

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

Claimant: [Name of claimant]

Agency classification: Park Ranger (Mountaineering)
GS-025-9

Organization: [Claimant's organization/location]
National Park Service
U.S. Department of the Interior

Claim: Received no overtime pay for standby,
suffered and permitted work, and travel.

OPM decision: No overtime payment is due

OPM decision number: F-025-09-01

/signed

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

March 5, 2008

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. The agency should identify all similarly situated current and, to the extent possible, former employees, and ensure 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:

[Address of claimant]

[Address of claimant's servicing human resources office]

Director, Human Resources
National Park Service
Room 2328
1849 C Street, NW
Washington, DC 20240

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

Introduction

On August 11, 2006, the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [name of claimant]. He claims (1) he should have been paid for periods on standby duty because his agency placed limitations on his personal activities that were so substantial that he could not use his time effectively for his own purposes; (2) he was “suffered and permitted” to work while on standby duty for a total of 636 unpaid hours of work, and (3) was required to work while traveling outside his normal duty hours. The claim covers his mountain patrol assignments from April 26 to May 7, and June 5 to June 27, 2006; from May 7 to June 3, 2005; from April 24 to April 30, and June 12 to July 7, 2004. During the claim periods he occupied the position of Park Ranger (Mountaineering), GS-025-9, and was assigned to the [claimant’s work location and organization], National Park Service, U.S. Department of the Interior, at [name of town and state]. We accepted and decided this claim under section 4(f) of the FLSA as amended.

To help decide this claim, we conducted telephone interviews with the claimant on September 24 and October 2, 2007; his former first-level supervisor (Lead Climbing Ranger) and second-level supervisor (South District Ranger) on September 25, 2007; and a former park ranger coworker of the claimant’s on October 1, 2007. In reaching our FLSA decision, we reviewed information gained from these conversations and all other material of record furnished by the claimant and his agency.

Background

During the periods specified above, the claimant led a patrol party of climbers consisting of himself (as the only park ranger and park employee in the group), and three to five experienced climber volunteers. They were flown via fixed wing aircraft from the South District headquarters in the town of [name of town] to the [name of camp] main base camp on [name of mountain] located at the 7,200-foot level. The claimant and volunteers could be assigned to spend up to twelve days at the [name of camp] base camp performing various tasks to assist visitors preparing to climb the mountain, e.g., distribute fuel for cooking, provide weather reports, maintain and clean up the camp, and answer a variety of questions on park procedures. If not assigned to the base camp, the claimant led his party on the West Buttress patrol up the mountain from [name of camp] to the 14,000-foot camp level, and at times to the 17,000-foot camp level. This round trip journey could take up to three weeks. During the climb, the appellant and volunteers provided assistance to visitor climbers they encountered including updating weather reports, cleaned up improvised visitor camping sites, checked for safety hazards on the trails, and responded to and participated in search and rescue (SAR) operations as needed.

Although for administrative purposes the agency specified an eight-hour work day (8:00 am to 5:00 pm) during the 2004 and 2005 mountain patrol seasons, and ten-hour work day (8:00 am to 7:00 pm) during the 2006 season, the agency placed all mountaineering rangers on patrol on a “maxi-flex” work schedule. This allowed individual full-time employees to vary (at their discretion) the number of hours worked on a given work day or the number of hours each week within the limits established for the organization. Given the state of the weather and climber

party size and arrival times, this policy provided each ranger maximum latitude to personally determine when he/she would perform work. For instance, a climbing party of visitors might arrive at [name of camp] base camp at 10:00 pm thus requiring the ranger to return to work to distribute fuel for cooking, provide safety briefings, update weather reports, check climbing gear, etc. The agency instructed rangers that they were to take breaks from work during the duty day to compensate for any tasks performed outside normal duty hours, but if they were required to return to work for more than a short time to answer extensive questions or participate in tasks where their presence was required (e.g., SAR, distribute cooking fuel), they would be paid a minimum of two hours call-back pay. Agency time and attendance records show that the claimant was paid a total of 308.25 hours of overtime pay during the claim periods.

Evaluation

The agency determined that the claimant is nonexempt from the FLSA because he does not clearly meet one or more of the exemption criteria of Subpart B, Part 551, 5 Code of Federal Regulations (CFR). The claimant did not dispute this determination and we concur.

The following discussion addresses whether the claimant should be paid for standby duty, whether he was “suffered or permitted” to work without compensation, and whether he worked while traveling. Where appropriate we have cited both the overtime provisions of the FLSA and title 5 as codified in the specific sections of 5 CFR.

Standby Duty/On-call Status

The FLSA regulations governing time spent on standby duty or in an on-call status are found in section 551.431 of 5 CFR. As stated in section 551.431(a)(1):

An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee’s activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee’s activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

Section 551.431(a)(2) of 5 CFR indicates:

An employee is not considered restricted for ‘work-related reasons’ if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency’s premises. For example, in the case of an employee assigned to work in a remote wildland area or on a ship, the fact that the employee has limited mobility when relieved from duty would not be a basis for finding that the employee is restricted for work-related reasons.

Section 551.431(b) states:

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 (2) 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 claimant believes that all of his time on standby duty (excluding meals, sleep time, and additional hours paid when called back to work) were hours of work under the provisions described in 5 CFR 551.431(a)(1) for which he should have been paid overtime. He indicates that he was restricted by the agency to designated posts of duty (i.e., [name of camp] base camp and two higher camps and trails) and was required to remain in a state of readiness to perform work with limitations on his personal activities so substantial that he could not use his off duty time effectively for his own purposes. Limitations he mentions include the requirement to stay within a one-hour call back radius of the camps, carry a radio which was on at all times so he could receive and respond to calls from volunteers or managers, the fact that he was regularly subject to interruptions during his office duty hours to respond to requests for information or assistance, and the agency requirement (imposed for safety reasons) to be physically “roped” to another person (e.g., a volunteer) at any time he desired to travel outside the camps. These limitations prevented him from leaving camp to ski alone, explore and hike up other trails, or return by aircraft to [name of town].

The claimant relies on *Skidmore v. Swift & Co.*, 322 U.S., 64 S. Ct. 1256; *Armour & Co.*, 323 U.S. 126, 65 S. Ct. 165; and *SEIU v. County of San Diego*, 35 F. 3d 483 (9th Cir. 1994), in support of his position regarding the applicability of 5 CFR 551.431(a). However, he fails to address the other pertinent paragraphs of 5 CFR 551.431. Despite the limitations described by the claimant previously in this decision, the claimant’s standby duty cannot be considered hours of work because, as addressed in 5 CFR 551.431(a)(2), his restriction was the natural result of geographic isolation. Because he worked in a remote area consisting of mountain camps and trails, his mobility was limited when relieved from duty; thus it would not be a basis for finding that he was restricted for work-related reasons. In addition, the claimant’s situation meets both requirements specified in 5 CFR 551.431(b)(1) and (2). He was off duty, and time spent in an on-call status was not hours of work because he carried a radio which was at all times turned on so he could be contacted, even though he was required to remain within a one hour call-back radius of camp. Additionally, he was allowed to make arrangements with any volunteer in his party so that any work that might arise during his on-call period could be performed by another person. The claimant indicated all volunteers were highly experienced climbers, fully trained and capable of performing virtually any duty that a park ranger could perform.

The claimant also bases his rationale for standby and on call on the premium pay provisions of chapter 55 of title 5, United States Code (U.S.C.) and implementing regulations of subpart A of part 550 of 5 CFR. The claimant’s standby duty is also not considered hours of work under 5 CFR 550.112(k). As indicated in paragraph (k)(1):

time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes.

Paragraph (2) of 5 CFR 550.112(k) notes:

An employee is not considered restricted for 'work-related reasons' if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. For example, in the case of an employee assigned to work in a remote wildland area or on a ship, the fact that the employee has limited mobility when relieved from duty would not be a basis for finding that the employee is restricted for work-related reasons.

As discussed in 5 CFR 550.112(l) *On-call status*:

An employee is off duty, and time spent in an on-call status is not hours of work if—

(1) The employee is allowed to leave a telephone number or 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

(2) The employee is allowed to make arrangements for another person to perform any work that may arise during the on-call period.

These criteria are very similar to those addressed in 5 CFR 551.431 and previously in this decision, and for the same reasons specified in our discussion of that section we find that the claimant was not restricted for work-related reasons under the provisions of title 5.

The record shows that the claimant was authorized by the agency to claim at least two hours overtime, as appropriate, when called back to duty while on mountain patrol assignments. Section 551.401(e) of 5 CFR states:

Irregular or occasional overtime work performed by an employee on a day on which work was not scheduled for that employee or for which the employee is required to return to his or her place of employment is deemed at least 2 hours in duration for the purpose of determining whether the employee may be entitled to overtime pay under this part, either in money or compensatory time off.

A similarly worded premium pay provision is codified in 5 CFR 550.112(h). The agency applied these call-back provisions (the record is not clear as to whether it relied on 5 CFR 551.401(e) or 5 CFR 550.112(h)) as authorization and entitlement to pay for an employee when called back to duty while serving at a remote work site. However, the agency's action conflicts with the

interpretation of “call-back” overtime contained in the Civilian Personnel Law Manual (CPLM), Title I-Compensation. As discussed in Chapter 4 – Additional Compensation and Allowances under section g. “Call-back” overtime (page 4-32), it states: “The purpose of the ‘call-back’ statute is to compensate employees for the particular inconvenience in preparing for work and traveling back to their work stations.” Work Performed at Home, 65 Comp. Gen. 49 (1985). Because the claimant was not called back from home, but rather returned to work while on temporary duty at a remote work site, we find that the agency’s payment of “call-back” overtime is inappropriate. Collections of these funds or waiver of the claimant’s indebtedness are the responsibility of the agency.

Suffered or permitted work

The claimant believes that he was “suffered or permitted” to perform a total of 636 hours of uncompensated work when on mountain patrol during the three periods covered by this claim. The claimant’s time cards do not show that he performed the additional hours of work during those periods. Comptroller General decisions, including one concerning Christine Taliaferro (B-199783, March 9, 1981), show that in this situation, the claimant is due FLSA overtime pay if the following two criteria are met: (1) he shows he performed overtime work under the FLSA for which he was not paid, and (2) he produces enough evidence to show the amount and extent of the work as a matter of reasonable inference. Our discussion of each criterion follows.

1. Did the claimant show he performed unpaid FLSA overtime work?

According to 5 CFR 551.104, the claimant can show he performed such work if the following three conditions are met: (a) he performed work, whether requested or not, beyond normal duty hours during the periods in question; (b) his supervisor knew or had reason to believe the work was being performed; and (c) the supervisor had the opportunity to prevent it from being performed. We discuss these conditions below.

a. Did the claimant perform work beyond normal duty hours?

The claimant provided limited information in the form of summaries of some of his patrol notes showing tasks performed on a few of the dates occurring during the three patrol mountaineering seasons. In those documents he claims to have performed approximately 44 hours of unpaid work outside of his administrative duty hours on the dates specified. He has furnished no other specific information to document the claim such as statements of volunteers, other park rangers, or other witnesses. The figure of 636 unpaid hours he claims is simply based on a calculation of eight hours of overtime owed for each day while in the [name of camp] base camp and on patrol on the West Buttress route during the 2003-2005 claim periods, and six hours a day during the 2006 period. The claimant’s former coworker interviewed was unable to substantiate his claim, noting that although her mountaineering work sometimes overlapped with his she could not recall the years that occurred. She noted that usually as one patrol came into base camp, another departed so there was not much opportunity to observe the hours of work performed by other park rangers. She mentioned that rangers and/or volunteers were expected to respond to questions from climbers outside duty hours, but because rangers were on a “maxi-flex” work schedule, they were free to adjust their work schedules during normal duty hours to compensate

for extra time worked to perform duties/respond to climber questions outside of duty hours. She mentioned that they were always paid overtime for participating in SAR operations. The claimant did not dispute the fact that the “maxi-flex” schedule permitted him also to adjust his work schedule as needed, and that he received payment for overtime work during SAR activities.

We also note that “overtime hours” under a flexible work schedule are defined in 5 U.S.C. 6121(6) as “all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but does not include credit hours.” Therefore, for purposes of this claim, we will assume the SAR hours for which the claimant acknowledged he received overtime pay were hours of work officially ordered in advance.

Based on the preceding discussion, we find that the claimant has not provided sufficient documented evidence to show that he performed tasks, whether requested or not, beyond his normal duty hours or any such work, if performed, was not properly treated as credit hours under 5 U.S.C. 6121(4) and available for the claimant’s use as provided for in 5 U.S.C. 6126.

b. Did the claimant’s supervisor know or have reason to believe the work was being performed?

It is established OPM policy that a supervisor has reason to believe work is being performed if a responsible person in the supervisor’s position would find reason to believe this was the case. This is met if the supervisor has direct evidence (e.g., through observation) or indirect evidence, e.g., through the employee’s work products or information from other employees.

In our phone conversation the immediate supervisor indicated that he rarely was at the same work site on the mountain with the claimant, and never directly observed the claimant working after normal duty hours. The supervisor generally remained at [name of town], but sometimes traveled to the [name of camp] base camp. He noted that he supervised eight park rangers and 30 volunteers during the mountain patrol seasons. While he agreed that park rangers work long hours when on mountain patrol, to his knowledge the claimant was fully paid for his overtime work as documented in his time and attendance records. In addition, the claimant was free to adjust his duty day under the provisions of the “maxi-flex” schedule to compensate for any after hours work. He was also always paid for SAR operations occurring outside of normal duty hours and was authorized to claim a minimum of two hours of call-back overtime pay when responding to significant interruptions during off duty hours. The supervisor noted that the claimant, like other park rangers, checked in by radio twice daily with him during duty hours, and there was nothing in the claimant’s work performance or comments from other rangers or volunteers that would lead him to believe he was performing uncompensated work. Based on the preceding discussion, we conclude that the claimant’s supervisor did not know and had no reason to believe that the claimant performed uncompensated work outside his normal duty hours.

c. Did the claimant’s supervisor have opportunity to prevent the work from being performed?

It is established OPM policy that the claimant’s supervisor had opportunity to prevent the work from being performed unless:

- (1) he did not know or have reason to believe the work was being performed;
- (2) the work occurred so seldom it was impossible to prevent; or
- (3) the supervisor tried by every reasonable means to prevent the work from being performed, such as directing the employee not to perform the work, counseling the employee about adverse consequences that might result from performing such work, controlling work hours more strictly, or taking other appropriate management actions.

As previously discussed, the supervisor did not know or have reason to believe that work was performed. Thus there is no basis to make a determination that work occurred seldom or at all, and no reason to take any supervisory action to prevent any work from being performed.

2. Is there enough evidence to show the amount and extent of overtime work as a matter of reasonable inference?

We must now decide if the claimant has produced enough evidence to show the amount and extent of his overtime work as a matter of reasonable inference. To do this, we first examine what evidence we have concerning the amount and extent of the claimant's overtime work:

- (a) The claimant's statement calculating that he worked 636 unpaid hours. That figure is based on his calculation of eight unpaid hours for each day during the claim periods covering 2003-2005, and six hours a day for 2006, while in the [name of camp] base camp and on patrol on the West Buttress route. He provided no specific documentary evidence to support those hours, but did furnish a summary from his patrol notes showing tasks performed on only a few dates during the 2004, 2005, and 2006 seasons totaling approximately 44 hours of unpaid work.
- (b) Since the claimant is not involved in completing time cards, the agency submitted his time and attendance reports for the claim periods which show he received a total of 308 hours and 25 minutes of overtime during the claim periods. The records show no further overtime paid.
- (c) Our interview with the claimant's immediate supervisor indicated that he was paid overtime during the claim periods, but he was unable to substantiate whether any additional hours were worked. He noted that the claimant was on a "maxi-flex" work schedule so he was free to change his daily work hours to compensate for work done outside normal work hours, or when weather conditions prevented work from being performed during duty hours. He was also authorized to claim a minimum of two hours of call-back pay when circumstances required his presence during off duty hours. A former coworker of the claimant during the claim periods was also interviewed but was unaware that the claimant worked any overtime during the claim periods.

Based on all of the above information considered together, there is insufficient evidence and related information, including records and supporting statements, to make a reasonable inference that during the claim periods the claimant performed uncompensated overtime work or, if such work was performed, was not properly treated as credit hours as discussed previously.

Travel outside normal duty hours

The claimant indicates that he was in a travel status during the claim periods and performed work while traveling between camps outside his normal duty hours, so he should receive overtime pay. 5 CFR section 551.422 notes:

- (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 nonworkdays that correspond to the employee's regular working hours.

The record shows that the claimant and the other park rangers performing mountain patrol duties during the seasons were placed on a "blanket" travel order by the agency at the beginning of each mountain patrol season. Consequently, each received a per diem rate of \$19.00 per day while assigned to mountain patrol. These funds were consolidated by the agency to purchase food for the entire season for the rangers, with the food pre-placed at the 14,000 foot-level camp at the start of each season. Although the claimant was officially in a travel status, we do not consider his time spent moving between camps outside the hours of his tour of duty under the "maxi-flex" flexible work schedule (i.e., core hours and flexible hours) compensable work hours under the FLSA. This is because the claimant's movement between camps was not travel as defined for purposes of 5 CFR 551.422; which, in the instant case, would be travel between the claimant's official duty station [name of town] and his temporary duty station of [name of mountain], or between his temporary duty station and another temporary duty station. The claimant's patrol work, including movement between camps, was not travel for purposes of 5 CFR 551.422 since such movement was within the confines of his temporary duty station. Thus for purposes of applying 5 CFR 551.422, the claimant's movement between camps does not warrant FLSA overtime pay.

In addition, the agency authorized him and the other rangers to operate under a "maxi-flex" flexible work schedule where each could set different hours each day for moving between locations depending on weather conditions and work requirements. This gave the claimant the flexibility to move between camps within the hours of his tour of duty under the flexible work schedule, based on safety, environmental conditions, and the type of duty being performed. However, when such movement from camp to camp occurred outside of both core hours and flexible hours, the travel hours cannot be considered part of the employee's tour of duty under the flexible work schedule.

Decision

As discussed above, the claimant is due no overtime pay under the provisions of the FLSA.