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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-198717

DATE: December 21, 1981

MATTER OF: Department of Energy Power Systems Dispatchers -
Entitlement to FLSA Overtime

- DIGEST:**
1. Department of Energy (DOE) questions retroactive entitlement of Power Systems Dispatchers to overtime under Fair Labor Standards Act (FLSA). Employees were considered exempt by prior agency (Interior) but determined to be nonexempt by DOE in 1979. Retroactive payments based on DOE's determination of nonexempt status may be made to the extent Office of Personnel Management determines duties of dispatchers were nonexempt throughout retroactive period. Meat Graders, B-163450.12, September 20, 1978, modified.
 2. Prior decision in Meat Graders, B-163450.12, September 20, 1978, is modified to remove bar to retroactive payments of FLSA overtime where employee was erroneously classified as exempt by employing agency and should properly have been nonexempt under published OPM guidance. However, where employing agency raises issue that there was a possible change in employees' duties over 5-year period, OPM should determine status of employees for all of the retroactive period in question and employees are entitled to retroactive pay only for such period they are properly in non-exempt status. Claims for retroactive payment are subject to 6-year statute of limitations. See 31 U.S.C. §§ 71a and 237.

This decision is in response to a request from Mr. Don W. Shinkle, Assistant Administrator for Management Services, Western Area Power Administration, Department of Energy (DOE). The issue in this decision is whether or not certain Power Systems Dispatchers employed by the Department of Energy are entitled to retroactive payment of overtime

under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq. (1976). We hold that a change in the classification of employees from exempt to nonexempt under the FLSA is not limited to prospective application but may be retroactively effective under certain circumstances.

BACKGROUND

In 1977 the power marketing functions under the Department of the Interior were transferred to DOE. Power Systems Dispatchers were considered by Interior to be exempt from coverage under the FLSA, and the report from DOE states that DOE did not question this determination. However, after an employee filed a complaint in 1978 concerning his exempt status and after DOE reviewed a determination by the Office of Personnel Management (OPM), San Francisco Region, holding that Hydro-Electric System Controllers employed by Interior were nonexempt under the FLSA, DOE determined that Power Systems Dispatchers were nonexempt under the FLSA. Prospective FLSA overtime payments were begun on October 9, 1979, but no retroactive payments have been made in view of our decision in Department of Agriculture Meat Graders, B-163450.12, September 20, 1978.

In the Meat Graders decision we considered the situation of agricultural commodity graders, GS-1980, who were specifically identified in Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974, as being in "administrative occupations" and therefore exempt under the FLSA. Further exemption guidelines were issued in FPM Letter 551-7, July 1, 1975, and, on July 6, 1976, the Civil Service Commission (CSC) (now Office of Personnel Management) ruled that meat graders were nonexempt or covered by the FLSA. In response to a request from Agriculture concerning the retroactive effect of the nonexempt determination, we held that the meat graders were not entitled to retroactive payments since the initial determination on coverage was not clearly wrong or based on erroneous information and since the employing agency was not on notice of possible FLSA overtime entitlement prior to July 6, 1976. Meat Graders, supra.

In the present case, DOE argues that our Meat Graders decision is controlling. The agency points out that the

Power Systems Dispatchers position had been "repeatedly" analyzed by Interior and determined to be exempt from the FLSA based on the guidelines of FPM Letter 551-7. DOE further argues that the duties and responsibilities of the dispatcher position may have changed during the lapse of time between Interior's determination of exempt status and DOE's determination of nonexempt status.

We note that claims have been filed by DOE Power Systems Dispatchers with both the San Francisco and Rocky Mountain Regional Offices of OPM, but both OPM offices have stayed any decision on these complaints pending our review of DOE's request on retroactive entitlement under the FLSA. It appears that no decision has been reached by OPM as to when these positions should have been considered nonexempt, and the only guidance we have before us is OPM's determination on the entitlement of Hydro-Electric System Controllers, GS-301-10, employed by the Department of the Interior, Central Valley Project. In that determination dated May 3, 1979, OPM held that those positions (Hydro-Electric System Controllers, GS-301) did not meet the administrative exemption and were therefore nonexempt under the FLSA with retroactive entitlement to May 1, 1974.

In view of the authority of the Office of Personnel Management under 29 U.S.C. § 204(f) (1976), to administer the FLSA with respect to Federal employees, we requested OPM's views on this matter. The report from OPM focuses on our Meat Graders decision and argues that since FPM Letter 551-7 explicitly cancelled and superseded FPM Letter 551-1, an agency could not in good faith assert reliance upon instructions and guidance contained in FPM Letter 551-1. Further, OPM argues the present case may be distinguished from our Meat Graders case since DOE has determined that the dispatchers' exempt classification was incorrect and retroactive entitlement to FLSA overtime would not conflict with a previous determination by OPM.

DISCUSSION

On prior occasions we have been asked by OPM to reconsider our Meat Graders decision but we declined since the claimants in that case took the issue before the Court of Claims. See Adams v. United States, Ct. Cl. Civil Action

No. 204-79C. We have been informed, however, that the Department of Justice is presently settling the Adams case. Since we think our position in the Meat Graders decision is partially in error and since our new position does not conflict with Justice's posture in Adams and will assist the settlement of many other outstanding FLSA complaints, it is appropriate that we now modify the rule in the Meat Graders decision. Of course, our modification of the rule stated in the Meat Graders decision has no impact on the meat graders claims, the disposition of which will be left to the court.

As noted above, we held in our Meat Graders decision that where the meat graders were specifically exempted from FLSA coverage by FPM Letter No. 551-1 but were held non-exempt by a subsequent CSC determination, there was no retroactive entitlement to FLSA overtime prior to the CSC determination. Upon reconsideration we now believe that FPM Letter 551-7 contained sufficient notice to the Department of Agriculture that their meat graders were improperly classified as exempt from FLSA and that Agriculture should have redesignated their meat graders as nonexempt effective July 1, 1975.

The exemption guidance in FPM Letter 551-1 was explicitly described as interim. The subsequent instructions in FPM Letter 551-7 expressly cancelled and superseded the interim exemption instructions in FPM Letter 551-1 and provided revised instructions for applying the exemption provisions of the FLSA. Therefore, the specific exemption of various job classifications in FPM Letter 551-1 was cancelled by FPM Letter 551-7 and agencies were placed on notice by FPM Letter 551-7 that they should apply the exemption criteria as stated in FPM Letter 551-7 in determining anew whether or not their employees were exempt.

The Department of Agriculture, however, relied on paragraph 3b of FPM Letter 551-7 which stated that: "The other exemption criteria are essentially the same as those reflected in FPM Letter 551-1 * * *" to justify its continued exemption of meat graders. It should be noted that paragraph 3b of FPM Letter 551-7 continued as follows:

"However, [the exemption criteria] are presented in substantially greater detail and have been extended to cover problem areas that were not adequately treated

in the interim instructions. Exemption determinations resulting from application of the attached instructions, except those discussed in paragraph a. above are effective as of May 1, 1974. * * *

Furthermore, paragraphs 3c and d dealt specifically with the retroactive status of employees who were found exempt or non-exempt under FPM Letter 551-1 but who, under the guidance in FPM Letter 551-7, were found to hold a different exemption status. Paragraphs 3c and d stated that the newly determined exemption status should be applied retroactively. It is evident therefore, that the criteria for exemption determinations in FPM Letter 551-7 are not entirely the same as those in FPM Letter 551-1 and agencies were on notice to apply the new exemption criteria to their employees. Therefore, we now modify our Meat Graders decision and hold that if an agency improperly applied FPM Letter 551-7, corrections in erroneous exemption determinations may be made retroactive to July 1, 1975. However, we continue to maintain that if the employees were listed as exempt under FPM 551-1, there is no basis for the employees to be redesignated as nonexempt prior to the issuance of FPM Letter 551-7. We continue to believe that published CSC (now OPM) instructions under the FLSA should not retrospectively change prior published instructions to the contrary.

The above modification in the Meat Graders decision does not provide a definitive answer in the present case. In this case, the position of Power Systems Dispatcher, GS-301, was not listed in FPM Letter 551-1 as exempt under an administrative occupation. Accordingly, there is no prior inconsistent OPM determination barring retroactive nonexempt status for the dispatchers. However, we believe the record before us does not contain sufficient information to determine the retroactive entitlement of these DOE Power Systems Dispatchers.

The report from DOE questions whether the duties of these employees have changed between 1974 and 1979. We are not aware that either DOE or OPM has decided that the FLSA coverage should be retroactive to May 1, 1974. In fact, the only guidance we have in the record before us is a copy of OPM's decision dated May 3, 1979, holding that Hydro-Electric System Controllers, GS-301, employed by Interior are entitled to FLSA overtime retroactive to May 1, 1974.

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While the job series (GS-301) is the same for both positions (Power Systems dispatchers were changed in 1980 from GS-301 to GS-303 series), that cannot be relied upon as the sole determinant of exemption status. See FPM Letter 551-7, Attachment, para. C.2.d.

The question of the retroactive effect of nonexempt status under the FLSA for Power Systems Dispatchers depends on whether or not the dispatchers duties have changed significantly since they were found nonexempt by OPM. This question should be remanded to OPM for its determination in light of our holding of today modifying our Meat Graders decision. Retroactive effect of the dispatchers nonexempt status may be extended back to the point where OPM determines the dispatchers were properly exempted. If OPM determines the dispatchers were never properly exempted, then they should be declared nonexempt retroactive to May 1, 1974.

We must also point out, however, that any claims for retroactive payments of FLSA overtime are subject to the 6-year statute of limitations contained in 31 U.S.C. §§ 71a and 237 unless the claims have been previously filed in our Office. Paul Spurr, B-199474, April 2, 1981 (60 Comp. Gen. _____); and Transportation Systems Center, 57 Comp. Gen. 441 (1978).

Harry D. Clark
For Comptroller General
of the United States