I am going to get paid for the work is that I was told that I was doing [sic] to get paid. And I have not volunteered to work for free. There was hours [sic] set by my employers when I was last in contact with my employers, but I have

> been available 24/7 for the Medical Research Project. I expect to be paid for this because of the time I spent in Medical Research. My deferred payroll benefits has [sic] been delayed and I am unable to determine the last government pay level that I was able to attain. The pay grade level that is requested is of someone with 39 years of a communications specialist skills.
>
> Due to the nature of this research I do not remember weather [sic] I was salaried or Hourly [sic], [sic] you must contact the U.S. Army if you are requesting pay information up to 2005. The question of salaried or hourly seems to be in material [sic] at this point because the original agreement ended in 2005. I have informed the government to end all my involvement with Medical Research and that all work after 2005 will be billed hourly and if the government is in disagreement of those terms please inform me of such disagreement by letter….Te [sic] work was completed in my regular environment as the terms originally dictated. Most of the work is preformed [sic] at home and consist [sic] mostly of interactive communications as far as I know.

The record contains a March 26, 2006, letter from the claimant to the Office of the Surgeon General of the Army, requesting information under the Privacy Act, stating:

> In 1969 I signed a contract with the United States Army's Department of Human Research And [sic] Development as a Volunteer (Civilian)…. I volunteered as a subject for research for a period of 35 years, that period expired December 31, 2005. As part of the agreement my compensation was to be put into an interest bearing account, [sic] until the research was over. Please send me information concerning where this account might be held.

The record also includes a September 27, 2008, e-mail from the claimant to the U.S. Army Medical Command (MEDCOM), stating:

> As I related to you I am a participant in what I was told at the time of volunteering for the Medical research that it was being sponsored by the U.S. Government (U.S. Army)….Now there is some chance that it was sponsored by the Department of Defense or it may be a Congressionally Directed Medical Research program (CDMRP). My recollection is that it was a contract signed in January 22, 1970 for the length of the Medical Research period of 35 years, and was to end in 2005. I have received some correspondence from the U.S. Army Medical Research and Material Command (MEDCOM) at 504 Scott Street, Fort Dietrick, MD 21701-5012 saying that there is no record of my participation in any Medical Research Program.
>
> However, I did receive some information from the Veterans Administration saying that my participation in a Medical Research Program began January 22, 1970. In an [sic] FOIA request it revealed that my records were temporarily inaccessible in the system of records called OMPF.

Claimant provided a TransUnion credit report issued January 3, 2008, in support of his claim. The credit report indicates claimant was "reported" on "10/2006" as employed by the "US Army Med Research& Developmen" [sic] in Frederick, MD The position held is

shown as “SGRD HR” with “date hired” left blank. The claimant was “reported” on “03/2000” as employed by the “Department of Defence [sic]” in Washington, DC. The position held and date hired areas are blank. The credit report shows “05/75” as “date verified” as employed with the Assistant Secretary of the Army in Washington, DC. The date hired is shown as “04/1971” and the position held area is left blank. This document, however, does not identify how or by whom this information was “reported” or “verified,” does not define the meaning of these terms, and does not address or attest to the accuracy of the data.

Under 5 CFR 551.104: *“Employ* means to engage a person in an activity that is for the benefit of an agency, including any hours of work that are suffered or permitted.” The FLSA does not define “work.” *Merriam-Webster Online* defines “work” as:

> **1**: activity in which one exerts strength or faculties to do or perform something: **a:** sustained physical or mental effort to overcome obstacles and achieve an objective or result **b:** the labor, task, or duty that is one's accustomed means of livelihood **c:** a specific task, duty, function, or assignment often being a part or phase of some larger activity.

Definitions of “work” in *The Free Dictionary* include: (1) “Physical or mental effort or activity directed toward the production or accomplishment of something,” (2) “A trade, profession, or other means of livelihood,” (3) “Something that one is doing, making, or performing, especially as an occupation or undertaking; a duty or task,” and, (4) “The part of a day devoted to an occupation or undertaking.”

Performing a “daily schedule of normal living” is not work. Claimant has been given ample opportunity but has failed to produce supporting evidence to establish that he has performed or produced a tangible work product for the Government. The “witnesses” claimant puts forward to support his claim include an attorney who identified himself in a December 8, 2008, letter to the U.S. Army Medical Command (MEDCOM) as representing the claimant in this matter. Other “witnesses” cited by claimant include various OPM, U.S. Food and Drug Administration, MEDCOM and other Department of the Army personnel who, in response to Freedom of Information Act or other records requests, advised claimant they had no record of his having participated as a subject in a medical research program or no record of his having been employed as a Federal civilian employee. The sample of witnesses we contacted confirmed they had no knowledge of the claimant’s having performed work as a civilian for the Federal Government.

Claimant’s rationale is also internally contradictory. The OMPF referred to by the claimant is identified in the record as the Official Military Personnel File. Military members are not subject to the FLSA; only civilians in the military department are subject to the FLSA (see 29 U.S.C. 203(e)(2)(A)(i)). The claimant’s reliance on the information provided by the Retired and Annuity Pay Contact Center of the Defense Finance and Accounting Service is similarly misplaced since the e-mail response to claimant specifically identifies the records as “your military records” and is merely inartfully pointing to the National Personnel Records Center as the place where such records would be kept. The claimant’s reliance on a TransUnion credit report to show employment with the Federal Government is misplaced since repeated searches under the Freedom of Information and Privacy Acts conducted at

the claimant's request for official Federal Government records to verify those purported dates of employment have been unsuccessful.[1]

We do not find claimant's assertions regarding civilian employment by the Federal Government credible. It is reasonable to conclude someone entering into an employment agreement would have retained a copy of the agreement. Furthermore, placement of monies in an "interest bearing account" would, on its face, have produced annual tax consequences since Federal agencies are not immune from the provisions of tax law. Therefore, claimant's purported ignorance as to the location of this account for some 35 years also is not credible.

Based on the preceding analysis, we do not have jurisdiction to settle this claim since claimant has failed to show he was an employee covered by OPM's FLSA claims adjudication process who performed work subject to the minimum wage and overtime provisions of the FLSA.).

Period of the claim

In the letter received by OPM on January 21, 2009, claimant indicates his belief that the claim period was preserved, stating: "See copy of letters written to OPM starting in 2005 requesting payment and letters written to the U.S. Department of Defense and the U.S. Army." However, none of the documents cited in support of this assertion constitute a written and signed claim required from a claimant in 5 CFR 551.705(c). As discussed in GAO's Principles of Federal Appropriation Law, Second Edition, Volume III, November 1994 (Redbook):

> [C]laims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C.§ 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to "fix responsibility for the claim and the representations made therein." Bialowas v. United States, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, "there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9, 11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).

[1] We find claimant's description of events is similarly contradictory. Claimant states at various times that he was a "volunteer." As defined in 5 CFR 551.104, for the purposes of the FLSA, *"Volunteer* means a person who does not meet the definition of *employee* in this section and who volunteers or donates his or her service, the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances, there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them." Therefore, claimant's identification of himself as a volunteer and an employee is a contradiction.

> While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter's intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

Claimant has not provided a copy of his 2005 letter to OPM. Instead, he has provided a copy of a May 25, 2005, letter from OPM which states: "This letter is in response to your recent **inquiry** [emphasis added] concerning your past federal service and possible benefits due you." The February 8, 2008, letter from the Department of the Army Freedom of Information Act and Privacy Act Office states: "This responds to your Freedom of Information Act request dated January 27, 2008 [copy not provided by claimant]. Your request is for access to and copies of records pertaining to you." The February 7, 2007, letter from the Department of the Army, Office of the Inspector General, states: "This acknowledges receipt of your February appeal to our response to your February 20, 2006, Freedom of Information Act request."

The other letters provided by claimant respond to claimant's requests for information on this matter from a number of sources (claimant failed to provide copies of his letters to these sources in which requested information), identify their subjects as, *inter alia*, (1) "You requested information pertaining to a cerebral device implanted in January 1970 at Arkansas State University, Jonesboro, Arkansas as a participant in a Human research project [September 11, 2008, letter from Department of the Army, Freedom of Information and Privacy Division]," (2) "I have received and reviewed your letter dated 11 October 2008 addressing your concerns over being a participant in a human medical research program under the auspices of the Department of Defense (DOD) [October 22, 2008, letter from Department of Defense Civilian Personnel Management Service, Investigations and Resolutions Division]," (3) "Essentially, your request [Privacy Act] states that you request our office improve accountability toward payment of a contract that was signed with the US Government to be a participant in the US Government Medical Research and development [sic] Program sanctioned by the US Department of Defense [October 22, 2008, letter from Defense Finance and Accounting Service]," and, (4) "You state you do not wish to continue as a participant in the U.S. Army Human research and Development Program [February 19, 2008 letter from U.S. Army Medical Research and Materiel Command]." None of these letters constitute evidence the claimant preserved his claim prior to OPM's receipt on January 21, 2009, of claimant's letter stating he was requesting compensation under the FLSA, as discussed previously in this decision.

All FLSA pay claims filed on or after June 30, 1994, are subject to a two-year statute of limitations (three years for willful violations). 5 CFR 551.702(a), (b). Therefore, even assuming, *arguendo*, the instant claim was valid, any potential entitlement to FLSA overtime pay or minimum wages earned prior to January 21, 2006, is barred due to the running of the three-year statute of limitations if willful violation can be shown to have occurred. The FLSA does not merely establish administrative guidelines; it specifically prescribes the time within which a claim must be received in order to be considered on its merits. OPM does not have any authority to disregard the provisions of the FLSA, make exceptions to its provisions, or waive the limitations it imposes. Thus, we conclude claimant failed to file a valid claim and, therefore, has failed to preserve a claim period.

Decision

We deny the claim for lack of standing and for lack of jurisdiction.