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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Marvin B. Atkinson—FLSA Overtime Pay Claim

**File:** B-256938.2

**Date:** January 29, 1996

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## DIGEST

Customs Service employee, on January 1, 1994, filed claim with his agency for 6 years' overtime pay under the Fair Labor Standards Act (FLSA). Customs Service allowed claim for 2 years' backpay, but denied claim for additional 4 years. Claimant's appeal to GAO for additional 4 years' overtime pay is denied under section 640 of Treasury Appropriations Act, 1995, as amended by Pub. L. No. 104-52, Nov. 19, 1995, which provides that 6-year limitation period shall not apply to any FLSA claim where the employee has received overtime compensation for the claim period under any other law or to any claim for commuting time between the employee's residence and duty station. His claim is denied because the record shows that he received administratively uncontrollable overtime (AUO) pay for the claim period and that his claim is for time spent driving a government vehicle between his home and duty station.

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## DECISION

Mr. Marvin B. Atkinson, an employee of the United States Customs Service, Department of the Treasury, has appealed to the General Accounting Office (GAO) from the Customs Service's denial of his claim for 4 years' overtime pay under the Fair Labor Standards Act (FLSA)<sup>1</sup> in addition to the 2 years' FLSA overtime pay he has already received. For the reasons stated below, his claim is denied.

## BACKGROUND

Mr. Atkinson's claim was received by Customs on January 1, 1994. He also filed his claim with the Office of Personnel Management (OPM) which accepted it on January 19, 1994, and referred it to Customs for review and a report. Mr. Atkinson is a civilian pilot and his claim is based on hours worked for purposes of FLSA

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<sup>1</sup>29 U.S.C. § 201 *et seq.* (1994).

overtime during home to work travel driving a government vehicle for the benefit of the Customs Service.<sup>2</sup>

Soon after Mr. Atkinson's claim was filed, we determined that the 2-year limitations period (3 years for willful violations) in 29 U.S.C. § 255(a) (1994) was applicable to all FLSA claims filed by federal employees with GAO, rather than a 6-year period which had been previously applied. Joseph M. Ford, 73 Comp. Gen. 157, May 23, 1994. The Office of Personnel Management (OPM) and several federal agencies had urged this position, and the Claims Court in Hickman v. United States, 10 Cl. Ct. 550, 552 (1986) had held that the 2-year statutory limitation period applicable to FLSA claims by private sector employees would be applied by the court to FLSA claims by federal employees as well. The court found that, when the FLSA was extended to federal employees, "no congressional intent was manifested . . . that federal employees would be accorded a more liberal limitations period than employees in the private sector." Id. at 552.

On June 30, 1994, the Customs Service acknowledged liability to Mr. Atkinson for overtime pay under FLSA and allowed his claim for 2 years, but denied his claim for an additional 4 years pursuant to Joseph M. Ford, supra.

Subsequent to our Joseph M. Ford decision and the Customs Service's action, section 640 of the Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (September 30, 1994) was enacted, and it provides that:

"In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) for claims filed before June 30, 1994."

The effect of section 640 was to limit the application of our Joseph M. Ford decision to FLSA claims filed on or after June 30, 1994, and to preserve a 6-year limitations period for claims filed before that date.

After enactment of section 640, Mr. Atkinson appealed Customs' denial of his claim for the additional 4 years of backpay to this Office. He contends that, since his claim was filed before June 30, 1994, he is entitled to payment for 6 years' FLSA overtime pursuant to section 640 of the Treasury Appropriations Act, 1995, quoted above.

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<sup>2</sup>His claim also shows that he received premium pay for administratively uncontrollable overtime (AUO) under 5 U.S.C. § 5545(c)(2) (1994).

On November 19, 1995, the Treasury, Postal Service and General Government Appropriations Act, 1996, was enacted with the following proviso amending section 640:

". . . Provided, That Section 640 of Title VI of the Treasury Postal Service and General Government Appropriations Act, 1995 (Public Law 103-329, 108 Stat. 2432), is amended by adding at the end thereof the following new sentence: "This section [Section 640] shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. § 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station."<sup>3</sup>

## OPINION

As noted above, Mr. Atkinson has appealed to GAO, claiming FLSA overtime pay for an additional 4 years under the terms of section 640. However, the November 19, 1995, amendment to section 640 effectively reestablishes the 2-year statute of limitations for any claim where the employee has received overtime pay under any other law, including, but not limited to, 5 U.S.C. § 5545(c), or any claim for time spent commuting between the employee's residence and duty station. We see no basis for the assertion that this amendment to section 640 does not apply to Mr. Atkinson's claim.

The record shows that Mr. Atkinson was receiving administratively uncontrollable overtime pay (AUO) under 5 U.S.C. § 5545(c)(2) from 1988 to 1991, the period covered in his appeal claim. As that statute provides, AUO is premium pay for irregular, unscheduled overtime duty calculated on an annual basis. Thus, under the amended section 640, quoted above, Mr. Atkinson's claim for an additional 4 years of FLSA overtime pay must be denied since he has already received compensation under 5 U.S.C. § 5545(c) for overtime hours worked during the entire period covered by his claim.

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<sup>3</sup>This clause is found in the section entitled "Departmental Offices, Salaries and Expenses" under Title I of the Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468 (November 19, 1995). The legislative history of the proviso clause, which was first introduced at the Conference on H.R. 2020, is scant. See H.R. Conf. Rep. No. 104-291, 104th Cong., 1st Sess. at 1, 2, and 25 (1995) (merely inserting proviso clause language and noting amendment of section 640), and 141 Cong. Rec. H12371 *et seq.* (daily ed. November 15, 1995).

In addition, Mr. Atkinson's FLSA claim covers time spent driving a government vehicle between his home and his office, i.e., "commuting." Thus, under the amended section 640, Mr. Atkinson's claim for additional years of overtime pay also fails because it seeks compensation for time spent commuting between his residence and his duty station.

Accordingly, Mr. Atkinson's claim is denied.

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