Date: January 24, 2006

Claimant: [name]

File Number: 04-0040

OPM Contact: Robert D. Hendler

The claimant, who occupies a Criminal Investigator, GS-1811-12, position with U.S. Department of Justice, U. S. Marshals Service (USMS), requests that the U.S. Office of Personnel Management (OPM) reverse his agency's decisions on five grievances stemming from special assignments in New York City and his portal-to-portal travel. We received the claim on June 25, 2004, and the agency's claim administrative report on March 22, 2005. For the reasons discussed herein, the claim is denied.

The claimant seeks "lost wages and back pay for compensation withheld" due to what he describes as the failure of the USMS "to adopt and implement Section 1114 of the National Defense Authorization Act for fiscal year 2002, amending the premium pay cap provisions applying to GS employees and law enforcement officers at 5 U.S.C. 5547," and "failure to adopt Section 118 of the Treasury and General Government Appropriations Act, 2001, as incorporated into Public Law 106-5545 Section 101(a)(3), that was implemented by the Chief of Personnel Management, 01 January 2002, in each instance grieved." The claimant requests the same compensation "for portal to portal travel time…lost while traveling to and from special assignments for each instance grieved." In his claim letter, he states:

> 3) I am seeking special assignment scheduling practices by the United States Marshals Service that limits the amount of lost wages due to bi-weekly law enforcement pay cap.
>
> 4) I am seeking unedited, complete copies of all Fact Finding Reports, as well as but not limited to, copies of all notes, memorandum, investigative reports and finding and reports of personal interviews and meetings that may have been held that resulted from grievances that I filed. All in accordance with United States Policy found in the United States Marshals Service Human Resources Manual 3.14-17.

OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702, is narrow, and is limited to adjudication of compensation and leave claims. This section of law does not include the authority to review agency work scheduling practices and grievance processing as requested by the claimant, intervene in or decide on the appropriateness of agency

processes involved in developing implementation procedures for the flexibilities provided for in U.S.C. §5547(c), or to order the release of information by the claimant's employing agency as requested by the claimant. The claimant may wish to seek disclosure of such records directly from his agency under the Freedom of Information Act and/or the Privacy Act. Therefore, OPM may not rely on 31 U.S.C. §3702 as a jurisdictional basis for considering such issues within the context of the claims adjudication function that it performs under §3702.

The claimant seeks redress under the provisions of 31 U.S.C. §3702. However, his claim rationale primarily relies on the hours of work and overtime pay provisions of the Fair Labor Standards Act (FLSA). FLSA claims regarding hours of work and overtime pay are reviewable for USMS Federal employees under the provisions of 29 U.S.C. 204(f) and its implementing regulations in 5 CFR, part 551, subpart G, and may not be processed under the provisions of 31 U.S.C. §3702. The agency's administrative report includes a Standard Form 50 showing that the claimant is FLSA exempt; i.e., exempt from the minimum wage and overtime provisions of the Act. The claimant has not challenged that determination. Therefore, for purposes of settling this claim, we will treat the claimant as FLSA exempt and will not address the aspects of his claim that rely on the application of the FLSA.

The claimant's assertions with regard to premium pay caps are inextricably tied to the underlying issue in this claim which is whether the hours that the claimant spent in a travel status going to and from special assignments in New York City are compensable as hours of work under the premium pay statute at 5 U.S.C. §5542(b)(2):

> (2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless -
>
> (A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or
>
> (B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

The claimant's rationale is largely discussed in his June 17, 2002, grievance filed with the USMS Human Resources Division in which he states that his travel to special assignments meets 5 U.S.C. §5542(b)(2)(B)(i) because he views his agency's policy requirement that he be armed while onboard aircraft and "to respond to minor incidents when asked by a crew member and to appropriate reasonable law enforcement action if there is a threat of serious injury" constitutes performing the USMS' law enforcement work "[s]ince it is not administratively nor legally possible to be performing law enforcement duties on official business and not working." To bolster his rationale, the claimant points to the definition of official business under Federal Travel Regulations, court decisions related to those regulations, and Internal Revenue Service regulations as to what constitutes travel for business.

It is well settled that "[t]he starting point for interpretation of a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575 (1990), citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

In the instant case, the claimant's attempt to define the meaning of "performance of work while traveling" by reference to other statutes must be rejected for two reasons. First, their definitions are not embedded within the premium pay statute itself and, therefore, may not control the application of the premium pay statute. Second, they are limited to defining what constitutes "official travel" rather than what constitutes work. If the claimant's interpretation of 5 U.S.C. §5542(b)(2)(B)(i) were to stand; i.e., that a law enforcement employee is considered to be performing work under the circumstances that he describes, then Federal law enforcement officers would presumably be entitled to pay for all time during their non-duty hours that they carry a weapon and must be prepared to thwart a crime. It is well established that: "All laws must be given sensible construction. A literal application of the statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given that is consistent with the legislative purpose. *United States v. Katz*, 271 U.S. 354, 46 S. Ct. 513; *United States v. Jin Fuey Moy*, 241 U.S. 394, 36 S. Ct. 658, *United States v. Palmer*, 3 Wheat. 610, 631" as cited in *United States v. Ryan*, 284 U.S. 167 (1931). The claimant's interpretation would lead to absurd consequences since the law prohibits compensation for travel outside of normal work hours other than for the enumerated circumstances defined in the statute.

The claimant's interpretation must be rejected as inconsistent with established case law. As discussed in the Civilian Personnel Law Manual, Title I, Compensation, Chapter 4, the travel of border patrol agents who drive from their headquarters to check points where they perform eight hours of work was held compensable since their duties during travel "involve the search for and apprehension of illegal aliens." See 52 Comp. Gen. 319 (1972). Employees of the former Atomic Energy Commission who were designated as "escorts to protect security shipments and who perform continual, long-distance, 24 hours-a-day travel, are in 'a work while traveling' status within the contemplation of 5 U.S.C. §5542(b)(2)(B)(i)." See 47 Comp. Gen. 607 (1968). Applying the underlying principle articulated in these cases, Federal air marshals performing surveillance during air flights would meet the requirements of 5 U.S.C. §5542(b)(2)(B)(i). However, the claimant's traveling in a state of readiness to provide law enforcement assistance does not meet the statutory requirements since there is no evidence that the claimant actually performed work while traveling to and from his temporary assignments.

The claimant's rationale for travel meeting 5 U.S.C. §5542(b)(2)(B)(ii) is predicated on his travel time meeting 5 U.S.C. §5542(b)(2)(B)(i). Since his rationale for 5 U.S.C. §5542(b)(2)(B)(i) must be denied, so must his rationale for 5 U.S.C. §5542(b)(2)(B)(ii).

The claimant's rationale for his travel meeting 5 U.S.C. §5542(b)(2)(B)(iii) is that:

> Arduous as defined is laboring, difficult or hard. The condition is vague in definition and does not specify whether it means physical or mental. Since September 11, 2001, U.S. Marshals Service has been on heightened alert, that

> major travel restrictions have been in place. These restrictions have placed undo hardships, both physical and mental upon travelers. Increased baggage restrictions, advanced pre-check in, flight delays, and constant in-flight alertness caused undo stress or arduous conditions upon the Deputies who are required to travel from one destination to another. Therefore it should be considered "hours of employment."

The claimant's interpretation for his travel being considered hours of employment under 5 U.S.C. §5542(b)(2)(B)(iii) must be rejected for producing absurd results similar to his rationale for his travel meeting 5 U.S.C. §5542(b)(2)(B)(i) in that it would result in most Federal employees receiving pay for official travel outside of normal work hours due to the heightened travel controls affecting the entire traveling public. The claimant's interpretation also must be rejected as inconsistent with established case law. As discussed in the Civilian Personnel Law Manual, Title I, Compensation, Chapter 4:

> Absent unusual conditions, travel by automobile over hard-surfaced roads does not constitute arduous conditions under the overtime statute. Dr Saul Narotsky, B-217685, May 31, 1985. See also B-193623, July 23, 1979. The same is true for long hours of travel on a commercial airliner. Thomas G. Hicky, B-207795, February 6, 1985.
>
> An employee may not be paid overtime or compensatory time for travel outside her regular duty hours on the basis that her travel, which was delayed due to bad weather, was under arduous conditions. Travel by common carriers, including airlines, is not travel under arduous conditions. Eunita Davis, B-231800, February 3, 1989.

OPM has adopted this line of reasoning. See File Number 01-0053, February 8, 2002.

The claimant's rationale for his travel meeting 5 U.S.C. §5542(b)(2)(B)(iv) is that:

> As a result of September 11th, all U.S. Flag carriers in the airline industry require all passengers to arrive at the airport a minimum of three or four hours prior to the aircraft departure, (see Attachment F). Since the airline industry is not under the control of the Executive Branch, any and all hours outside the normal work hours cannot be administratively controlled, and therefore must be considered overtime. This is also true when a connecting flight is missed or canceled due to airline complications. Point of fact is a December 02, 1997 decision in the case of The National Association of Government Employees Mediation and Conciliation Service, Case #95-15222, (see Attachment G), whereas a U.S. government arbitrator found that when an outside contractor requires government employees to be somewhere outside of normal business hours, in connection with their work, these hours could not be administratively controlled by the Executive Branch and must be paid as overtime. Overtime in not availability, since availability is not allowed while traveling. Therefore, this means the standard for "hours of employment", and should be paid as overtime.

OPM is neither guided nor bound by arbitration decisions. We are also not bound by an agency fact-finder report provided by the claimant that improperly applied a rationale similar to the claimant's with regard to 5 U.S.C. §5542(b)(2)(B)(i). The claimant's reliance on the arbitration decision is misplaced in that travel covered by 5 U.S.C. §5542(b)(2)(B)(iv) is travel that **results** from an event that could not be scheduled or controlled administratively. The phrase "could not be scheduled or controlled administratively" refers to the ability of an executive agency, as defined in 5 U.S.C. 105, to control the event that necessitates an employee's travel. Because the claimant's travel to protective details was controlled by his agency, the travel did not result from an event that could not be scheduled or controlled administratively. See Comptroller General Decision, B-193127, May 31, 1979; Perry L. Golden and Wayne Woods, 66 Comp. Gen. 620 (1987); Morris Norris, 69 Comp. Gen. 17 (1989).

The claimant's rationale with regard to his agency's failure to properly implement the annual premium pay cap at 5 U.S.C. §5547(b)(3) for mission-critical work appears to assume that performing the mission work of the USMS on protection details automatically meets the definition of mission-critical work. Another underlying principle of statutory construction is that laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other and should be interpreted harmoniously. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-566 (1845); *Alexander v. Mayor and Commonality of Alexandria*, 9 U.S. (5 Cranch) 1, 7-8 (1809). This assumes that, when Congress passes a new statute, it is aware of all previous statutes on the same subject. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). If the claimant's interpretation of 5 U.S.C. §5547(b)(3) were to stand; i.e., that any special assignments are inherently mission-critical and are automatically covered by 5 U.S.C. §5547(b)(3), then management's right and responsibility to make determinations as to what constitutes mission-critical work would be rendered superfluous and unenforceable. Therefore, the claimant's rationale with regard to 5 U.S.C. §5547(b)(3) for any and all special assignments subsequent to its implementation date must be rejected.

OPM does not conduct investigations or adversary hearings in adjudicating claims, but relies on the written record presented by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, Mar. 15, 1982, as cited in *Philip M. Brey, supra.*

This settlement is final. No further administrative review is available within the OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.