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DECISION



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

FILE: B-200112

DATE: December 21, 1981

MATTER OF: FAA Electronic Maintenance Technicians --
Retroactive FLSA Entitlement

- DIGEST:**
1. Grade GS-12 Electronic Maintenance Technicians (EMT's) employed by Federal Aviation Administration (FAA) were considered nonexempt under Fair Labor Standards Act (FLSA) in 1974 but were found to be exempt in 1976. FAA subsequently changed designation to non-exempt incident to litigation, and Office of Personnel Management posed no objections to changed designation or retroactive entitlement. Therefore, EMT's are entitled to payments under FLSA retroactive to 1974 since retroactive entitlement is based on different interpretation of exemption criteria rather than change in administrative regulations.
 2. Grade GS-12 Electronic Maintenance Technicians employed by Federal Aviation Administration (FAA) were considered non-exempt under Fair Labor Standards Act (FLSA) in 1974 but no payments were made. Although EMT's were found exempt in 1976, subsequent determination in 1980 that they are nonexempt permits retroactive entitlement to 1974. Claims for retroactive payments are subject to 6-year statute of limitations which may only be tolled when claims are filed in this Office and not by agency actions.

This decision is in response to the request from Mr. Donald B. Rock, Director of Personnel and Training, Federal Aviation Administration (FAA), concerning the entitlement of certain Electronic Maintenance Technicians (EMT's), GS-856-12, to retroactive payment for overtime under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq (1976).

The issue in this decision is whether EMT's are entitled to retroactive payments for overtime under FLSA. Also at issue is the application of 31 U.S.C. §§ 71a and 237 (1976) to these retroactive payments. We hold that where the Office of Personnel Management (OPM) has, in effect, overruled a prior exemption determination, we will not object to payment for FLSA overtime retroactive to May 1, 1974, but subject to the 5-year statute of limitations for administrative claims.

BACKGROUND

The report from FAA states that as of May 1, 1974, the effective date for FLSA coverage of Federal employees, EMT's were considered nonexempt by FAA. See Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974, which did not list EMT's as exempt. Additional guidance on exemption provisions was issued in FPM Letter 551-7, July 1, 1975, para. C 3 d, concerning employees in scientific and engineering technician occupations. The report from FAA states that the agency reviewed that guidance but continued to consider EMT's to be nonexempt.

Although the FAA considered EMT's to be nonexempt or covered under the FLSA, the agency failed to make FLSA overtime payments to these employees in 1974 and 1975. As a result, five grade GS-12 EMT's filed a complaint with the Denver Regional Office of the Civil Service Commission (CSC) (now OPM) seeking backpay. However, that office ruled on February 17, 1976, that these employees were exempt under the FLSA due to their work in a professional occupation. Although the CSC ruling suggested that the FAA submit additional information to justify the agency's original non-exempt determination, the FAA failed to submit any additional information and concluded that EMT's in grades GS-11 and GS-12 positions were exempt. As a result of the Denver decision, and in accordance with FAA's determination that journeyman EMT's should be treated consistently under the FLSA, FAA advised its regions on June 4, 1976, that all GS-856-11 and GS-856-12 EMT positions would be exempt.

On May 17, 1978, the CSC, in response to complaints from two employee unions, ruled that EMT's, GS-856-11, were nonexempt under the FLSA since they failed to meet two of the professional exemption criteria. The CSC ruled further

that these grade GS-11 EMT's were entitled to retroactive payments and the FAA subsequently made FLSA payments to all grade GS-11 EMT's retroactive to May 1, 1974, the effective date of FLSA coverage for Federal employees.

In 1979, 39 grade GS-12 EMT's filed suit in U.S. District Court challenging their exempt status under the FLSA. The lawsuit was settled administratively by the FAA agreeing to change the designation of the plaintiffs to non-exempt, to make FLSA payments to the plaintiffs from the date the lawsuit was filed (June 11, 1979) until August 24, 1980 (the date all grade GS-12 EMT's began receiving FLSA overtime), and to make retroactive payments for 2 years prior to the date the lawsuit was filed. We note that the statute of limitations for judicial proceedings under the FLSA is 2 years (3 years for willful violations). See 29 U.S.C. §§ 255, 256 and Transportation Systems Center, 57 Comp. Gen. 441 (1978).

There are approximately 3,500 other GS-12 EMT's in the FAA who perform work similar to the 39 named plaintiffs in the court suit. In view of FAA's belief that consistency of treatment for similarly situated employees is proper, FAA changed to nonexempt the FLSA status of these other GS-12 EMT's on August 24, 1980. With respect to both present and former GS-12 EMT's, FAA also now wishes to make such employees whole by making backpay payments for FLSA overtime entitlement to May 1, 1974.

The FAA's request for decision, however, raises the question as to the entitlement of all GS-12 EMT's to retroactive FLSA payments for three distinct time periods. The first period is from May 1, 1974, to approximately June 1976, when the FAA characterized the grade GS-12 EMT's as nonexempt but made no FLSA overtime payments. The FAA argues that it intended to pay these employees and it advised the employees it would be unnecessary to file claims to toll the statute of limitations on administrative claims. Therefore, the FAA urges that we consider the statute of limitations was tolled by the agency's own action, its failure to pay while acknowledging entitlement. In the alternative, FAA argues that its determination on August 24, 1980, to begin FLSA payments to all GS-12 EMT's tolled the statute of limitations.

The second period in question is from June 1976 to August 24, 1980, when the FAA designated all grade GS-12

EMT's as exempt. The FAA argues that although payment for this period may appear to conflict with our decision in Department of Agriculture Meat Graders, B-163450.12, September 20, 1978, the present case is distinguishable from that of the Meat Graders on two grounds. The FAA contends that the CSC reviewed only a few of the approximately 3,500 EMT positions in reaching the determination that the position was exempt, and, unlike the Meat Graders case, it was the agency rather than CSC that made the FLSA designation change for the majority of the EMT's. In addition, the FAA argues that the CSC requested additional information which the FAA, due to its inexperience with the FLSA at that time, failed to provide. Under these circumstances the FAA believes these EMT's should receive retroactive payments under the FLSA during the period they were designated exempt by the agency.

Finally, if our answer for the second period is in the negative, the FAA questions whether other grade GS-12 EMT's may be paid administratively for the period from June 11, 1977, to August 24, 1980, consistent with the out-of-court settlement reached on the lawsuit filed by 39 EMT's.

In view of the authority of the Office of Personnel Management (OPM) 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 states that while the grade GS-12 EMT's were classified exempt in 1976 OPM has no objection to this determination in 1980 that the grade GS-12 EMT's are nonexempt. OPM also agrees with the contention of the FAA that the present case can be distinguished from our Meat Graders decision since CSC's initial ruling exempted only a few of the EMT positions and invited FAA to send further information which could have affected the outcome of the decision rendered. The report from OPM concludes that since the FAA agreed in an out-of-court settlement that grade GS-12 EMT's were nonexempt and since OPM did not object to this determination, the request from FAA for retroactive payments is supportable.

DISCUSSION

The request from FAA focuses on our decision in Meat Graders where we considered the situation of agricultural

commodity graders, GS-1980, who were specifically identified in FPM Letters 551-1 as being exempt under an administrative occupation. Further exemption guidelines which superseded those in FPM Letter 551-1, were issued in FPM Letter 551-7, July 1, 1975, and on July 6, 1976, the CSC ruled that meat graders were nonexempt. In response to a request from Agriculture we held that the meat graders were not entitled to retroactive payments prior to July 6, 1976, where the initial determination on coverage as set forth in FPM Letter 551-1 was not clearly wrong or based on erroneous information and where the employing agency was not on notice of possible FLSA overtime entitlement based on the revised exemption standards contained in FPM Letter 551-7. Meat Graders, supra.

However, in Power Systems Dispatchers, B-198717, dated today, we have modified our Meat Graders decision. We now believe that since FPM Letter 551-7 contained sufficient notice to Agriculture that their meat graders were improperly classified as exempt from FLSA, Agriculture should have redesignated their meat graders as nonexempt effective July 1, 1975, the effective date of FPM Letter 551-7. See Power Systems Dispatchers, supra. Thus, to the extent a determination on exemption status is found wrong under OPM's published guidelines, a corrective determination of status may be implemented retroactively. However, where the employees are listed as exempt in published OPM guidelines, any change in designation from exempt to nonexempt will not be retroactive since published OPM instructions should not retrospectively change prior published information to the contrary.

The present case is distinguishable from that of the Meat Graders since there has been no change in administrative directives or regulations affecting the EMT's. As noted above, EMT's were not specifically mentioned in either FPM Letters 551-1 or 551-7 so we are only concerned with an interpretation of the exemption guidance contained in those regulations. Although the CSC's Denver Regional Office ruled in 1976 that grade GS-12 EMT's were exempt, OPM has not objected to a contrary interpretation in an out-of-court settlement to a lawsuit or in its report to our Office. We, therefore, view OPM as retroactively overruling the exemption determination of the Denver Region of CSC in 1976. Since it has not been alleged that the duties of the grade

GS-12 EMT's have changed over the relevant period, OPM's determination on the EMT's exemption status is applicable under the standards set forth in both FPM Letters 551-1 and 551-7. The rule against retroactive application of OPM guidelines where prior inconsistent guidelines exist, as stated in Power Systems Dispatchers, would not apply in this case. Under these circumstances we have no objection to the administrative settlement of grade GS-12 EMT claims for FLSA overtime for the period from May 1, 1974, to August 24, 1980, subject to the provisions of the statute of limitations.

As we held in Transportation Systems Center, 57 Comp. Gen. 441 (1978), administrative claims filed with this Office are subject to the 6-year statute of limitations contained in 31 U.S.C. §§ 71a and 237. The 6-year limitations period continues to run until a claim has been filed with our Office, and filing a claim with the employing agency does not toll the statute of limitations, even if the delay is the fault of the agency. See Paul Spurr, B-199474, April 2, 1981 (60 Comp. Gen. _____); James W. Gregory, B-201936, April 21, 1981; Herbert M. Pollock, B-199521, August 19, 1980.

Although the FAA may have erroneously advised its employees that it was not necessary to file claims for FLSA overtime, such advice does not obligate the Government beyond the limits of the applicable statutes and regulations. See 54 Comp. Gen. 747 (1975) and court cases cited therein. Therefore, all claims by grade GS-12 EMT's employed by the FAA are subject to the 6-year statute of limitations contained in 31 U.S.C. §§ 71a and 237. For employees who have not filed claims with this Office, the FAA may make payments for the amount due retroactive for 6 years from the date payment is made. See Anthony Santomango, B-197603, August 21, 1980. We understand that all affected EMT's have been advised by the FAA that they should immediately file claims with our Office.

Accordingly, we hold that the FAA may make payments of FLSA overtime to grade GS-12 Electronic Maintenance Technicians retroactive to May 1, 1974, but subject to the application of the 6-year statute of limitations to each claim.

Harry R. Van Cleave
For Comptroller General
of the United States