U.S. Office of Personnel Management

Office of Merit Systems Oversight and Effectiveness

Classification Appeals and FLSA Programs

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

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

Appellant:	[claimant's name]
Agency classification:	Architect GS-808-11
Organization:	Projects Section Facilities Management Service Medical Center Department of Veterans Affairs [location]
Claim:	Exemption status
OPM decision:	Claim denied
OPM decision number:	F-0808-11-01

/s/

Robert D. Hendler
FLSA Claims Officer

2/5/01

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Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which Office of Personnel Management administers the Fair Labor Standards 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 right of further administrative appeal. This decision is subject to discretionary review only under conditions and time limits specified in 5 CFR 551.708 (address provided in 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

Decision sent to:

[claimant's name]
[claimat's address}

[name]
Chief, Human Resources Management
Service
Department of Veterans Affiars
Medical Center
[address]
[location]

Ms. Ventris C. Gibson
Deputy Assistant Secretary for
Human Resources Management (05)
810 Vermont Avenue, NW
Department of Veterans Affairs
Washington, DC 20420

Introduction

On October 27, 1999, the Philadelphia Oversight Division of the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. In his October 18, 1999, letter the claimant stated that he was classified as an FLSA non-exempt worker who occasionally works compensatory time. However, he claimed that non-exempt workers are paid their regular rate of pay, not one and one-half times his regular rate of pay, for overtime worked. His claim is based on having worked a total of 11.75 hours in May 1998, September 1998, and March 1999, as compensatory time, which he also believes should have been credited at the same rate of one and one-half hours of compensatory time for each hour of compensatory time earned. He also requested proper compensation, including liquidated damages; education of management and staff on pay setting matters; and "a broad review regarding who has what classification and why." We have accepted and decided his claim under section 4(f) of the FLSA as amended.

General issues

The claimant raised concerns in his letters on how the FLSA has been implemented in his activity. He said that his activity does not uniformly classify work as exempt or non-exempt, pointing out that an engineer who performs identical work is classified as exempt. However, we must make exemption decisions by comparing a claimant's duties and responsibilities to criteria in Federal regulations and other guidelines, and cannot compare a position to others in deciding a claim.

The claimant stated that the Department of Veterans Affairs (VA) structures its architectural work to prevent it from being performed with the judgement required to be considered exempt. He stressed that the factor levels credited to his position evidence the limited nature of his assignments and the non-exempt nature of the work that he performs. However, the factor levels assigned to his position do not control the FLSA coverage of his work. Instead, they represent agency classification judgements and are not directly applicable to FLSA coverage analysis. The PD's information, including the factor levels described, may only be considered to the extent that they help us determine how the position works.

OPM independently determines the FLSA exemption status of the work performed by a claimant before we address a claim for uncompensated overtime. We have addressed the claimant's comments on how FLSA is implemented in the Federal government and other matters not germane to this case in separate correspondence.

In reaching our FLSA decision, we have carefully reviewed all information furnished by the claimant and his agency, including his official position description (PD) #[number] classified as Architect, GS-808-11; information in the claim administrative report; and the activity's and claimant's responses to our letter of April 10, 2000, seeking to clarify the duties and responsibilities assigned to and performed by the claimant. On November 19, 1999, the claimant and his supervisor certified the PD as current and accurate.

Evaluation

The claimant disagrees with the agency's exemption determination made under the professional exemption criteria. His rationale also addresses the administrative exemption criteria. In our decision, we compare his position with both of these criteria to determine the FLSA exemption status of his position.

The regulations applicable in determining if work is exempt or non-exempt are contained in 5 CFR, part 551, Pay Administration Under the FLSA, Subpart B, Exemptions and Exclusions. Section 551.207 of the CFR contains the criteria governing whether the claimant's position should be exempt from the FLSA under the professional exemption criteria. The position is exempt if it meets professional exemption criteria (a)(1), (2), or (3), known as the primary duty test, and (b) through (d), in section 551.207.

<u>The claimant's position meets the primary duty test</u>.

Criterion (a)(1) deals with work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or work comparable to that performed by professional employees that is performed on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

The claimant believes that he does not apply theoretical knowledge; he applies practical knowledge of the requirements and techniques set forth in code and VA standards. He also states he spends at least 80 percent of his time as a Contracting Officer's Technical Representative (COTR). This work consists of inspecting the work products of both outside architect/engineers (A/E) as well as construction contractors. He says he applies very specific criteria, follows standard procedures and codes, compares the work product to published VA standards and specifications, and selects from established standard procedures when problems are encountered. He said that he provides expertise, but does not resolve critical problems, and applies standard architectural practices, but does not deal with difficult to resolve conflicts. However, in contrast, he also claimed that as a troubleshooter, he corrects the problems of other architects and engineers. In doing so, he cannot use pre-existing solutions. He stated that this work takes a fairly high degree of training and experience to successfully bring resolution to difficult field or design supervision problems.

Responding to our request for clarification, he stated that the classification factors credited to his position prevent him from practicing as a professionally exempt senior architect. He said that COTR delegations do not give him authority on matters of time or money, thereby limiting his authority and independent judgement. He claimed that he is limited to clarifying problems and reaching agreements, rather than persuading other architects or subject-matter specialists to adopt technical points and methods about which there are conflicts and to negotiate agreements. He reiterated the limitations that policy imposes on his work, and said that he refers situations where

rules do not apply and a better solution has to be derived by going beyond the rules and working out a new rule from the intent of the previous to his supervisor.

The PD of record describes work that conflicts with these statements. It states that the claimant is responsible for assisting in the general design of construction projects. As a member of the project design team, he participates in preliminary design meetings to develop cost efficient, space efficient, functional and aesthetic design schemes for station level, NRM, minor miscellaneous and major projects. He acts as liaison between Engineering Service, medical center personnel and Architectural/Engineering firms. He is a member of the A/E Selection Board and participates in the A/E selection process. The claimant is expected to provide professional architectural and design services related to the layout, design, development and completion of construction projects ranging from $25,000 to $3,000,000 and small in-house maintenance projects. He prepares project scope, cost estimates, drawings and contract and prepares justifications and descriptions for proposed projects. During the construction phase, the claimant prepares necessary reports, checks blueprints and specifications, and takes corrective action when needed. He reviews and approves/disapproves material and equipment submittals for the projects assigned to him during the construction phase. The claimant ensures that standards and regulations are followed in the designs as well as ensuring the competency of the design. The claimant's performance standards confirm these functions.

The claimant's agency has provided information on the expectations and requirements of the position, as annotated in the PD, indicating the claimant's primary duty consists of work that requires substantial knowledge in architecture and related engineering fields, as acquired through a bachelor's degree. We find that the architecture degree is in a field that is pertinent to his identifying design and construction problems and developing proposed solutions for those projects. Working within policy limitations does not, as the claimant suggests, restrict the application of knowledge in analyzing technical issues. We find that criterion (a)(1) is met; therefore the primary duty test is met.

<u>The claimant's position meets criterion (b)</u>.

Criterion (b) focuses on work of an intellectual nature, which is work involving general intellectual capability, such as perceptiveness, analytical reasoning, perspective, and judgement applied to a variety of subject-matter fields, or work involving mental processes that require substantial judgement based on considering, selecting, adapting, and applying principles to numerous variables. An employee involved in work of an intellectual nature does not rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from a broad range of possible actions.

Based on the nature of the work described, we find the work involves analytical demands typical of full performance level architectural work. The record shows that the architectural work performed requires intellectual capability, including perceptiveness, analytical reasoning, perspective, and judgement to conceptualize alternative technical approaches necessary to develop scopes of work, resolve issues with and recommend redesigns to contract architects, and

technically oversee contractor performed construction and related work. These functions entail applying knowledge of a variety of subject-matter fields covered by architectural and related engineering principles. The work involves substantial judgement based on considering, selecting, adapting, and applying this wide variety of subject-matter principles and concepts to the numerous variables present with each architectural project.

Working within the confines of agency policy does not change the fact that the claimant is responsible for organizing and planning his assigned architectural functions. He must determine the most appropriate means of completing assigned position functions, and apply the breadth and depth of program and technical knowledge in the most effective way to accomplish the architectural and engineering duties effectively and efficiently. The position reflects the scope of work and application of intellectual acumen that satisfy this criterion (b).

The claimant's position meets criterion (c).

This criterion covers the use of discretion and independent judgement. Established OPM guidance explains that the exercise of discretion and independent judgement involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. The work must involve sufficient variables as to regularly take action and the decisions must be significant. Employees who perform work requiring primarily skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines that specifically govern their actions would not meet this element. In addition, deciding whether a situation does or does not conform to clearly applicable criteria would not be considered making significant decisions.

GS-11 grade level work, whether exempt or non-exempt, is defined in 5 USC 5104(11) as:

> work of marked difficulty and complexity and responsibility. . .requiring extended specialized, supervisory, or administrative experience which has demonstrated important attainments and marked capacity for sound independent action or decision; and. . .intimate grasp of specialized and complex subject matter, or of the profession, art or science [or]. . .with wide latitude for the exercise of independent judgement, to perform work of considerable difficulty requiring somewhat extended professional, scientific, or technical training and experience which has demonstrated important attainments and marked capacity for independent work . . . .

The claimant's position is vested with substantial independence of action since the claimant plans and carries out his assignment independently, resolves most conflicts that may arise, and coordinates work with others. He is expected to interpret agency policy on his own, keeping his supervisor informed of potentially controversial matters or far-reaching implications. The PD reflects regular and recurring exercise of discretion and judgement in such duties as coordinating projects, working as a member of the project design team, acting as a member of the A/E Selection Board, and participating in the A/E selection process.

While agency policies may limit certain administrative choices, they do not limit the position's requirement for professional analysis. OPM's FLSA regulations state that decisions made as the result of the exercise of independent judgement may consist of recommendations for action rather than the actual taking of action. The fact that decisions are subject to review does not

mean that the employee is not exercising independent judgement of the level required for exemption. Decisions are not "significant" if they only affect the procedural details of the employee's own work or such matters as deciding whether a situation conforms to clearly applicable criteria. The term "significant," however, is not restricted to decisions that are made by employees who formulate policies or exercise broad commitment authority. The claimant's work meets this criterion in that he judges how to apply standard architectural practices and modify conventional practices. The claimant's day-to-day freedom of action in performing the above analytically demanding work, reflects sufficient variables as to regularly require the scope of discretion and judgement warranting the crediting of this element to the position.

Criterion (d) is not applicable.

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on professional functions and work that is an essential part of those functions. Because the claimant's position is classified above these grade levels, this criterion does not apply to the position.

Summary

Based on the preceding analysis, we find the claimant's position is exempt under the professional exemption criteria.

Section 551.206 of the CFR contains the criteria governing whether the claimant's position should be exempt from the FLSA under the administrative exemption criteria. The position is exempt if it meets administrative exemption criterion (a)(1), (2), or (3), known as the primary duty test, and (b) through (d), in section 551.206.

The claimant's position meets the primary duty test.

Criterion (a)(1) deals with work that significantly affects the formulation or execution of management policies or programs. Criterion (a)(2) involves general management or business functions or supporting services of substantial importance to the organization serviced. Criterion (a)(3) involves substantial participation in the executive or administrative functions of a management official.

Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that others act on. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or organizations, both within or outside the Federal government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of

program management; i.e., planning, developing, promoting, coordinating, controlling, or evaluating operating programs.

As COTR, the claimant functions as management's representative in executing management programs by obtaining contractor compliance with technical contract requirements. Crediting this criterion is not prevented, as the claimant proposes, by his lack of contracting officer authority. This criterion is creditable because the contracting officer relies on the claimant's technical input to determine whether contract requirements have been satisfied. Management similarly relies on the claimant's advice in determining the acceptability of contractor A/E work. The claimant performs exempt program planning work in preparing project scope, cost estimates, drawings and contract specification, and preparing and justifying proposed projects. For these reasons, criterion (a)(1) is met.

In addition to the difficult and complex analytical functions involved in general management, e.g., budgeting or financial management, general management or support services include services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into non-exempt production functions. To warrant exemption from the FLSA, such work must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

The claimant determines the acceptability of goods, e.g., approving or disapproving material and equipment during the construction phase, and the acceptability of services, e.g., A/E contract products. In preparing documents for progress reports, partial payments, change orders, and supplemental agreements, his work is central to the purpose and reason for the existence of the Engineering Service; i.e., planning, coordinating, and managing the activity's engineering program. The functions he performs as staff architect are part of the core mission of the engineering program to meet a broad range of management goals, e.g., assisting in the general design of construction projects to meet cost efficiency, space efficiency, and functional and aesthetic requirements. Thus, his decisions and recommendations are of fundamental importance to the business of the engineering program and the medical center. He works within the overall policies, objectives, and requirements prescribed by activity and agency program regulations, guidelines, and procedures. These functions reflect support services of substantial importance to the organization, and affect the ability of the activity, and its Engineering Service, to accomplish their mandated emergency management program mission. Therefore, we find that the claimant's work also meets criterion (a)(2).

<u>The claimant's position meets the nonmanual work test.</u>

Criterion (b)(1) covers work that is intellectual and varied in nature. Criterion (b)(2) covers work of a specialized or technical nature that requires considerable specialized training, experience, and knowledge.

Work meeting criterion (b)(1) involves general intellectual capability, such as perceptiveness, analytical reasoning, perspective and judgement applied to a variety of subject-matter fields, or work involving mental processes that require substantial judgement based on considering, selecting, adapting and applying principles to numerous variables. The employee cannot rely on standardized application of established procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures, interpreting findings, and selecting and recommending the "best" alternative from among a broad range of possible actions.

While agency policies may limit certain administrative choices, they do not limit the position's requirement to analyze contractor performance for adherence to technical contract specifications and equivalent issues. As discussed previously, OPM's FLSA regulations state that decisions made as the result of the exercise of independent judgement may consist of recommendations for action rather than the actual taking of action. The fact that decisions are subject to review, e.g., by the supervisor and/or contracting officer does not mean that the employee is not exercising independent judgement of the level required for exemption. The claimant's work meets this criterion in judging whether A/E firms and other contractors are responsive to project and program needs, working with them to resolve problems and recommend re-designs, and recommending contract actions to the contracting officer. The claimant's day-to-day freedom of action in performing the above analytically demanding work reflects sufficient variables as to regularly require the scope of discretion and judgement sufficient to crediting this criterion to the position.

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledges characteristically acquired through specialized academic training.

The duties described previously in this decision require substantial intellectual effort to analyze and apply subject matter of considerable difficulty entailed in the program work assigned to the position. The position's full performance level architectural design and contractor oversight duties reflect work requiring substantial knowledge of complex subject matter. Accordingly, we find the position meets criterion (b)(2).

<u>The position meets the discretion and independent judgement test.</u>

Work meeting criterion (c) requires the employee to frequently exercise discretion and independent judgement, under only general supervision, in performing the normal day-to-day work. The exercise of discretion and independent judgement involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. Decisions made as the result of independent judgement may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion and independent judgement of the level required for exemption.

The claimant's position is vested with substantial independence of action as discussed previously. While agency policies may limit certain administrative choices, they do not limit the position's requirement to analyze and recommend action on contractor proposals and performance. Firm commitments or final decisions are not necessary to support exemption. Decisions made as the result of the exercise of independent judgement may consist of recommendations for action rather than the actual taking of action. The fact that decisions are subject to review does not mean that the employee is not exercising independent judgement of the level required for exemption. Decisions are not "significant" if they only affect the procedural details of the employee's own work or such matters as deciding whether a situation conforms to clearly applicable criteria. The term "significant," however, is not restricted to decisions that are made by employees who formulate policies or exercise broad commitment authority. The claimant's work meets this criterion in judging whether A/E designs, contractor responsiveness to statements of work, and contractor construction performance meet program requirements. The claimant's day-to-day freedom of action in performing the above analytically demanding work, reflects sufficient variables as to regularly require the scope of discretion and judgement warranting the crediting of criterion (c) to the position.

Criterion (d) is not applicable.

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. Because the claimant's position is classified above these grade levels, this criterion does not apply to the position.

Summary

Based on the preceding analysis, we find the claimant's position is exempt from the FLSA under the administrative exemption category.

Decision

Based on the above analysis, the claimant's position is properly exempt from the overtime provisions of the FLSA. Therefore, we cannot address his claim for overtime pay.