



State of Ohio
Office of the Inspector General

THOMAS P. CHARLES, Inspector General

REPORT OF INVESTIGATION

FILE ID NUMBER:	2007409-A
AGENCY:	Ohio Department of Transportation
BASIS FOR INVESTIGATION:	OIG Initiative
ALLEGATIONS:	Unjustified Payment of Premium Overtime Compensation to FLSA Exempt Employees
DATE INITIATED:	April 1, 2008
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Executive Summary

File ID Number 2007409-A

The Office of the Inspector General (“OIG”), on its own initiative, undertook a review of the Ohio Department of Transportation’s (“ODOT’s”) overtime compensation policy for non-union employees in executive, administrative and professional positions. We discovered that ODOT’s overtime policy is out of step with the Fair Labor Standards Act (“FLSA”) guidelines and is excessive in comparison to virtually all other state agencies. A review of ODOT records reveals that ODOT current overtime policy significantly diverges from its own overtime-FLSA analysis conducted in 2004-2005. As a result, ODOT has approved and paid approximately \$2 million per year in premium overtime compensation.

The FLSA is a federal law which governs the process used to determine whether a position is either eligible for overtime pay for hours worked in excess of 40 hours per week, or is ineligible for overtime pay (“exempt”) and paid a flat sum for hours worked, even if the hours worked exceed 40 hours. The FLSA sets forth specific job categories that may be considered exempt from the FLSA’s overtime pay requirements. These include the following: “Executive” (*e.g.*, managers of departments, divisions or subdivisions), “Administrative” (*e.g.*, executive and administrative assistants), and “Professional” (*e.g.*, lawyers, doctors, engineers, and some computer professionals). Typically, employees in these categories are expected to fulfill the duties of their positions regardless of hours worked and are provided compensatory time (“comp-time”) on an hour-for-hour basis for hours worked in excess of 40 in a week, rather than premium overtime pay.

The OIG requested and reviewed ODOT’s overtime compensation data, focusing only on non-bargaining unit employees in these FLSA exempt categories. Based on our analysis, ODOT’s overtime compensation policy and payments appeared to disregard the FLSA exemptions in favor of paying premium (time-and-one-half) overtime to nearly all employees. Next, we compared ODOT’s total overtime payments for employees in the FLSA exempt positions with other similarly sized state agencies. Based on this comparison, ODOT overshadowed even the next closest agency in overtime expenditures.

ODOT records show that in 2004-2005, the agency conducted a FLSA overtime eligibility-exemption analysis. Pursuant to ODOT's own review of 1,460 non-union employees, ODOT identified 1,229 who were exempt from premium overtime compensation, but were eligible for comp-time. ODOT's analysis also identified another 30 staff not eligible for either overtime pay or comp-time. Despite ODOT's own internal analysis directing otherwise, the agency ultimately chose to disregard applicable FLSA exemptions and allowed premium overtime pay to all but 120 positions. Records revealed that the thrust of this decision was rationalized on the premise that ODOT executive, administrative and professional compensation is less than for similar positions in the private sector. How ODOT distinguished itself from other state agencies for purposes of this rationalization was not identified in any record. Since 2005, ODOT has paid nearly \$6 million in overtime compensation to employees who were otherwise exempt per ODOT's own FLSA analysis.

In view of the complexities of the FLSA exemptions analysis, we prevailed upon the Department of Administrative Services ("DAS"), Human Resources Division, to guide our FLSA interpretation and to assist in reviewing ODOT's current overtime eligibility-exemption policy. Based solely on position classifications, DAS determined that of ODOT's 43 non-bargaining unit classifications (within pay ranges 14-16), 34 are exempt from overtime pay.¹ DAS also reviewed ODOT's 2004-2005 FLSA eligibility-exemption analysis. DAS found that ODOT's FLSA exemption analysis to be precise, but with regard to ODOT's wholesale exceptions to FLSA exemptions, DAS indicated that the agency has never submitted them for review and approval. A review of ODOT's current overtime records reveals that employees in all 43 position classifications have either been deemed eligible for, or paid, premium overtime compensation.

Furthermore, Ohio Revised Code 124.18(A) requires any department wanting to pay overtime compensation to employees who are exempt pursuant to FLSA to submit the policy to the Department of Administrative Services ("DAS") for approval. No record of DAS approval was discovered or provided. DAS confirmed that no such request has been submitted by ODOT.

¹ According to both FLSA and DAS, a job duties test would necessarily follow to determine whether position responsibilities are accurately reflected by position classifications. However, ODOT conducted such an analysis in 2004-2005, as will be discussed in this report.

Based on our findings, we believe that ODOT's overtime compensation policy unjustifiably disregards appropriate FLSA exemptions in favor of excessive overtime compensation. And, ODOT's overtime policy is significantly out of step with all other state agencies whose missions, as well as similarly classified employees, are no less important. Based on our findings, we make two recommendations concerning ODOT's overtime compensation policy.

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C.....	University of California, Davis: Human Resources: FLSA Overview
D.....	FLSA Exemptions Flow Chart
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I.....	“Overtime Eligible -- ODOT Exceptions” Roster
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I. BASIS FOR INVESTIGATION

In the course of investigating allegations regarding improper overtime payments to an Ohio Department of Transportation (“ODOT”) employee,² the Office of the Inspector General (“OIG”) discovered that ODOT’s premium overtime payments appeared excessive. With regard to the allegations, we were able to confirm that the employee received overtime compensation in accordance with *current* ODOT policy. However, it appears that ODOT’s overtime policy disregards applicable Fair Labor Standards Act (“FLSA”) overtime exemptions in favor of paying premium overtime. And, it appears that this policy disregards ODOT’s own internal FLSA overtime analysis conducted in 2004-2005. Therefore, on our own initiative we undertook a review of ODOT’s overtime compensation policy for non-union employees in executive, administrative and professional positions.

II. ACTIONS TAKEN IN FURTHERANCE OF THE INVESTIGATION

We researched ODOT policies and procedures, Department of Administrative Services (“DAS”) directives, and the Fair Labor Standards Act (“FLSA”) relative to the payment of overtime at premium (time-and-one-half) rates for state personnel exempt from a collective bargaining unit. We compared ODOT’s overtime policies and payment data with other similarly situated state agencies. Also, we interviewed relevant ODOT personnel as well as representatives from the Department of Administrative Services (“DAS”) Human Resources Division.

III. DISCUSSION

We began by examining ODOT’s policies and procedures for the payment of overtime compensation. ODOT’s policy is a general statement that the department will comply with the terms of applicable collective bargaining agreements, FLSA, state law and DAS directives. [See Exhibit A.] With regard to non-bargaining unit employees, the policy states that ODOT’s

² OIG Report of Investigation, File ID Number 2007409.

Deputy Director for Quality and Human Resources (“Q&HR”) is responsible for maintaining a roster of all employees’ overtime status. Accordingly, the policy requires Q&HR to expressly identify employees who are deemed “overtime exempt” pursuant to FLSA criterion as well as those deemed overtime eligible (*i.e.*, “exceptions”) despite otherwise applicable FLSA exemptions. [See Exhibit B.]

We next reviewed relevant FLSA requirements. The FLSA is a federal law which governs working conditions and hours, establishes the minimum wage, as well as standard work hours, among other provisions. [See Exhibit C.] In short, the FLSA operates under a presumption that all employees are entitled to a premium rate of compensation for work exceeding 40 hours in a week *unless* there is an applicable exemption. To be clear, payment of overtime to employees who *do not meet* an FLSA exemption is *mandatory*; an employer’s choice to pay overtime to employees who otherwise *meet* an exemption is, however, *discretionary* to the employer and is considered an “exception.”

The FLSA exemption test has two parts: 1) a salary requirement, which all permanent state employees meet; and 2) a duties test, which requires an examination of an employee’s job responsibilities to see whether the employee meets one of three FLSA exemptions, *i.e.*, the “Executive” exemption, “Administrative” exemption, and/or “Professional” exemption. The Executive exemption applies to employees who manage at least two full-time employees over whom they exercise the authority to hire, fire or promote. Employees qualifying for the Administrative exemption perform duties directly related to management or general business operations and exercise independent judgment on significant matters. Finally, the Professional exemption applies to employees whose duties require advanced knowledge generally developed through specialized education, such as attorneys, engineers and some computer professionals.

We requested and reviewed data from ODOT for the payment of overtime compensation for non-union employees. Like all other state agencies, ODOT organizes non-union employees by position classifications and by sequentially numbered pay ranges from 1 through 18, and 41 through 49, reflecting increasing compensation thresholds. This sequential numbering system is

used throughout all state agencies and is a yardstick within and among state agencies towards establishing fair and consistent compensation for state employees.

Employees in pay ranges below 14 are less likely to perform duties that meet the FLSA Executive, Administrative, and Professional designations and, thus, would be entitled to premium overtime pay. As employees' pay increases into ranges 14 and higher, they are more likely to be performing Executive, Administrative or Professional job duties as defined by the FLSA. Generally, employees that reach pay ranges 16 and above easily meet an FLSA exemption. And, as set forth above, where employees meet the FLSA criterion for exemptions, the state agency *may* preclude payment of premium overtime pay to those employees. [See Exhibit D.] If, however, the state agency chooses to allow overtime pay regardless of an applicable FLSA exemption, the agency may grant an exception. [See also Exhibit D.]

With regard to exceptions, state agencies are required to get DAS approval to pay overtime compensation to employees whom otherwise meet applicable FLSA exemptions. The Ohio Revised Code ("ORC"), Section 124.18(A) states, in pertinent part, "With the approval of the director of administrative services, the appointing authority may establish a policy to grant compensatory time or to pay compensation to employees who are exempt from overtime compensation."

In 2004 there were significant revisions to the FLSA and, as a result, DAS requested that all state agencies review overtime policies in light of those changes. Each state agency was tasked to review position classification, along with actual job duties, to ascertain whether FLSA exemptions applied. ODOT undertook this review between late 2004 and mid-2005. [See Exhibits E and F.³]

Pay ranges 14 through 16 were selected for review by OIG investigators simply as a means to most readily examine ODOT's overtime policy. This range was identified to be where agency discretion and decision-making regarding exemptions and exceptions seemed most likely to

³ Handwritten notes, which appear on these exhibits, were included on the original documents when obtained from ODOT.

occur. Our selection of these particular pay ranges is by no means intended to suggest that pay ranges below 14 and above 16 do not also require further review.⁴

Allegation: ODOT's overtime policy is excessive, out of step with both FLSA requirements and other state agencies, and has never been reviewed or approved by DAS in accordance with Ohio Revised Code Section 124.18(A).

As a result of changes to the FLSA in 2004, all state agencies were requested to review overtime compensation policies. We obtained and reviewed the files maintained by ODOT's Q&HR division documenting the process and outcome of ODOT's internal 2004-2005 FLSA review. Since overtime compensation for union employees is dictated by the terms of the collective bargaining agreement, ODOT focused their review on the approximately 1,460 non-union positions in the department. A May 2005 memorandum, authored by ODOT's then-Chief Legal Counsel, recommended a comprehensive overtime and compensatory time policy in order to correct non-uniform practices within the agency. [See Exhibit E.]

Attached to the 2005 memorandum is an outline of FLSA definitions for overtime eligible and overtime exempt employee categories, and the applicable number of ODOT employees who fall into each category. The outline identifies 30 executive level staff who would not be eligible for overtime or compensatory time; 1,229 employees among the FLSA exempt categories not eligible for overtime, but who would be eligible to earn one hour of compensatory time for each hour worked beyond 40 in a week; and 243 employees meeting the FLSA overtime eligibility requirements. [See also Exhibit E.] The FLSA analysis and conclusions set forth in the 2005 memorandum are supported by written analysis from ODOT's Human Resources department prepared in late 2004. [See Exhibit F.] This analysis reflects that employees in pay ranges 14-16 were deemed not eligible for overtime pursuant to applicable FLSA overtime exemptions.

We also obtained and reviewed a PowerPoint[®] presentation, dated December 13, 2004, prepared by ODOT, which sets forth detailed FLSA exemption analysis as applied to agency employees.

⁴ Salaries in pay range 14 starts at \$58,094 and go up to \$92,310 at the highest level of pay range 16. [See Exhibit G.]

This PowerPoint analysis provides support for application of FLSA overtime pay exemptions to employees within various pay ranges. [See Exhibit H, Slide Number 4.]

Notwithstanding ODOT's own analysis and conclusions, records reveal that the agency nonetheless chose to disregard applicable FLSA overtime exemptions in favor of granting 1,200 premium overtime pay "exceptions" in pay ranges 14-16. [See Exhibit I.] Pursuant to ORC 124.18(A), exceptions to otherwise applicable FLSA exemptions must be submitted for review and approval with DAS. We were not provided, nor did we identify, any evidence demonstrating that ODOT submitted overtime pay exceptions to DAS for review and approval. Similarly, DAS had no records demonstrating that ODOT submitted such a request for exceptions.

We asked the DAS Human Resources Division to review ODOT's 2004-2005 FLSA overtime analysis. DAS found ODOT's original analysis and conclusions well-founded, but found ODOT's decision to implement 1,200 "exceptions" without seeking appropriate approval curious at best. With regard to ODOT's 2005 justification that ODOT executive, administrative and professional positions are less paid than those similarly situated in the private sector, DAS expressed to the OIG that this rationale may not be unique to ODOT and is applicable to most state agencies.⁵

We learned that ODOT has 43 position classifications within pay ranges 14-16. We discovered that ODOT pays premium overtime to employees in all 43 classifications.⁶ At our request, representatives from the Human Resources Division at DAS analyzed the 43 position classifications (covering approximately 800 employees). At the start, we collectively noted that in applying the FLSA there are many positions for which reasonable minds could differ in terms of the applicability of overtime exemptions. In order to account for this, we asked DAS to place each position into one of three categories: 1) *clearly* should be overtime exempt; 2) *debatable*

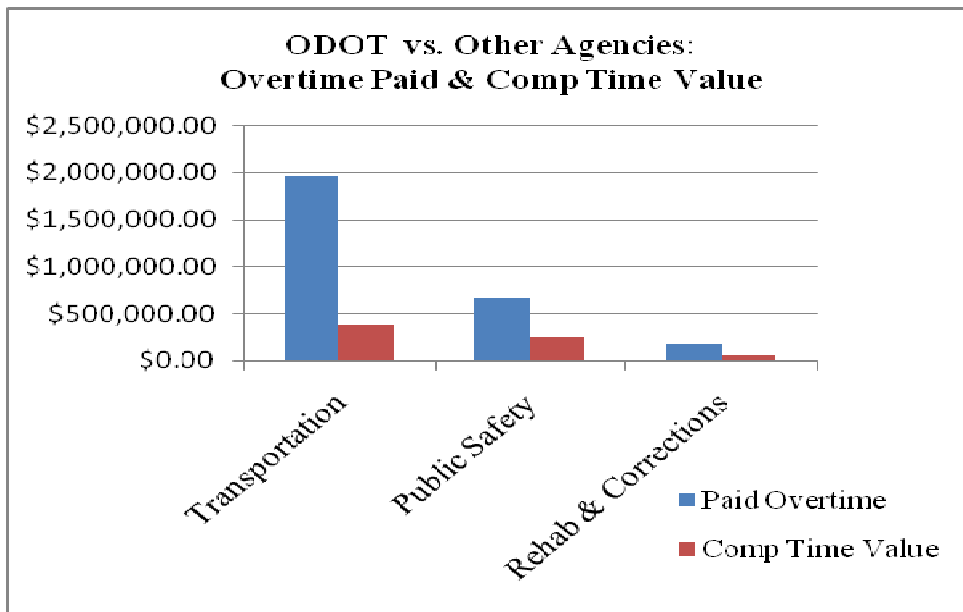
⁵ DAS also points out there are some state agency positions for which compensation is, in fact, on par with the private sector. DAS further notes that certain positions are exclusive to state government, for which private sector comparison is impossible.

⁶ ODOT also all allows these otherwise exempt employees to elect comp-time (at time-and-one-half) in lieu of premium overtime pay. These employees may cash out comp-time or, if unused at the end of nine months, is automatically cashed out and paid to employees. Overtime costs contained in this report include comp-time which was cashed out and paid.

whether or not the position should be overtime eligible, and not worth potential litigation; and 3) *clearly* overtime eligible.

DAS identified 34 of the position classifications as clearly overtime exempt; eight position classifications were debatable; and, only one position classification of the 43 was clearly overtime eligible. [See Exhibit J.] This finding was qualified by DAS personnel, in that they stated that their FLSA exemptions analysis was based solely on position classification. They added that these findings would need to be analyzed in conjunction with an examination of the actual duties performed by ODOT employees. DAS noted, however, that with changes to the FLSA in 2004, they required each state agency to review position classifications, *and* actual duties, for the purpose of establishing overtime compliance and consistency across state agencies. DAS added that ODOT's 2005 FLSA analysis and conclusions would constitute such a review.

We also requested and received from DAS overtime payment data for other similarly situated state agencies. The table below sets forth overtime costs in pay ranges 14-16 for ODOT and two other comparable state agencies.



*Note: ODOT data for fiscal year 2007; other agencies data for calendar year 2007.

We also obtained a roster of all state employees in pay ranges 14-16, who are classified by their respective agency as overtime eligible. For purposes of preparing the table below, the OIG reviewed the total number of overtime eligible employees in pay ranges 14-16, for all state agencies, identified the most overtime eligible employees in each pay range, and then listed the top four agencies for each pay range. Of the 1,443 overtime eligible state employees in these pay ranges, ODOT accounts for 55.5 percent. The table below summarizes the results of the analysis of this roster:

Pay Range	Agency	OT Eligible Employees	Percentage of Total for this Range
16	Mental Health	22	22%
	Public Safety	21	21%
	ODOT	14	14%
	Rehab & Correction	7	7%
	All Other Agencies	36	36%
	State Total	100	
15	ODOT	298	61%
	Public Safety	57	11.7%
	Rehab & Correction	47	9.6%
	Job & Family Services	18	3.7%
	All Other Agencies	68	13.9%
	State Total	488	
14	ODOT	489	57.2%
	Public Safety	201	23.5%
	Rehab & Correction	36	4.2%
	Mental Health	11	1.3%
	All Other Agencies	118	13.8
	State Total	855	
Total for Pay Ranges 14-16	ODOT	801	55.5%
	Public Safety	279	19.3%
	Rehab & Correction	90	6.2%
	Mental Health/Job & Family Services	75 (combined)	5.2%
	All Other Agencies	273	18.9%
	State Total	1,443	

Overtime payment data provided by ODOT shows that in each of the past three state fiscal years⁷ ODOT has paid \$2 million to \$2.25 million in premium overtime compensation to employees in pay ranges 14-16. The initial explanation we received from ODOT officials concerning these overtime costs focused on the unique departmental responsibilities for snow and ice removal during the winter. However, analysis of the overtime payment data shows that, in the past three years, snow and ice removal only accounted for between 2.2 percent and 5.3 percent of the overtime earnings of these employees. The total costs for snow and ice overtime includes employees in pay ranges 14-16 performing duties outside the scope of their regular position classifications.

ODOT next offered the impact of the summer construction season, which generally runs from March through November, as the explanation for overtime costs. However, in analyzing overtime costs for the department construction staff (factoring out any overtime earned for snow and ice removal), in the pay ranges 14-16, summer construction only accounts for between 45 percent and 52 percent of these costs in the past three years. Unlike snow and ice overtime payments, employees receiving overtime pay for summer construction were not performing duties outside of their position classifications. Prudent stewardship of public funds dictates that premium overtime pay, for otherwise exempt employees, should be a last resort to remedy emergencies; and, only where the required tasks fall outside of official position classifications. Premium overtime pay should not be utilized as means to merely supplement income.

With ODOT's two primary justifications only accounting for a little over half of the overtime costs for these pay ranges, we continued searching for the basis for the comparatively high overtime costs for mid- to upper-level employees. Documents obtained from the Q&HR division, as well as in interviews of ODOT personnel, reveal that ODOT was allowing the accrual and payment of overtime to employees in these positions in order to keep wages more competitive with private sector counterparts. [See Exhibit H, Slides 14 and 15.] ODOT reasoned that paying overtime compensation, to otherwise exempt employees, would be an acceptable cost to mitigate potential disruption from employee turnover.

⁷ The state fiscal year runs July 1 - June 30.

Private sector parity and possible turn-over are not unique to ODOT. *Every* agency in state government is on equal footing to make these same assertions. These rationales are no more compelling because they are offered by ODOT. While ODOT's mission is, indeed, essential, the same is true for all other state agencies as well. We believe there is ample evidence which demonstrates that ODOT's overtime policy to wholesale pay premium overtime to otherwise FLSA exempt employees is excessive and out of step with the FLSA requirements and other state agencies.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

V. CONCLUSION

We find that ODOT's policy is out of line with other state agencies in permitting and paying premium rate (time-and-one-half) for overtime worked by executive, administrative and professional employees. According to a roster provided by DAS, ODOT accounts for over half of all state employees in such positions eligible for premium rate overtime. DAS identified 34 of ODOT's 43 position classifications that are clearly not eligible for overtime compensation. This conclusion is supported by ODOT's own 2004-2005 FLSA-overtime analysis and review. ODOT's choice to ignore FLSA exemptions, and its own analysis, in favor of unjustifiable rationalizations to pay premium overtime, cost approximately \$6 million over the past three years. And, although ODOT has decided to except employees from the FLSA overtime exemptions, ODOT has not submitted these exceptions to DAS for review and approval pursuant to ORC 124.18(A).

VI. RECOMMENDATIONS

Based on the results of our investigation, the OIG makes the following recommendations and further requests that ODOT respond to this office within the next 60 days with a plan as to how the recommendations will be implemented:

1. ODOT should reevaluate departmental policy for overtime eligibility for non-union employees granted overtime compensation on the basis of “ODOT Exceptions.”
2. ODOT should comply with Ohio Revised Code 124.18(A) by submitting any policy granting overtime compensation to employees who are exempt from overtime compensation pursuant to the Fair Labor Standards Act to the Department of Administrative Services for approval. ODOT should also implement their overtime policy in accordance with DAS approval.