



DEPARTMENT OF VETERANS AFFAIRS
DEPUTY ASSISTANT SECRETARY FOR
HUMAN RESOURCES MANAGEMENT AND LABOR RELATIONS
WASHINGTON DC 20420

APR 13 2009

Robert Redding
President, NFFE-IAM VAC
2101 N. Elm Street (Room 3070)
Fargo, ND 58102

Dear Mr. Redding:

We acknowledge receipt of your Grievance and Request for Information dated January 29, 2009. In your Grievance you claim that the Agency violated the Federal Labor Standards Act (FLSA), Title 5, OPM and DOL Regulations and the collective bargaining agreement by:

1. Failing to properly classify NFFE bargaining unit employees as FLSA non-exempt;
2. Failing to pay proper compensation for overtime worked to NFFE bargaining unit employees (exempt, nonexempt and wrongfully exempt);
3. Failing to allow NFFE bargaining unit employees a choice of compensatory time or overtime (nonexempt and wrongfully exempt); and,
4. Failing to pay suffer or permit overtime to NFFE bargaining unit employees (nonexempt and wrongfully exempt).

Your grievance does not specify what employees you allege to have been improperly classified as FLSA exempt and what employees you allege to have not received proper compensation. To be able to respond to your grievance, please provide a list of employees you claim to have been improperly classified as FLSA exempt; those who allegedly have not received proper compensation for overtime worked; those who allegedly were not given the choice of compensatory time or overtime; and, those who allegedly have not been paid for "suffer[ed] or permit[ted]" overtime.

The FLSA does not apply to VA's medical professional employees. Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded Duty Dental Auxiliary and Chiropractors are governed by the Agency's specialized Title 38 personnel statutes, 38 U.S.C. § 7401 et seq., rather than by the general civil service rules. Title 38 employees are appointed under 38 U.S.C. § 7401(1) or § 7405 and compensated under the Title 38 pay statutes, 38 U.S.C. § 7431-7458. Because the FLSA is inconsistent with the Title 38 overtime statute, the FLSA does not apply to Title 38 employees because Congress has specified that where Title 38 provisions conflict with the Title 5 rights applicable to Federal employees, the provisions of Title 38 control. 38 U.S.C. § 7425 (b). Under 38 U.S.C. §§ 7423 and 7421, the VA Secretary

¹ It should be noted that "the Union waive[d] the time frames associated with the Grievance, until a mutually agreeable time subsequent to the gathering and providing of the information requested ... in the Union's 7114 [Request for Information] RFI and after a Grievance meeting in this matter."

has the power to prescribe the hours and conditions of employment for 7421(b) employees and the Secretary has not, through regulation or otherwise, incorporated the provisions of the FLSA for Title 38 employees. Although the FLSA requires that non-exempt employees be compensated for overtime work that is “suffer[ed] and permit[ted],” 29 U.S.C. § 203(g), 5 CFR § 551.104, the Title 38 statute authorizes overtime pay only for “officially ordered and approved” service in excess of 8 hours a day or 40 hours a week. 38 U.S.C. § 7453(e)(1). As a result, Title 38 employees are not entitled to overtime pay under the FLSA or for “suffer[ed] and permit[ted]” overtime work.

Employees appointed under 38 U.S.C. § 7401(3) and 7405(a)(1)(b) are called Hybrids and are appointed “without regard to Civil Service classification laws”. Hybrids are General Schedule employees authorized to be hired under Title 38 authority. Hybrids include Audiologists, speech pathologists, and audiologist-speech pathologists, biomedical engineers, certified or registered respiratory therapists, dietitians, licensed physical therapists, licensed practical or vocational nurses, medical instrument technicians, medical records administrators or specialists, medical records technicians, medical technologists, dental hygienists, dental assistants, nuclear medicine technologists, occupational therapists, occupational therapy assistants, kinesiotherapists, orthotist-prosthetists, pharmacists, pharmacy technicians, physical therapy assistants, prosthetic representatives, psychologists, diagnostic radiologic technologists, therapeutic radiologic technologists, social workers, blind rehabilitation specialists, and blind rehabilitation outpatient specialists. While Hybrids are entitled to some Title 5 protections, e.g. adverse action rights, they are compensated under the Title 38 pay statutes. 38 U.S.C. §§ 7451 et. seq. As 38 U.S.C. § 7425(b) states that no provisions of Title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of Title 38 shall be considered to supersede, override, or otherwise modify a provision of Title 38, Hybrids who receive Title 38 premium pay are not entitled to FLSA overtime or overtime pay for “suffer[ed] and permit[ted]” overtime work.

Professional Exemption

NFFE only represents professional employees as defined in the Federal Service Labor Management Relations Statute.

The FLSA requires an employer to compensate an employee at one and one-half times the regular pay rate for any work performed in excess of forty hours per week. 29 U.S.C. § 207(a)(1). However, employees employed in a "bona fide executive, administrative, or professional capacity" are exempt from this provision of the FLSA. 29 U.S.C. § 213(a)(1).

The OPM regulations are set forth at 5 CFR §§ 551 et seq.:

5 C.F.R. §551.207 addresses the professional exemption criteria and states “[t]o qualify for the professional exemption, an employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Learned professionals, creative professionals, and computer employees are described in §§551.208, 551.209, and 551.210, respectively.”

In addition, Sections 551.208 through 551.210 address the other FLSA exemptions.

5 CFR 551.208 applies to Learned Professionals and states: “(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

- (1) The employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level;
- (2) The advanced knowledge must be in a field of science or learning which includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and
- (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction which restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in unusual cases where a lawyer has not gone to law school, or a chemist does not possess a degree in chemistry. However, the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any

field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

(b) Expansion of professional exemption. The areas in which the professional exemption may be applicable are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Such organizations may develop similar, specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession. . . .”

The DOL regulations are consistent with the OPM regulations. 29 CFR § 541.300 sets forth the general rule for professional employees:

(a) The term “employee employed in a bona fide professional capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term “salary basis” is defined at §541.602; “fee basis” is defined at §541.605; “board, lodging or other facilities” is defined at §541.606; and “primary duty” is defined at §541.700.

The DOL regulations contain further explanations for "learned professionals" In 29 C.F.R. § 541.301:

“(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning;
and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase “field of science or learning” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.

However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. . . . "29 C.F.R. § 541.301.

In accordance with the OPM and DOL Regulations, the following employees are exempt from FLSA as professional employees:

Professional Series exempt from FLSA

GS-0060	Chaplain	
GS-0180	Psychologist	
GS-0185	Social Worker	
GS-0401	Biologist	
GS-0403	Microbiologist	
GS-0413	Physiologist	
GS-0510	Accountant	
GS-0602	Physician	Title 38 excluded
GS-0605	Nurse Anesthetist	Title 38 excluded (Registered Nurse) (series
abolished by OPM)		
GS-0610	Nurse	Title 38 excluded (Registered Nurse)
GS-0630	Dietician	
GS-0631	Occupational Therapist	
GS-0633	Physical Therapist	
GS-0635	Kinesiotherapist	
GS-0638	Recreational Therapist	
GS-0644	Medical Technologist	
GS-0660	Pharmacist	
GS-0662	Optometrist	Title 38 excluded
GS-0665	Speech Pathologist/Audiology	
GS-0668	Podiatrist	Title 38 excluded
GS-0680	Dentist	Title 38 excluded
GS-0690	Industrial Hygienist	
GS-0801	General Engineer	
GS-0819	Environmental Engineer	
GS-0850	Electrical Engineer	
GS-0858	Biomedical Engineer	
GS-1301	Physical Scientist	
GS-1306	Health Physicist	
GS-1320	Chemist	
GS-1410	Librarian	
GS-1529	Mathematical Statistician	

VA-Specific positions in general professional series exempt from FLSA:

GS-0101 Social Science Program Coordinator
GS-0101 Addiction Therapist
GS-0101 Vocational Rehabilitation Counselor
GS-0601 Research Health Science Specialist
GS-0601 Research Health Scientist
GS-0601 Health Science Specialist
GS-0601 Science Advisor
GS-0601 Blind Rehabilitation Specialist
GS-0601 Blind Rehabilitation Specialist (Services)
GS-0601 Nuclear Medical Technologist
GS-0601 Histotechnologist
GS-0601 Cytotechnologist
GS-0601 Registered Respiratory Therapist
GS-0601 EFDA Dental Assistant

Medical Occupations exempt from FLSA under the professional exemption by regulation if they have completed four years of academic study:

GS-0603 Physician Assistant (Title 38 excluded)
GS-0644 Medical Technologist
GS-0682 Dental Hygienist

In conjunction with the grievance, you filed an extensive request for information, pursuant to 5 U.S.C. § 7114 (b)(4). In an initial attempt to begin responding to your request for information, enclosed please find the information requested in paragraphs one (1) and two (2) of your request for information. (Attachments 1 and 2) The employees listed are not covered by the FLSA or entitled to FLSA overtime for the reasons set forth above. The information in paragraph one is provided as of December 31, 2008, instead of January 1, 2009, because of the way the Agency maintains the information. The Agency does not keep the BUEs business phone numbers or business addresses². That information is not normally maintained by the Agency. The same applies to the information requested in paragraph 2.

Paragraph 3 is answered as part of the Grievance response. As stated above, The FLSA does not apply to VA's medical professional employees. While Hybrids are entitled to some Title 5 protections, e.g. adverse action rights, they are compensated under the Title 38 pay statutes. 38 U.S.C. §§ 7451 et. seq. As 38 U.S.C. § 7425(b) states that no provisions of Title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of Title 38 shall be considered to supersede, override, or otherwise modify a provision of Title 38, Hybrids who receive Title 38 premium pay are not entitled to FLSA overtime or overtime pay for "suffer[ed] and permit[ted]" overtime work. Furthermore, NFFE only represents professional employees as defined in the Federal Service Labor Management Relations Statute. These professional employees are exempt from FLSA.

² However, the business addresses for the BUEs should be the VA facility where they work.

Paragraph 4- The FLSA decisions are made by the Classifiers in the field offices. Attached please find a list of VA Facility Classifiers as of January 1, 2009. (Attachment 3)

Paragraph 5-Attached please find Human Resources Management Letter (HRML) No. 05-08-09, Fair Labor Standards Act. (Attachment 4)

Paragraph 6- See answer to 5.

Paragraph 7- We are not familiar with FLSA worksheets. The information is not normally maintained by the Agency.

Paragraph 8 requests each employee's position description (PD). To be able to provide you that information, please provide the names, and facilities of the specific employee PDs you are requesting.

Paragraph 10 requests all SF-50. To be able to provide you that information, please provide the names, and facilities of the specific employee SF-50 you are requesting.

Paragraph 11- This information is not normally maintained by the Agency.

Paragraphs 12-17 please provide the names, and facilities of the specific employee for whom you are requesting the data relating to overtime payment. We note that the Agency does not maintain such information in Excel.

Paragraph 18- The Agency does not use that type of information and/or the information is not normally maintained by the Agency

Paragraph 19-This information is not normally maintained by the Agency.

Paragraph 20-This information is not normally maintained by the Agency.

Paragraphs 21-23- Please provide more information on the need for this information and the specific employees the information is relevant to. Otherwise, we do not believe there is a particularized need for this information and/or the records are not normally maintained by the Agency.

Paragraph 24- Please provide the names, and facilities of the specific employee for whom you are requesting the information.

Paragraph 25-This information is not normally maintained by the Agency.

Paragraph 26 – The VA has no such standardized forms.

Paragraph 27-The Leave and Hours of Duty policy is prescribed in VA Handbook 5011, Part II, Chapters 2 and 3, and Part III, Chapters 2 and 3. (Attachment 5)

Paragraphs 28-29- Please provide the names, and facilities of the specific employee for whom you are requesting the information.

For the aforementioned reasons, VA denies the Grievance for Title 38 employees who are not subject to the FLSA, for Hybrids who are paid overtime under Title 38 and not Title 5, and Title 38 employees and Hybrids who fall within a professional exemption, the learned professional exemption, or any other applicable FLSA exemption.

Sincerely yours,

A handwritten signature in cursive script that reads "for Denise Bragg".

Scott Holliday
Acting Deputy Assistant Secretary
for Labor-Management Relations