

**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 75242-9968

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

Claimant: [claimant's name]

Agency classification: Investigator
GS-1810-12

Organization: [Field Office]
Defense Security Service
Department of Defense
[location]

Claim: Exemption status

OPM decision: Exempt

OPM decision number: F-1810-12-01

/s/ Bonnie J. Brandon

Bonnie J. Brandon
FLSA Claims Officer

June 26, 2001

Date

As provided in section 551.708 of title 5, Code of Federal Regulations, this decision is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the 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 section 551.708 of title 5, Code of Federal Regulations (address provided in section 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 and address]

Chief, Human Resources Operations
Defense Security Service
1340 Braddock Place
Alexandria, VA 22314-1651

Deputy Director for Resources
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Chief
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1400 Key Boulevard, Suite B-200
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Introduction

On February 13, 2001, the Dallas Oversight Division of the U.S. Office of Personnel Management accepted a Fair Labor Standards Act (FLSA) claim from [the claimant]. He believes that his position as Investigator, GS-1810-12, should be nonexempt under FLSA. The claimant's position is located in [a] Field Office, Defense Security Service (DSS), [geographic location]. We have accepted and decided his claim under section 4(f) of the FLSA, as amended.

To help decide the claim, an Oversight representative held telephone conversations on May 30 and 31, 2001, with the claimant and his immediate supervisor. In reaching our FLSA decision, we have reviewed information gained from these conversations and all material of record furnished by the claimant and his agency, including his official position description [number] (a standard position description that DSS uses on a nationwide basis).

General issues

The claimant notes that there have been a number of court cases where positions with "nearly identical duties" to his position have been found to be nonexempt under FLSA. However, we must make exemption decisions by comparing claimants' duties and responsibilities to criteria in Federal regulations and other Federal guidelines. Since comparison to Federal guidelines is the proper method for making exemption decisions, we cannot compare the claimant's position to others as a basis for deciding his claim.

Evaluation

Sections 551.205, 206, and 207 of title 5, Code of Federal Regulations (CFR) contain the criteria governing whether the claimant's position should be exempt from the FLSA. We find that the claimant's work does not meet the exemption definition of either executive or professional work as described in 5 CFR 551.205 and 551.207, respectively. His work does not meet the executive exemption criteria because he is not required to serve as a supervisor, foreman, or manager directing the work of subordinate employees. The professional exemption criteria is not met in that the claimant's work neither requires knowledge in a field of science or learning characteristically acquired through education or training that meets the requirements for a bachelor's degree or higher nor involves a recognized field of artistic endeavor that is original or creative in nature, the result of which depends on his invention, imagination, or talent.

The administrative exemption criteria in 5 CFR 551.206 define an administrative employee as an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria.

- (a) *Primary duty test.* The primary duty test is met if the employee's work—
 - (1) Significantly affects the formulation or execution of management policies or programs; or

- (2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
 - (3) Involves substantial participation in the executive or administrative functions of a management official.
- (b) *Nonmanual work test.* The employee performs office or other predominantly nonmanual work which is–
- (1) Intellectual and varied in nature; or
 - (2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.
- (c) *Discretion and independent judgment test.* The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) *80-percent test.* In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent in other comparable white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

The objective of the [claimant's] Field Office, Defense Security Service, is to conduct personnel security investigations so that adjudicators within the Department of Defense can make security clearance determinations. The claimant is responsible for conducting background investigations that relate to confidential, secret, or top-secret security clearances. He pursues leads for individuals that are in his geographic area of responsibility. The claimant conducts investigations through record reviews, subject interviews, reference checks, and taking sworn written statements. He then writes reports of the information found. Information gathered is forwarded to the Personnel Investigations Center (PIC) at Fort Meade, Maryland. Once the PIC receives all of the information from all investigators who are assigned pieces of a case, the PIC then forwards the completed background investigation package to adjudicators to make the security clearance determination. The claimant's completion of background investigations significantly affects the execution of the mission of the [claimant's] Field Office and the Defense Security Service program as a whole. This meets the intent of criterion (a)(1) and (a) (2).

The claimant performs duties that are nonmanual in nature. He spends approximately 90 percent of his time conducting investigations, working mostly in an office setting researching records, writing reports, conducting interviews, and performing administrative duties to complete his work. He travels by government vehicle to conduct neighborhood checks and interviews that cannot be done from his office. The claimant is mostly responsible for investigating leads in cases that involve secret or top secret security clearances. This level of investigation calls for considerable experience and training in investigative techniques, such as interview techniques, reading body language and facial expressions, and various document research techniques. Such

specialized experience and training allows the claimant to thoroughly follow through on any information that may be of interest to the adjudicators. His work is predominantly intellectual and varied, and its specialized nature requires considerable special training, experience, and knowledge to reach the senior investigator level. Therefore, the claimant's position meets (b)(1) and (b)(2).

The claimant handles multiple leads on multiple cases during any given time. To work effectively and efficiently, he must plan his pursuit of leads by considering the order of priority, age, geographic area, and whether there are possible issues with the case. Such planning requires analytical reasoning and judgment. On a daily basis, the claimant must plan his caseload and organize leads to promote effective and efficient use of his work time. He must look at the scope of the investigation to determine if leads provided are in his area of responsibility. Since the claimant must handle multiple cases at one time, leads not properly scoped must be sent back to the PIC for reassignment to the proper geographic area. While the DSS Investigations Manual provides general first-level guidance for investigators, the claimant must use discretion and independent judgment in his determination of whether leads have provided information that require further investigation. He must be alert to body language, whether answers provided are conflicting, and if there has been falsification on the security application. For example, if a subject under investigation reveals previously undisclosed drug use during an interview, then the claimant must determine if the subject deliberately withheld the information. This requires expanding the investigation to determine if the subject, through either personal conduct or behavior, is vulnerable to coercion and/or blackmail, which could pose national security threats. With only general supervision, the claimant is responsible for planning and completing his work. The Special Agent in Charge who is the claimant's supervisor reviews all investigations that require attachments of documents or reveal issues with the investigation. Otherwise, the claimant's work is spot checked for accuracy, content, and thoroughness. The claimant's frequent use of discretion and independent judgment in performing the work meets criterion (c).

Since the claimant's position is classified at the GS-12 level, the requirement described in criterion (d) is not applicable.

In summary, the claimant's position meets (a)(1), (a)(2), (b)(1), (b)(2), and (c) of the administrative exemption criteria.

Decision

The claimant's position meets the administrative exemption in 5 CFR 551.206 and is properly exempt from the FLSA.