

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



Dallas Oversight Division
1100 Commerce Street, Room 4C22
Dallas, TX 75242

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

Claimant: [claimant's name]

Position: Wastewater Treatment Plant Operator
WG-5408-9

Organization: [claimant's organization]
National Park Service
Department of the Interior
[city, state]

Claim: Was not paid for waiting periods while on
duty at remote work site

OPM decision: Waiting periods compensable under the FLSA

OPM decision number: F-5408-09-01

/s/Bonnie J. Brandon

Bonnie J. Brandon
FLSA Claims Officer

10/13/98

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.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision, then pay the claimant the amount owed him.

Decision sent to:

[claimant's name and address]

[claimant's servicing personnel office]
National Park Service
Department of the Interior
[address of servicing personnel office]

Director of Personnel
Department of the Interior
Mail Stop 5221
1849 C Street, NW.
Washington, DC 20240

Introduction

On May 23, 1996, the Dallas Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [the claimant's name]. He states that he has not been fully paid for all hours of work from December 1991 through March 8, 1995, the date the personnel office at [location of claimant's servicing personnel office] received written notice from [the claimant] that he believes he is entitled to back pay under provisions of the FLSA. During the claim period, Mr. Cory worked in the [claimant's organization], National Park Service, Department of the Interior, [city, state]. His position was classified as Wastewater Treatment Plant Operator, WG-5408-9. It was nonexempt from the FLSA. We have accepted and decided his claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully reviewed all information provided by the claimant and his agency, including his official job description (number [number]).

General issues

On September 30, 1994, the six-year statute of limitations for FLSA claims was changed to two years (three years for willful violation) when Public Law (P.L.) 103-329 was signed. The effect of section 640 of P.L. 103-329 was to limit FLSA claims filed on or after June 30, 1994, to a two-year period (three years for willful violation) and to preserve a six-year limitation period for claims filed *before* that date. Since the claimant's FLSA claim was filed with his agency after June 30, 1994, his claim is limited to the two-year period back from the date the agency received his claim; i.e., the claim period is from March 9, 1993, through March 8, 1995.

The U.S. Court of Appeals for the Federal Circuit (*Carter v. Gibbs*, Fed. Cir. 1990) has determined that if a person filing an FLSA claim was a bargaining unit member during any part of the claim period, if the unit was covered by a collective bargaining agreement, and if the agreement did not explicitly exclude FLSA matters from its negotiated grievance procedure (NGP), then the person's administrative remedy to resolve the claim is the NGP. Although the claimant was covered by a collective bargaining agreement during the claim period, we accepted his claim based on an OPM decision in 1994 involving an FLSA claim by another employee at [the claimant's employing agency] who was also covered by the same agreement as the current claimant. In the earlier claim, OPM accepted the employing agency's determination that the agreement in effect at that time excluded FLSA matters.

According to personnel officials at [the claimant's employing agency], the current claimant is covered by the basic agreement between [the claimant's employing agency], National Park Service, Department of the Interior, and Local [number of the Local] of the American Federation of Government Employees that became effective on December 18, 1995. This agreement does not explicitly exclude FLSA matters from its NGP. Therefore, the NGP is the administrative avenue for resolution of any future FLSA claim that the current claimant may file for a time period that includes the date of December 18, 1995.

The claimant relates his work situation and claim for compensation under provisions of the FLSA to that for another [the claimant's employing agency] employee where OPM decided in 1994 the employee was entitled to back pay under the FLSA. The current claimant believes his situation is so similar to the earlier claim that back pay should also apply to his case. The FLSA claims process is a de novo review that includes a comparison of the facts of the claim to criteria in Federal laws, regulations, and guidelines. Therefore, we must compare the facts in the current claim to these criteria to determine the claimant's entitlement to back pay. We cannot compare the claimant's position to others for deciding his claim.

Evaluation

During the period of the claim, the claimant's duty station was [city, state], although his actual work site was at [name of claimant's work site] located near [a specific area of the national park]. The Park designated [a city] as the duty station to allow the claimant official work hours to hike to and from the assigned work site. According to information provided by the claimant and the Park, it takes between three to four hours to hike to [the claimant's work site] and between four to six hours to hike out. While at [the claimant's work site], the claimant resides in Government housing. He remains in residence at [the claimant's work site] during his off-duty period so that he can perform his standby duty in the evenings.

The claimant's tour of duty during the period of the claim consisted of eight 10-hour days on duty and six days off duty. After the claimant completed his regular work shift on the eighth day, he was relieved by his counterpart and hiked out of the [work site area] to remain off duty for the other six days of the pay period. When at [the work site], the claimant's official work schedule was 5:00 a.m. to 4:00 p.m. with one hour for lunch. He was also allowed one hour of overtime each workday to check the plant in the evening, usually between 7:00 p.m. and 9:00 p.m. The file reflects that the claimant was on call for 24 hours a day for each of the eight days he was at [his work site].

The wastewater treatment plant runs 24 hours a day. As indicated in the file, during the period covered by this claim the claimant was required to respond within one hour to alarms that warn of equipment malfunction or other emergencies. The alarm system consists of a flashing yellow light, a red warning light, and an audible buzzer. These alarms are visible and audible up to about 200 feet away from the plant. In addition to the duties and responsibilities associated with the wastewater treatment plant, the claimant was responsible for campground repairs and facilities maintenance at [the claimant's work site]; e.g., pipeline breaks and cleaning, maintaining, and repairing public restrooms.

Section 551.431 of title 5, Code of Federal Regulations, states that time spent on standby duty or in an on-call status is considered hours of work under the FLSA if the employee is (1) restricted to his or her living quarters or designated post of duty; (2) has his or her activities substantially limited; and (3) is required to remain in a state of readiness to perform work. It further states that an employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if (1) the employee is allowed to leave a telephone number or to carry an electronic

device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or (3) the employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person. The intent of the regulation is to make any waiting time that substantially limits an employee's use of that time for his or her own private purposes hours of work (i.e., compensable) under the FLSA. Translated to the circumstances of the claimant's case, waiting time served is compensable under the FLSA if the circumstances during the waiting time substantially limit the employee's normal daily off-duty activities.

In addition to his regular on-duty hours, the claimant served periods waiting for possible emergencies during the eight days he was on site at [the claimant's work site]. During this time, the claimant was the only employee at [his work site] with the skill and experience to respond to emergencies at the plant. While information provided by the agency indicates that the claimant carried a beeper when he was at [his work site], the claimant stated that he did not have a beeper, that he was never required to carry a beeper, and that there was no one else to page him in case of emergencies. The claimant further stated that while he was at [his work site] he carried a Park radio that was used to communicate with other divisions for purposes such as flight operations, search and rescue, and visitor assistance and was not used for notifying him of emergency situations at the wastewater plant; i.e., there was no one available to call him back to the plant, and he was required to remain within sight and hearing distance of the alarms. Since the claimant was the only Park employee on site at [the claimant's work site] with necessary knowledge and skill to handle emergencies at the plant, he could not arrange for a substitute to respond to alarms during hours outside his regular 10-hour tour of duty. According to information provided by the claimant, failure to respond to an alarm without compelling justification (e.g., assisting in search and rescue) is considered grounds for disciplinary action.

The agency submitted information that lists 13 instances between April 15, 1993, and May 26, 1996, when the claimant was paid for work performed at the plant outside his regularly scheduled 10-hour tour of duty. The agency indicates that this number of instances is not sufficient to support the claimant's contention that he is in a standby status because he must maintain a state of readiness to respond to emergencies at the plant.

During the period covered by the claim, the claimant's permanent living residence (i.e., his home) was at the [location of the claimant's residence]. When he was at his home, his normal daily activities outside of employment duty involved activities such as being with his family for movies, dinners out, and school events; attending church; and attending educational classes, meetings of social organizations, or other sponsored events in the immediate community around his home. As indicated previously, the claimant's home is a four-to-six-hour hike from the work site. In the one-hour response time expected by the agency, there is no way the claimant could reach [his work site] from his home or its immediate surrounding community in response to alarms even if someone at [the claimant's work site] could contact him by radio. The alarms at the wastewater plant at [the claimant's work site] are not equivalent to an electronic device that would permit the claimant to leave the work site. He would still have to be near the wastewater plant at [his work site] to meet the required one-hour response time. Consequently, when serving waiting periods

while on duty, the claimant had to stay in the immediate area of [his work site]. This temporary residence required him to be outside the community where he engaged in normal daily off-duty activities. Therefore, those activities were, automatically, substantially limited. Such a circumstance meets the conditions for FLSA compensation even though the claimant was free to move around [his work site]. His movement and activities around [his work site] did not rise to the level of engaging in normal off-duty activities. Thus, during hours exclusive of his regular tour of duty when the claimant is required to stand by within earshot or eyesight of alarms from the plant, he is for practical purposes: (1) restricted to his designated post of duty, (2) substantially restricted in terms of the activities in which he can engage (i.e., those activities which are offered at or within a few hundred meters of [the claimant's work site]), and (3) required to remain in a state of readiness to perform work.

All hours that fall outside of the claimant's regularly scheduled tour of duty in which he is required to stand by and be prepared to respond to an alarm are considered to be hours of work under 5 CFR 551.431(a)(2) and are subject to FLSA overtime pay under 5 CFR 551.501(a). Although there is disagreement between the agency and claimant over whether the hours in question should be credited as overtime hours under FLSA, there is no disagreement that the claimant is required to stand by in a state of readiness to respond promptly and work competently to perform emergency repairs when necessary. The claimant is accordingly entitled to receive back pay with accrued interest for all hours of FLSA overtime work for which he was not properly compensated during the claim period.

The claimant is authorized back pay only for the actual number of hours worked for the two-year period ending March 8, 1995. Bona fide sleep time as described in 5 CFR 551.432(a) is not considered hours of work under FLSA if the tour of duty is more than 24 hours in duration; adequate facilities are available to permit the employee to enjoy an uninterrupted period of sleep; and at least five hours are available for that purpose. The claimant is considered to be on duty for 24 hours for each of the eight days he is at [his work site]. Up to eight hours in each unbroken 24-hour segment can be credited as sleep time and deducted from the total number of overtime hours claimed by the claimant while at [his work site].

The agency indicated that the claimant has been compensated for overtime hours under title 5 pay provisions that may coincide with hours claimed under the FLSA. Provided that the hourly rate of overtime pay is at least equal, the claimant is entitled to no additional compensation under FLSA for hours of work for which he had already been paid under title 5. In addition to sleep time and the receipt of prior overtime payments, there may be other hours which do not qualify as hours of work which should be deducted from the total number of overtime hours that the claimant claims. For example, hours during which the claimant was relieved by another person or was allowed to leave the work site subject to electronic or radio call back would not qualify as hours of work under FLSA. The claimant is not entitled to overtime compensation for hours during which he was not officially restricted from leaving the work site. Time and attendance records should be reviewed to ensure that overtime hours are not inadvertently credited for periods when the claimant was absent from the work site.

The claimant presented evidence to show that he is required to perform stand by duty in the manner previously described and that he actually performed the work. Therefore, he is entitled to back pay with interest for all hours claimed, except those hours for which specific evidence can be cited to refute the basis for his claim. In challenging the claimant's claim of hours of overtime work, it is important to identify the hours and dates in question and the specific reasons why his claims are unwarranted. In the absence of specific evidence to refute the number of hours claimed, all hours claimed should be considered as compensable. Once the exact number of compensable hours is determined, the claimant's basic entitlement to overtime back pay should be calculated in accordance with the provisions of subpart E, sections 551.501 through 551.521 title 5, Code of Federal Regulations. Overtime back pay should be calculated for all compensable hours worked during the period beginning March 9, 1993, and ending March 8, 1995. In addition, agency officials should determine, in terms of the issues discussed in this decision, if the claimant is due overtime back pay from March 8, 1995, to the present.

The claimant is also owed interest on the overtime back pay in accordance with the provisions of section 5596(b)(2)(B)(I-iii), title 5, United States Code. Interest payments on the overtime back pay to which the claimant is entitled can be calculated in accordance with the procedures specified in Federal Personnel Manual Letter 550-78, dated May 31, 1988.

Decision

The claimant is entitled to back pay with interest for all hours claimed, except those hours for which specific evidence can be cited to refute the basis of his claim.

Compliance instructions

The agency is to compute the claimant's pay entitlement, including interest on the back pay, as described in section 5596 of title 5, United States Code, and subpart H of part 550, Code of Federal Regulations.

If agency personnel have any questions, they may call our office at 214/767-0561.