

Fair Labor Standards Act Decision
Under section 204(f) of title 29, United States Code

Claimant: [Name of claimant]

Position: Construction Control Representative
GS-809-12

Organization: [Claimant's organization
and work location]
Bonneville Power Administration
Department of Energy

Claim: Position should be nonexempt, thus
due FLSA overtime pay

OPM decision: Nonexempt. Due the difference between
FLSA and title 5 overtime pay

OPM decision number: F-0809-12-03

//signed//

Ana A. Mazzi
Deputy Associate Director
Merit System Audit and Compliance

June 30, 2010

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 (FLSA). 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 section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

The agency is to compute the claimant's overtime pay in accordance with instructions in this decision and then pay the claimant the amount owed him. If the claimant believes the agency has incorrectly computed the amount owed him, he may file a new FLSA claim with this office.

Decision sent to:

[Name of claimant, representative, and mailing address]

Director, Office of Human Capital Management
Bonneville Power Administration
Department of Energy
P.O. Box 3621
Portland, OR 97208-3621

Director, Office of Strategic Planning
and Vision
Office of Human Capital Management
Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Introduction

On April 14, 2008, OPM received an FLSA claim from [claimant's representative] filed on behalf of [name of claimant], an employee of the Bonneville Power Administration (BPA). The claimant believes his work should be nonexempt (i.e., covered) under the FLSA and thus is entitled to FLSA overtime pay. His position is classified as Construction Control Representative, GS-809-12, with [claimant's organization and work location], BPA, Department of Energy. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant, his representative, and his agency, including a copy of most of the agency's administrative report which we received on January 9, 2009. However, due to a dispute between the claimant and the agency over the accuracy of the position description (PD) of record, we did not receive a copy of his updated PD until September 17, 2009. To help decide this claim, we conducted a telephone interview with the claimant on October 5, 2009. Because the supervisory position over the claimant is currently vacant, we conducted a telephone interview with the claimant's former first-level supervisor (recently retired) on December 3, 2009, and his acting supervisor on December 4, 2009.

Background

For several years the claimant has been assigned to the GS-809-12 position (PD number], which the agency designated as exempt (i.e., not covered) from the overtime pay provisions of the FLSA. He has been with BPA for 10 years, working as a lineman during his first year, and the past nine as a construction control representative. Prior to BPA he worked as a journey-level lineman and construction inspector in private industry. He has many years of practical experience in high-voltage electrical construction. He has attended extensive BPA sponsored training in electrical construction including courses on electrical grounding, high voltage electrical safety, crane and rigging management, aerial and boom operation, erosion control, hazardous materials and asbestos awareness, aerial rescue, stringing equipment and power line sagging, fiber optics, implosive fittings, tower foundation staking, transmission line design, cyber security, Government construction contracting, building codes, construction safety requirements, etc.

Position information

The claimant spends approximately 90 percent of his time in the field at construction sites carrying out onsite inspection of civil, structural, architectural and electrical contractor-performed construction projects. Specifically, over the last 12 months he has served as BPA construction inspector on three projects in the agency's multi-state region. One dealt with stringing new fiber optic cable near existing power lines requiring modification of substations, and the other two projects covered removal and replacement of wood poles supporting power lines. He has previously worked on projects involving replacement of old power lines and installation of line spacers. His inspection duties include inspecting materials prior to construction to ensure compliance with contract technical specifications; inspecting placement of

tower steel, fabrication of concrete footings, and soil compaction to support towers and poles; ensuring proper sagging of electrical power lines between towers and the torque on tower bolts; ensuring contractor construction methods and processes meet contract and industry standards; closely monitoring all aspects of construction safety in accordance with prescribed safety standards; compiling and recording data of all work activities and problems, workforce, equipment in use, accidents, visitors, and construction progress; ensuring electrical clearance holds have been submitted by the contractor; and submitting pay item reports on work progress to the BPA construction manager for determination of bi-weekly or monthly progress payments to the contractor. The claimant performed similar work during the remainder of the claim period.

The claimant spends about 10 percent of his time functioning in a limited capacity as Contracting Officer's Technical Representative (COTR). His duties include attending pre-bid and pre-construction conferences to provide his expertise on particular construction methods, materials, features and requirements unique to high-voltage electrical construction; informing contractors of requirements concerning construction scheduling, progress reporting, payment, safety measures, wage and hour law observance, payroll records, etc.; attempting to resolve with the contractor differences in interpretation of contract specifications, and reporting on situations that may lead to formal claims by the contractor; and maintaining contact and attempting to resolve problems with landowners, Federal, State, local agencies, railroads and utility companies, who are directly affected by BPA's contracted construction projects. In addition, depending upon specific delegation memoranda prepared by the contracting officer for each contract specifying what authorities are delegated and if they can be re-delegated to the inspector, the claimant *may* be delegated authority to negotiate, prepare, and sign field contract modifications (which are sent to the contracting officer for payment) not exceeding a cost of \$10,000 and/or extending contractor performed work by no more than seven days for a particular construction project. For any modifications exceeding those predetermined limits, the claimant makes field measurements, computations, checks local prices, and submits his recommendations to the BPA project contracting officer who negotiates and prepares the contract modification.

BPA management officials have certified to the accuracy of the claimant's PD [number]. However, the claimant states it is not accurate because he does not perform all of the COTR duties described and devotes only 10 percent (rather than 60 percent) of his time to this function. He states most of his time (i.e., 90 percent) is spent inspecting field construction projects onsite as described in the PD. Based on our fact-finding (which was corroborated by both the former first-level supervisor and presently acting supervisor) we find the PD is inaccurate because the claimant does not perform many of the COTR duties described, and indeed spends only 10 percent of his work time on COTR duties with the remaining time devoted to onsite construction inspection. For example, the claimant does not establish construction specification compliance criteria, formulate construction projects, assess construction program effectiveness, or analyze and resolve a variety of unusual conditions or problems related to contract construction. These duties are the responsibility of the construction manager or project engineer. In contrast to COTR duties stated in the PD and under Factor 3 – Guidelines, the claimant cannot deviate from established construction methods to modify or adapt broad guidelines in resolving complex issues and problems; cannot develop new methods and criteria or propose new policies and practices; provide comprehensive management advisory and technical services on substantive

construction functions; or develop and recommend new, innovative construction policies, approaches, and guidelines. Such activities are beyond the scope of his authority, and fall within the purview of the agency's construction managers and project engineers. In addition, the claimant is not involved in reviewing project plans and specifications prior to contract advertisement; does not analyze results of laboratory tests and present test data to engineers by preparing technical reports and recommendations; does not formulate and present technical findings through briefings and project papers; and does not recommend appropriate design improvements or changes. The discussion in the PD under Factor 5 – Scope and Effect, is also inaccurate as the purpose of his work is not to assess the productivity and efficiency of program operations, or analyze and resolve problems in the staffing and effectiveness of administrative support and staff activities. Moreover, the claimant's duties do not involve establishing criteria to measure and/or predict the attainment of program or organizational goals and objectives. The preceding tasks are performed by higher-level construction management and engineering officials within the agency.

Evaluation of FLSA coverage

Sections 551.201 and 551.202 of 5 CFR require an employing agency designate an employee FLSA exempt only when the agency correctly determines the employee's work meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles: (1) each employee is presumed to be FLSA nonexempt; (2) exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption; (3) the burden of proof rests with the agency which asserts the exemption; and (4) if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt. The designation of a position's FLSA status ultimately rests on the duties actually performed by the employee.

There are three primary exemption categories applied to Federal employees: executive, administrative, and professional. Neither the claimant nor the agency assert the claimant's work is covered by the executive or professional exemption and, based on careful review of the record, we agree it is not covered. Therefore, our analysis is primarily limited to the administrative exemption criteria in effect during the claim period. Given the claim period in this case, the claim is covered by both the 1998 FLSA regulations and the current FLSA regulations, effected on October 17, 2007.

Administrative Exemption Criteria

FLSA Regulations (1998)

Under the administrative exemption criteria in 5 CFR 551.206 (1998) in effect during part of this claim (see discussion at "Claim Period" below), an administrative employee is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four 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 programs or policies; 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.* 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 level in other white collar pay systems) must spend 80 percent or more of their work time in a representative work week on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

The primary duty test is not met

The first element of the primary duty test is not met because the claimant's work does not significantly affect the formulation or execution of management programs or policies. As defined in section 551.104 (1998), *formulation or execution of management programs or policies* means work that involves management programs and policies which range from broad national goals expressed in statutes or Executive orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing or recommending proposals that are acted on by others. Employees significantly affect the execution of management programs or policies typically when the work involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulations or other controls).

The claimant's work neither involves the formulation or execution of management policies or programs, nor does it *significantly* affect their execution. While [claimant's organization] and BPA have established specific work goals and supporting staff resources in organizational planning documents, the claimant does not formulate policies, make policy decisions, or participate indirectly in developing or recommending proposals that are acted on by others. Such tasks are performed by higher management officials such as agency project managers and engineers. Although he inspects contractor-performed work to determine it meets individual contract clauses, technical specifications and drawings, his duties do not significantly affect the execution of management programs or policies because he is not in a position to obtain compliance with such policies by other individuals or organizations. His role is to daily observe and report contractor performed construction activities, assess timeliness and progress, determine whether contract provisions and specifications are followed, interpret specifications as needed, ensure safe work practices are carried out, and authorize contract modifications within predetermined limits. Except for safety matters, he cannot require compliance on construction

methods, is not in a position to require compliance with the agency's work goals and objectives, and does not make significant determinations furthering the overall operation or accomplishment of the agency's construction program. He is solely concerned with daily and immediate construction activities and processes, and does not have responsibility for the overall operation and accomplishment of the agency's electrical construction program. Such responsibilities are held by agency project managers, contracting officers and project engineers. Unlike exempt administrative employees, he does not perform any of the phases of program management described above, e.g., planning, coordinating, or evaluating operating programs.

The claimant does not meet the second element of the primary duty test because his work does not involve management or general business functions or supporting services of substantial importance to the organization serviced. As defined in section 551.104 (1998), such functions, as distinguished from production functions, mean the work of employees who provide support to line managers. (1) These employees furnish such support by (i) Providing expert advice in specialized subject-matter fields, such as that provided by management consultants or systems analysts; (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting or financial management; (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or (iv) Providing supporting services, such as automated data processing, communication, or procurement and distribution of supplies. (2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, 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's work does not meet the criteria because his work does not involve management or general business functions or supporting services of substantial importance to his organization as defined above. Such support is furnished to line managers at higher levels within the agency by designated administrative support staff, particularly contracting officers who negotiate and administer construction contracts, and authorize payments based on acceptability of work.

The claimant does not meet the third element of the primary duty test because his work does not involve substantial participation in the executive or administrative functions of a management official. As defined in section 551.104 (1998), *participation in the executive or administrative functions of a management official* means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor's effectiveness. The claimant does not occupy such a position, and is neither delegated the authority nor responsibility to participate in the executive or administrative functions of his supervisor or any other management official, including acting for them in the absence of specific instructions, or taking any actions which significantly affect the supervisor's effectiveness.

The nonmanual work test is met

Although the claimant performs nonmanual work outside of an office, we find it does not meet the first element of the nonmanual work test because it is not intellectual and varied in nature. As defined in section 551.104 (1998), *work of an intellectual nature* means work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject-matter fields, or work requiring mental processes which involve substantial judgment 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 the claimant sometimes interprets a particular contract clause or specification and suggests alternative construction methods, his work is limited to a single subject-matter area (i.e., construction inspection) rather than multiple subject-matter fields. Additionally, in inspecting construction he relies on application of standardized procedures, and well-established BPA construction techniques and precedents outlined in individual contract clauses, specifications, and agency policy memoranda. Although depending on the type of project, construction conditions, materials and techniques may vary, decisions the claimant makes are based on standard and prescribed procedures and guidelines (e.g., Associated Standard of Testing Materials covering soil compaction requirements, standards published by the Institute of Electrical and Electrician Engineers prescribing methods for stringing and grounding high-voltage wires), rather than innovative techniques or processes, or weighing the best alternative from among a broad range of possible actions.

The claimant's work meets the second element of the nonmanual work test. As defined in section 551.104 (1998), *work of a specialized or technical nature* means work which requires substantial specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject-matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledge characteristically acquired through specialized academic education. As a construction control representative performing construction inspection most of his time, he must apply a substantial knowledge of that complex field including construction methods and techniques covering a variety of electrical construction projects, an understanding of agency contract provisions and specifications, in depth knowledge of construction safety measures, laws, and regulations, and familiarity with contracting procedures. As a senior worker, development of that knowledge and skill results from considerable specialized formal and on-the-job training, and many years of practical work experience at BPA and in private industry encompassing construction inspection.

The discretion and independent judgment test is not met

The claimant does not exercise the level of discretion and independent judgment to meet that test. As defined in section 551.104 (1998), *discretion and independent judgment* means work which involves comparing and evaluating possible courses of conduct, interpreting results or

implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The “decisions” made as the result of independent judgment 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 that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

- (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee’s action.
- (2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently.
- (3) The decisions made independently must be significant. The term “significant” is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee’s own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria.

Although the claimant works independently in performing his daily activities, including planning, organizing, prioritizing and executing his assignments, he does not exercise the degree of discretion and independent judgment characteristic of this test. In performing construction inspections, his work is governed by and performed within the context of well-established construction techniques, past precedents, specific contract clauses and detailed technical specifications addressing the scope of each project, and construction methods and materials. In particular, contract specifications prescribe how a project is to be constructed, materials to be used, and safety requirements. For example, contract specifications for construction of new 500KV transmission towers and lines include tower measurements, types of angled steel, type of electrical transmission lines, setting of tower foundations with appropriate materials, spacers and their dimensions. His inspection guidelines and contract provisions are standardized and specifically govern his actions, and he does not have the authority to make independent judgments on the construction approaches and techniques to be used. The decisions he makes are not significant within the meaning of the regulation in that they affect the procedural details of his work (e.g., sagging wire requirements, separation of spacers, availability of specified materials), and primarily focus on deciding whether agency contractors meet construction contract clauses and specifications.

The 80-percent test is not applicable to the claimant's work.

Because the claimant's position is classified above the GS-5 or GS-6 grade level, this criterion does not apply to the claimant's work.

The claimant's work does not meet the administrative exemption criteria.

FLSA Regulations (2007)

The current regulation in 5 CFR 551.206 (2007), defines an *administrative employee* as one whose primary duty is the performance of office or non-manual work directly related to the management or general business operations, as distinguished from production functions, of the employer or the employer's customers and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. The regulation states that (a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed. (b) The phrase *discretion and independent judgment* must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

- (1) Has authority to formulate, affect, interpret, or implement management policies or operating practices;
- (2) Carries out major assignments in conducting the operation of the organization;
- (3) Performs work that affects the organization's operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the organization;
- (4) Has the authority to commit the employer in matters that have significant financial impact;
- (5) Has authority to waive or deviate from established policies and procedures without prior approval;
- (6) Has authority to negotiate and bind the organization on significant matters;
- (7) Provides consultation or expert advice to management;
- (8) Is involved in planning long- or short-term organizational objectives;
- (9) Investigates and resolves matters of significance on behalf of management;
- (10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

Under the regulation, the exercise of discretion and independent judgment implies that the employee has authority to make an independent decision, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term does not require the decisions made by an employee have a finality that goes with unlimited

authority and a complete absence of review. Decisions made may consist of recommendations for action rather than the actual taking of action. The fact they are subject to review and sometimes revised or reversed after review, does not mean the employee is not exercising discretion and independent judgment. The regulation notes that the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

Under the current regulations, the claimant's work does not meet the administrative exemption criteria. Although he performs non-manual work related to [claimant's organization] operations, his primary duties do not include the exercise of discretion and independent judgment with respect to matters of significance. While he must sometimes choose between or propose to the contractor an alternative construction procedure, particularly if covered by his predetermined contract modification authority, these decisions do not meet the discretion and independent judgment threshold with respect to matters of significance as described in the ten factors of the regulation, summarized above. For example, he has no authority to formulate, affect, interpret, or implement management policies at his level (contract managers and project engineers have such authority); he carries out only very specific, short-term assignments, rather than major ones, related to immediate construction projects and activities, which do not affect the organization's operations to a substantial degree; he has no authority to commit his employer in matters having significant financial impact (*if* delegated specific contract modification authority for a particular project, it is limited to \$10,000 and up to seven days work extension); has no authority to waive or deviate from established agency policies or procedures, and is not authorized to negotiate and bind his organization on significant matters. Although given his extensive practical electrical construction experience the claimant may be called upon to provide advice to contracting officers or construction engineers on the feasibility of a specific construction method or specification outlined in a contract, overall responsibility for consulting with and providing expert advice to agency management officials on construction projects is the responsibility of the project engineer. Unlike the exemption criteria, the claimant is not involved in planning long-or short-term organizational objectives; does not investigate and resolve matters of significance on behalf of management (this is the responsibility of the contracting officer, project engineer, or agency safety officer); and is not authorized to represent the organization in handling complaints, arbitrating disputes, or resolving grievances.

While the claimant works independently, free of immediate supervision and direction, in contrast to the application of discretion and independent judgment, the claimant uses knowledge and skill in applying well-established construction techniques which are clearly outlined and governed by specific agency operating guidance, industry standards, and project contract specifications. His work meets the exclusion discussed in the administrative exemption criteria of the 2007 regulations [5 CFR 551.206 (n)] which notes ordinary inspection work generally does not meet the duties requirements for the exemption because inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which are described in manuals and other sources. Like the exclusion, the claimant applies standard construction contracts and specifications covering projects with many precedents. He relies on the electrical construction techniques and skills acquired through his extensive specialized training and work experience. Although as previously noted he has some leeway in performing

his work, this is only within closely prescribed and predetermined monetary and time extension limits.

Conclusion

The claimant's work does not meet the executive, administrative, or professional exemption criteria. Therefore, it is nonexempt and properly covered by the overtime pay provisions of the FLSA.

Claim Period

Under both regulations applicable during the claim period, all FLSA pay claims filed after June 30, 1994, are subject to a two-year statute of limitations (and three years for willful violations). See 5 CFR 551.702 (1998) and (2007). A claimant must submit a written claim to either the employing agency or OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date establishing the period of possible back pay entitlement. The appropriate date for preserving the claim period is April 14, 2008, when OPM received the claimant's request. Thus the claim's time period began on April 14, 2006.

Willful violation

Although not raised by the claimant's representative, the next issue normally examined in establishing the claim period is if it should be extended to three years based on whether the agency's actions met willful violation criteria. "Willful violation" is defined as follows:

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

5 CFR 551.104 (1998) and (2007)

Clearly not all violations of the FLSA are willful as this term is defined in the regulations. There is no question that BPA erred in the claimant's exempt status determination. However, to prove willful violation, there must be evidence that BPA showed reckless disregard of the Act's requirements. Instead, we find the agency erred in making the exemption determination by relying on a PD we found to be inaccurate (but that agency line management certified as accurate) which described extensive COTR work which appeared to meet the administrative exemption criteria, particularly in affecting the formulation or execution of management programs and policies, and the consistent exercise of discretion and independent judgment. As addressed in our preceding discussion, this is not the case. The above information causes us to conclude the agency's actions were not deliberate and do not meet the criteria for willful violation as defined in 5 CFR 551.104.

Decision

The claimant's work is nonexempt (i.e., covered by FLSA overtime provisions), and he is entitled to compensation for all overtime hours worked at the FLSA overtime rate. The claim was received by OPM on April 14, 2008, and the claimant can receive back pay only for two years prior to that date. We find no indication of willful violation by the agency. The agency must follow the compliance requirements on page ii of this decision.

The claimant's representative provided an estimate on the number of overtime hours generally worked in a given pay period. The agency must reconstruct the claimant's pay records for the period of the claim and compute back pay for the difference between the FLSA overtime pay owed and any title 5 overtime pay already paid, and interest on back pay, as required under 5 CFR 550.805 and 550.806, respectively. If he believes the agency incorrectly computes the amount, the claimant may file a new FLSA claim with this office.