

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

B-211648

July 19, 1983

[REDACTED]
The Honorable John Paul Hammerschmidt
House of Representatives

Dear Mr. Hammerschmidt:

We refer to your submission dated April 25, 1983, on behalf of your constituent [REDACTED] concerning his claim for retroactive payment of overtime compensation under the Fair Labor Standards Act for the period from May 1, 1974, to July 1, 1975. [REDACTED] does not appear to be entitled to the payment of additional overtime compensation under the Fair Labor Standards Act (Act). The beginning date of his entitlement to overtime compensation, July 1, 1975, was not determined by the date on which he filed his claim but by the effective date of Federal Personnel Manual Letter 551-7 which provided revised guidelines for determining whether employees are exempt under the Act.

In his letter of April 14, 1983, [REDACTED] states that he has received retroactive payment of overtime compensation for the period from July 1, 1975, to August 27, 1977, but that he has not received overtime compensation which he believes is due him for the period from May 1, 1974, to July 1, 1975.

We have been advised by the Department of Agriculture that during the period in question, May 1, 1974, to August 27, 1977, [REDACTED] was employed as an Agricultural Commodity Grader (Processed Fruit and Vegetable) GS-1980-9. The records of this Office show that on July 9, 1980, [REDACTED] filed a claim with our Claims Group which was recorded for purposes of tolling the 6-year statute of limitations on claims cognizable by our Office at 31 U.S.C. § 71a (1976) (Currently set forth at 31 U.S.C. § 3702(b)). Although his claim was then returned to the Department of Agriculture for further administrative action its filing with this Office on July 9, 1980, assured that the portion of his claim for the period beginning 6 years earlier, on July 9, 1974, was not barred from further consideration.

The Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended coverage under the Act to certain Federal employees effective May 1, 1974. Under 29 U.S.C. § 204(f) (1976) the Civil Service Commission (now the Office of Personnel Management) is authorized to

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administer the provisions of the Act. Under the Act a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week which management "suffers or permits" to be performed. See para. 3c of Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974.

On May 15, 1974, the Commission issued FPM Letter 551-1 containing interim instructions on the application of the Act. Paragraph D of Attachment 2 to that letter categorized Federal employees with the occupational code GS-1980, "Agricultural Commodity Grading" in grade levels GS-7 and above as being in "administrative occupations" and therefore "exempted" from the overtime provisions of the Act by 29 U.S.C. § 213. (Supp. IV, 1974). However, further exemption guidelines were issued by the Commission in FPM Letter 551-7, July 1, 1975, which superceded the exemption guidelines in FPM Letter 551-1. On July 6, 1976, the Commission's Bureau of Personnel Management Evaluation issued a letter opinion wherein it ruled that under the guidelines of FPM Letter 551-7, Agricultural Commodity Graders (Meat) with the occupational code GS-1980 in grade levels GS-9 and below were nonexempt and therefore covered by the provisions of the Act.

In our decision Matter of Meat Graders, B-163450.12, September 20, 1978, we held that Agricultural Commodity Graders (Meat) were not entitled to payments for overtime under the Act on a retroactive basis since the initial determination of coverage was not clearly wrong or based on erroneous information and since the employing agency was not on notice of possible overtime entitlement under the Act prior to the Commission's determination of July 6, 1976. However, in Matter of Department of Energy Power Systems Dispatchers, 61 Comp. Gen. 152 (1981) we modified the Meat Graders decision. We held that if an agency improperly applied FPM Letter 551-7, corrections in erroneous exemption determinations could be made retroactive to July 1, 1975, the effective date of FPM Letter 551-7. However, we also held that if the employees involved were listed as exempt under FPM Letter 551-1, there was no basis for the employees to be redesignated as nonexempt prior to the issuance of FPM Letter 551-7. We stated in Energy Power Systems Dispatchers that the Commission's instructions under the FLSA should not retrospectively change prior published instructions to the contrary.

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By letter dated May 2, 1979, the Office of Personnel Management informed this Office that on August 19, 1977, the Department of Agriculture had advised that processed fruit and vegetable graders were nonexempt under the Act. The Office further advised that the Department's nonexemption determination (under the criteria of FPM Letter X551-7) was based on an advisory opinion from the Commission's Bureau of Personnel Management Evaluation dated July 28, 1977, which stated that the positions of fruit and vegetable graders and meat graders were similar to the point that all those positions should be nonexempt under the Act.

Accordingly, under the rule set forth in Energy Power Systems Dispatchers, Agricultural Commodity Graders (Processed Fruit and Vegetable) were entitled to overtime compensation under the Act retroactive to July 1, 1975, the effective date of FPM Letter X551-7. As stated in Energy Power Systems Dispatchers, claims for retroactive payment of overtime under the Act are subject to the 6-year statute of limitations. See Matter of [REDACTED], 60 Comp. Gen. 1354 (1981) and Matter of Transportation Systems Center, 57 Comp. Gen. 441 (1978). Since [REDACTED] first filed his claim with our Office on July 9, 1980, he would be entitled to retroactive payment of overtime compensation under the Act for the period back to the effective date of FPM Letter X551-7, July 1, 1975. No part of the period of entitlement to overtime compensation was barred by the statute of limitations.

In his letter dated April 14, 1983, [REDACTED] states that he has been advised about a legal action brought against the Department of Agriculture which has resulted in the payment of overtime compensation retroactive to May 1, 1974. He asks why some fruit and vegetable graders have apparently been able to collect payment of overtime for the period May 1, 1974, to July 1, 1975. In [REDACTED] and [REDACTED], et al. v. United States, Civil Action No. 80-2767 filed on October 28, 1980, in the United States District Court, District of Columbia, the plaintiffs, a number of Agricultural Commodity Graders (Processed Fruit and Vegetable) claimed retroactive entitlement to overtime compensation under the Act for the period May 1, 1974, to August 27, 1977, in connection with their alleged performance of overtime duty. The records of the court shows that [REDACTED] was not among the plaintiffs in this action. On January 15, 1982, the

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plaintiffs and the Government entered into a stipulated dismissal of the action wherein the plaintiffs agreed to dismiss their action in return for the Government paying them overtime compensation according to the provision of the Act for the period retroactive to May 1, 1974. This stipulation of the parties was approved by the court on January 15, 1982. Thus, the compensation payable to those Agricultural Commodity Graders (Processed Fruit and Vegetable) who were plaintiffs in [REDACTED] was determined by the terms of the stipulated agreement which was binding on the parties to the action and not by a determination of entitlement to overtime compensation under the Act. Since [REDACTED] apparently was not among those employees who were plaintiffs in [REDACTED] the terms of the stipulated agreement would not be applicable to him and thus he would not be entitled to payment of overtime compensation retroactive to May 1, 1974. Thus, as stated above, under the rule set forth in Energy Power Systems Dispatchers, [REDACTED] was entitled to retroactive payment of overtime compensation under the Act for the period beginning July 1, 1975. Since [REDACTED] states that he has already been paid overtime compensation for that period he would not be entitled to any additional payment of overtime.

[REDACTED] asks whether there is any statute of limitations which would preclude his filing an action in court to seek recovery of additional retroactive payment of overtime compensation under the Act. Under 29 U.S.C. § 255(a) (1976) a cause of action under the Fair Labor Standards Act for unpaid overtime compensation is barred unless commenced within 2 years (3 years for willful violations) after the cause of action accrued. An action is commenced within the meaning of 29 U.S.C. § 255 on the date a complaint is filed in court. 29 U.S.C. § 256 (1976). Under these authorities [REDACTED] is barred from seeking overtime under the Act in the courts for the additional period from May 1, 1974, to July 1, 1975.

Lastly, [REDACTED] states that he did not receive a Form W-2 for the December 1982 retroactive payment of overtime compensation and he requests that he be furnished the Form W-2 for such payment.

[REDACTED] former employer, the Department of Agriculture, would appear to be responsible for forwarding him the Form W-2 for the December 1982 payment and we have no knowledge as to the circumstances surrounding the apparent

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delay in furnishing him that form. Inquiries concerning the Form W-2 should be directed to the Department of Agriculture.

We trust that the above information serves the purpose of your inquiry. As requested by you, we are returning the enclosures submitted with your correspondence.

Sincerely yours,

for *Harry R. Van Cleave*
Comptroller General
of the United States

Enclosures

COMPENSATION

Overtime

Fair Labor Standards Act

Exemptions

Reinterpretation of OPM regulations

COMPENSATION

Overtime

Fair Labor Standards Act

Retroactive benefits

Exemption status

Reinterpretation of OPM regulations