

**BEFORE  
SEAN J. ROGERS  
ARBITRATOR**

In the Matter of Arbitration between:

**AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-  
CIO, NATIONAL COUNCIL OF HUD  
LOCALS 222,**

*Union*

**and**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT,**

*Agency.*

**OPINION AND AWARD  
(GS-360 EQUAL OPPORTUNITY SPECIALISTS)**

**APPEARANCES:**

**On behalf of the American Federation of Government Employees, Council 222:**

Michael J. Snider, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

Jason Weisbrot, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

Ari Taragin, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

Carolyn Federoff, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

**On behalf of the Department of Housing and Urban Development:**

Norman Mesewicz, Esq., Deputy Director of Labor Relations – *representing the Employer.*

## PROCEDURAL BACKGROUND

On June 18, 2003, pursuant to the *Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees AFL-CIO* (CBA) the parties, the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) filed a Grievance of the Parties (GoP) challenging the Department of Housing and Urban Development's (Agency or HUD) alleged pattern and practice of directing bargaining unit employees to travel during non-duty hours without compensation as required by the Fair Labor Standards Act (FLSA), 29 USC § 201, *et seq.* (Travel grievance). On December 24, 2003, the Union filed a second GoP on behalf of all bargaining unit employees claiming that HUD failed to properly classify the bargaining unit employees under FLSA overtime provisions, and failed to compensate these employees properly and fully for their overtime work (FLSA grievance).

The parties were unable to resolve the Travel and FLSA grievances through their CBA grievance process. The Union invoked arbitration and the parties agreed to join the two grievances for resolution by arbitration. I was selected as the Arbitrator to resolve the disputes from a panel of neutrals maintained by the parties.

On September 12, 2005, the parties and the Arbitrator held an initial pre-hearing conference call (IPHC) to agree on dispute resolution procedures for the orderly processing of the grievances through arbitration. On September 28 and 29, 2005, as a result of the IPHC, combined mediation sessions and arbitration hearings (med-arb) were held on the grievances. The parties agreed to devote September 28, 2005 to a mediated settlement effort and, failing resolution of the grievances, September 29, 2005 was to be devoted to an evidentiary hearing. Following these first two days of med-arb, the parties agreed to devote October 11, 2005 to med-arb as well. The parties continued their efforts to settle the dispute throughout the med-arb process. The Parties agreed that the first positions to be addressed through the arbitration dispute resolution process would be HUD's GS-360 Equal Opportunity Specialist (EOS) positions, grades 11 through 15.

On September 29, October 11, November 3 and 4, 2005 evidentiary hearings were held on the grievance. The hearings were held at HUD's Headquarters Office, 451 7<sup>th</sup> Street, SW, Washington, DC. The Union was represented by Michael Snider, Esq., Snider and Associates and Carolyn Federoff, Esq., President, AFGE, Council 222. The Employer was represented by Norman Mesewicz, Esq., Deputy Director of Labor Relations, HUD. At the hearing, the Parties were each afforded a full opportunity: to present testimony, documents and other evidence; to examine and cross-examine witnesses; and to challenge documents and other evidence offered by the other Party.

AFGE's witnesses were: Peggy Johannsen, GS-12 EOS; Mernie Mathis, GS-12 EOS; Martin P. Kiebert, GS-13 EOS; Racesa Waheed, GS-12 EOS, New York City; Willie House-Bey, GS-12 EOS, Philadelphia; Vivienne Cardullo, GS-12 EOS, Philadelphia; and Sherry Norton, GS-12 EOS, Jacksonville (stipulated as similar to other GS-360 EOS, grade 12).

HUD's witnesses were: Marlene Thrash, Human Resources Specialist; Barbara M. Knox, Director, Office of Fair Housing and Equal Opportunity (FHEO), Region 5; Floyd O. May, General Deputy Secretary, FHEO; Candace M. Tapscott, Supervisory EOS, FHEO, Miami; James N. Sutton, Regional Director, FHEO; Vicki Ray, Center Director, FHEO, Louisville; and Debra Bouziden, Enforcement Branch Chief, FHEO, Miami. The witnesses were sworn and sequestered, and a transcript (Tr) was taken. Joint Exhibits (Jx) 1-7, Union Exhibits (Ux) 1-37 and Employer Exhibit (Ex) 1-6 were offered by the Parties and received into the record. The Parties submitted written post-hearing briefs. The last brief was received on February 24, 2006 and the record was closed.

The Parties presented no issues of timeliness, grievability or arbitrability in the dispute and, therefore, the dispute is ripe for decision. This Award addresses only the propriety of HUD's FLSA classification of the GS-360 Equal Opportunity Specialist (EOS) positions, grades 11 through 15 pursuant to the Parties' procedural agreement on the conduct of the arbitration process.

This is the first Award in a series of Awards to resolve the Parties' dispute over the FLSA classifications of bargaining unit employees. This first Award resolves the Parties' dispute by applying the FLSA, and DOL's and OPM's regulations to the actual duties of the GS-360 EOS, grades 11 through 15, bargaining unit employees. The Award based on the testimony, evidence and argument presented by the Parties' representatives.

### **STATEMENT OF THE ISSUE**

The Parties agreed to state the issue as follows:

Whether the Agency has proven that it properly exempted GS-360 EOS, grades 11, 12, 13, 14 and 15 bargaining unit employees from the Fair Labor Standards Act?

### **STIPULATIONS**

The Parties agreed to the following stipulations:

1. Sometime in the past, prior to the filing of the grievance, the Agency made FLSA determinations solely on grade. (Tr 10-12, 9-29-05).
2. After the filing of the instant grievances, the Agency made a second FLSA determination for a number of [job] series. Regarding the [GS-360 EOS, grade 12, job series] . . . , the Agency . . . based that determination on the . . . position description. (Tr 11, 9-29-05).
3. The Agency did not rely upon actual job duties for either the determination referenced in Stipulation 1. or 2. (Tr 12, 9-29-05).

4. [This Award is to be based on a] . . . hearing strictly limited to whether the [Agency's] exemption call was correct or not. (Tr 12, 9-29-05)

## RELEVANT CONTRACT, STATUTORY AND REGULATORY LANGUAGE

### PARTIES' COLLECTIVE BARGAINING AGREEMENT:

From the *Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees AFL-CIO*, effective March 30, 1998 (Jx 1):

### FROM THE PARTIES' CBA:

#### Article 22 GRIEVANCE PROCEDURE

**Section 22.01 – Definition and Scope.** This Article constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties. This grievance procedure replaces Management's administrative procedure for employees in the bargaining unit only to the extent of those matters which are grievable and arbitrable under this negotiated Agreement. A grievance means any complaint by:

- (1) Any employee concerning any matter relating to his/her employment; or
- (2) The Union concerning any matter relating to the employment of any employee; or
- (3) Any employee, the Union, or Management concerning:
  - (a) The effects or interpretation, or claim of breach, of this collective bargaining agreement; or
  - (B) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

\* \* \*

### Section 22.15 – Grievance of the Parties.

- (1) Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing within forty-five (45) days of the date of when the party became aware or should have become aware of the matter being grieved. Either party may grieve a continuing condition at any time.

- (2) Upon request, the parties shall meet within twenty (20) days to discuss informal resolution of the grievance after notice is given.
- (3) Within thirty (30) days after receipt of the written grievance, the receiving party shall send a written response stating its position regarding the grievance. If the response is not satisfactory, the grieving party may refer the matter to arbitration.

\* \* \*

Article 23  
**ARBITRATION**

\* \* \*

**Section 23.04 – Arbitration Fees and Expenses.** The losing party shall pay the arbitrator’s fees and expenses. The arbitrator should indicate which party is the losing party. If in the arbitrator’s judgment, neither party is the clear losing party, costs shall be shared equally.

The party cancelling arbitration after the arbitrator is engaged shall pay the attendant expenses, if any.

\* \* \*

**Section 23.10 – Authority of the Arbitrator**

- (1) The parties agree that the jurisdiction and authority of the arbitrator shall be confined to the issue(s) presented in the grievance
- (2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto. In the case of a back-pay award based on an employee having been affected by an unjustified or unwarranted personnel action, the arbitrator may authorize reasonable attorney’s fees in accordance with standards contained in the Back-Pay Act, as amended by the Civil Service Reform Act of 1978, and as interpreted by the Merit Systems Protection Board (MSPB).

**FROM THE FAIR LABOR STANDARDS ACT OF 1938:**

**Sec. 203. Definitions**

As used in this chapter--

- (e) (1) Except as provided in paragraphs (2), (3), and (4), the term “employee”

means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(I) as a civilian in the military departments  
(as defined in section 102 of title 5),

(ii) in any executive agency (as defined in  
section 105 of such title),

(iii) in any unit of the judicial branch of the  
Government which has positions in the  
competitive service,

(iv) in a nonappropriated fund  
instrumentality under the jurisdiction of  
the Armed Forces,

(v) in the Library of Congress, or (vi) the  
Government Printing Office;

\* \* \*

#### **Sec. 204. Administration**

\* \* \*

(f) Employees of Library of Congress; administration of provisions by Office of Personnel Management

The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 216(b) of this title.

\* \* \*

**Sec. 207. Maximum hours**

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

\* \* \*

**FROM THE OFFICE OF PERSONNEL MANAGEMENT REGULATIONS:**

**Sec. 551.206 Administrative exemption criteria.**

An administrative employee is an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service and meets all four of the following criteria:

(a) Primary duty test. The primary duty test is met if the employee's work--

- (1) Significantly affects the formulation or execution of management programs or policies or;
- (2) Involves management or general business functions or supporting services of substantial importance to the organization serviced; or
- (3) Involves substantial participation in the executive or administrative functions of a management official.

(b) Nonmanual work test. The employee performs office or other predominantly nonmanual work which is--

- (1) Intellectual and varied in nature; or
- (2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) Discretion and independent judgment test. The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) 80-percent test. In addition to the primary duty test that applies to all employees, General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable white-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80- percent test.

**FROM THE DEPARTMENT OF LABOR REGULATIONS:**

**29 CFR § 541.203 Administrative exemption examples.**

(j) Public sector inspectors, investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met. [38 FR 11390, May 7, 1973; 69 FR 22122, 22260, April 23, 2004]

\* \* \*

**THE PARTIES**

**I. The Department of Housing and Urban Development**

The **Department of Housing and Urban Development's** mission statement provides that,

HUD's mission is to increase homeownership, support community development and increase access to affordable housing free from discrimination. To fulfill this mission, HUD will embraces high standards of ethics, management and accountability and forge new partnerships – that leverage resources and improve HUD's ability to be effective on the community level. (Ux 3).

HUD employs approximately 10,000 people nationwide. The agency is headquartered in Washington, DC and its field offices are located nationwide. The instant



grievance arbitration involves approximately 290 GS-360 EOSs in grades 11, 12, 13, 14 and 15.<sup>1</sup>

## **II. American Federation of Government Employees, Council 222**

The **American Federation of Government Employees, Council 222** is the council of AFGE locals which is recognized as the certified exclusive representative of HUD employees in a nationwide bargaining unit.

### **RELEVANT TESTIMONY AND EVIDENCE ON THE WORK PERFORMED BY HUD'S GS-360 EOSs**

During the four days of hearings, the Parties developed an extensive record of testimony, documents and evidence regarding the work performed by GS-360 EOSs. All of the testimony, documents, evidence and post-hearing briefs have been reviewed and relied on in the resolution of the consolidated grievances. While no evidence was excluded from consideration by the Arbitrator, the following briefly summarizes the work performed by HUD's GS-360 EOSs.

GS-360 EOSs are responsible for administrating and supporting HUD's civil rights programs under several federal statutes, including, for example: Title VI of the Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1968; Section 504 of the Rehabilitation Act, Section 3 of the Housing and Urban Development Act of 1968; Section 109 of the Housing and Community Development Act of 1974; and other relevant Executive Orders and regulations concerning fair housing compliance and enforcement. Broadly, GS-360 EOS HUD's mission in the specific areas of civil rights program enforcement, compliance and operations.

#### **HUD's Witnesses**

**Marlene Thrash**, Human Resources Staffing and Classification Specialist, testified that she had been in her position fifteen months. (Tr 23-85, 9-29-05). Thrash testified about HUD's FLSA classification process starting with an explanation Agency Exhibit (Ax) 1, entitled *Fair Labor Standards Act Decision Under Section 4(F) of Title 29, United States Code and 5 CFR 551, Pay Administration Under the Fair Labor Standards Act (FLSA)*. (Ax 1). Thrash testified that the exhibit was an analysis she did for the FLSA determination on GS-360 EOS, grade 12, Equal Opportunity Specialists (EOS) in FHEO. (Tr 25, 9-29-05). Ax 1 states that the Agency's classification decision concerns, the FLSA coverage determination of a group of employees performing work described in position descriptions

---

<sup>1</sup> The master list of bargaining unit employees, showing the employees' FLSA classification for pay period January 24, 2004 through February 11, 2004, was created by HUD at AFGE's request. (Jx 5) This master list shows the distribution of GS-360 EOS's by grade as follows: grade 11, 41 employees; grade 12, 181 employees; grade 13, 53 employees; grade 14, 10 employees; and grade 15, 5 employees. The employee count is a snap shot for the pay period and only an approximation.

covering Equal Opportunity Specialist (EOS), GS-360-12 in HUD headquarters and EOS (Civil Rights Analyst), GS-360-12, in HUD field offices. (Ax 1).

Thrash said that she created Ax 1 sometime in February 2005. (Tr 29, 9-29-05). Her decision concludes with the statement:

These positions (the "group") meet the administrative exemption in 5 CFR 551.206 and are properly exempt from the FLSA. (Ax 1).

Thrash identified Ax 2 as the field-EOS PD and she said that Ax 2 was "the document that I used to determine what the employees in the position perform." (Tr 31, 9-29-05). The PD is dated July 14, 1997. (Ax 2). Thrash identified Ax 3 as the headquarters-EOS PD. (Tr 37, 9-29-05). She said Ax 3 as "the document that I used for to determine the headquarters positions, what duties they perform at headquarters, for the Equal Opportunity Specialist position." (Tr 37, 9-29-05). The PD is dated May 1, 1992. (Ax 3). Thrash also identified Ax 4 as a copy of the information she got off the internet that gives the definition for FLSA categories. (Tr 38, 9-29-05). The document is dated February 3, 2005. (Ax 4).

Thrash testified that she was assigned to analyze the FLSA classification for EOS, grade 12 by Louis Anderson a Branch Supervisor in HUD's Personnel office. (Tr 50, 9-29-05). She said that she obtained copies of EOS PDs and "reviewed the position descriptions and determined what the major duties were for these employees, and compared it to the definitions" from the internet document. (Tr 40, 9-29-05, Ax 4). Thrash determined that the GS-360 EOSs, grade 12, were exempt based on the FLSA definitions of the administrative exemption. (Tr 42, 9-29-05). She testified that in reaching her conclusion that the positions were FLSA exempt, she relied only on the PDs and OPM regulations. (Tr 48, 9-29-05). She said she did not verify the accuracy of the PDs. (Tr 57, 9-29-05). She testified that she did not review the actual job duties of the employees and she was unfamiliar with the OPM requiring that FLSA exemption status is based upon duties the employee actually performs rather than what is described in the position description. (Tr 58, 9-29-05). She said that from the PD she knew what the GS-360 EOS do, but she could not verify the accuracy of the PDs that she reviewed. (Tr 60, 62, 9-29-05). She did not check with anyone from DOL or OPM to verify if the GS-360 EOSs were properly exempt. (Tr 63, 9-29-05).

Thrash testified that the GS-360 EOS position met the first primary duty test at 5 CFR 551.206(a)(1) for an administrative exemption because the PDs require GS-360 EOSs,

to prepare reports. These reports are used to develop the policy or program requirements for the position. It speaks to that in the PDs . . . The work requires the development of recommendations to change management policies and practices where improvement is needed. (Tr 43, 9-29-05).

Thrash testified that the GS-360 EOSs position met the first primary duty test at 5 CFR 551.206(a)(2) for an administrative exemption because the PDs' introduction,

talks about the titles of law that the employees are responsible for administering, and those titles are major programs for the Agency, so there is a substantial impact on the organization that they work in. They are considered major programs of the Agency. (Tr 44, 9-29-05).

Thrash testified that the GS-360 EOSs position met the first primary duty test at 5 CFR 551.206(b)(1), the intellectual and varied element of the nonmanual work test, for an administrative exemption because Ax 3 states,

a requirement for expert skill and fact-finding, analysis, problem-solving, and writing . . . the position requires the incumbents perform some type of analysis in doing their jobs, so I feel it's nonmanual in nature and it is often of an intellectual nature. (Tr 44, 9-29-05).

She said the work is of a specialized or technical nature that requires special training, as provided in 5 CFR 551.206(b)(2), because "the experience primarily can only be gained here at HUD." (Tr 45, 9-29-05).

On cross examination, Thrash testified that she did not interview supervisors, employees or individuals that classified the two GS-360 EOS positions previously. (Tr 48-49, 9-29-05). She said she did not analyze the GS-360 EOS positions at the GS-9/11/13/14/15 levels. (Tr 49-50, 9-29-05).

Thrash testified that she was not familiar or aware of the OPM publication *How to Make Exemption Status Determinations Under the Fair Labor Standards Act*. (Tr 56, 9-29-05). Thrash said that she did not interview the incumbents and supervisors and did not verify the accuracy of the PDs. (Tr 57-58, 9-29-05). Thrash was not familiar the statement that "FLSA exemption status is based upon the duties the employee actually performs rather than duties described in the position description." (Tr 58, 9-29-05).

However, Thrash then admitted that the designation of an employee as FLSA exempt or non-exempt ultimately rests on the duties actually performed by the employee and admitted that the OPM regulations require that the actual job duties be inspected. (Tr 59, 9-29-05).

Thrash testified that the GS-360 EOS are carrying out HUD's mission. (Tr 66, 9-29-05). She said that she was familiar with the production/administration dichotomy also known as the line/staff distinction. (Tr 66, 9-29-05). After considering part of HUD's mission statement, concerning HUD's mission to ensure affordable housing, free from discrimination, Thrash agreed that it was possible that GS-360 EOSs perform that role at HUD. (Tr 74, 9-29-05).

Thrash's testimony established that: she did not know what types of guidelines GS-360 EOSs used on a day-to-day basis; she did not review the guidelines GS-360 EOSs use that are listed in the PD; and she did not know what the GS-360 EOSs' final work product looks like or what it was used for. (Tr 78-79, 9-29-05).

Thrash said that she concluded that the GS-360 EOSs' work was of great significance their "[e]rrors would be costly" for HUD "in terms of litigation from discrimination complaints." (Tr 81-82, 9-29-05).

**Floyd O. May**, General Deputy Assistant Secretary in the Office of Fair Housing and Equal Employment, testified that he had very intimate knowledge regarding the duties and responsibilities of GS-360 EOSs and that he was hired under that series in 1975 working as a GS-360 EOS until the mid-1990s. (Tr 20-57, 10-11-05). May testified,

[t]he duties and responsibilities of a 360 FHEO specialist run directly to the Fair Housing Act itself. . . . And the personal responsibilities of the staff in the 360 series are to receive, review, analyze, investigate, and conciliate cases brought under that statute. The persons occupying that series are additionally responsible to conduct routine compliance reviews under the various fair housing and equal opportunity statutes, rules, and regulations. The persons also are expected to represent the department in instances where there have been findings of discrimination, in testifying in court proceedings. (Tr 23-24, 10-11-05).

May continued to say GS-360 EOSs,

are expected to possess analytical skills that allow them to review information, analyze the information, and make critical judgments regarding the worth of that information, as it pertains to a fair housing investigation . . . the individuals are expected to be able to review complex data sources, such as . . . bank records, testimonies of witnesses, review of documents, and computer generated information. (Tr 24, 10-11-05).

The Union's *voir dire* examination of May established that May was not a GS-360 EOS first-line supervisor, but he is the third or fourth line supervisor of GS-360 EOS, grade 13 and below. (Tr 26-27, 10-11-05).

May testified that GS-360 EOS, grade 12, employees are "expected to perform their work with a minimal amount of direct supervision and are expected to perform their work pretty independently, as well as to provide assistance to lower graded specialists in the same series." (Tr 27-28, 10-11-05). May said that the base guide documents for GS-360 EOSs are the Title 8 Handbook, other technical guidance memoranda, the statute and

regulations that pertain to each law that HUD administers.<sup>2</sup> (Tr 28-29, 10-11-05). Regarding the discretion GS-360 EOS exercise May said,

The specialists do not have independent authority to exercise judgments that are within the defined statute or -- regulations, or the documents that have been prepared that support the statute.

In other words, the statute is, again the base authority for all the activities. And each of the specialists are [sic] expected to be able to interpret the statute and execute their responsibility in accordance with what the statute requires.

The handbook – the Title 8 Handbook, specifically, is a document that sets out the procedures that are required . . . for an investigation.

The specialists are not authorized to operate – or to supplement their judgment differently than what the handbook and the statute requires [sic]. (Tr 29-30, 10-11-05).

Regarding the complexity and impact of GS-360 EOSs work, May said the work of GS-360 EOSs,

graduates to a greater degree of complexity the higher the grade level that the Specialist occupies.

At the 12 level, the specialist is expected to be able to conduct investigations that have a multiplicity of issues of persons who are to be interviewed, as well as to . . . look at areas such as lending discrimination cases, as well as multiple cases. . . . Depending on the type of case that the department is investigating, the impact could be none at all or it could be very extreme.

If the case is a complex case, such as zoning cases, and pattern and practice cases, it would have a profound impact on the department's responsibilities. (Tr 30-31, 10-11-05).

May testified that "the great majority" of the cases that the department receives for investigation are single issue cases. (Tr 55, 10-11-05). May said the GS-360 EOSs investigative plan must be approved by a supervisor and their investigations are subject to numerous levels of review and sign-off even cases that are administratively closed must be reviewed by HUD counsel as GS-360 EOSs cannot independently close a case. (Tr 35-

---

<sup>2</sup> The Title 8 Handbook is referred to by several names in the record, including, for example: the Investigator's Handbook, the Investigation Handbook, the Investigative Handbook and the Handbook. All names refer to same document. In this Award, the Arbitrator has chosen to use the term *Investigator's Handbook* unless quoting from text, a witness or a document.

36, 54 10-11-05). May said that deviations from the investigative guidelines and conciliation agreement format have to be approved by a supervisor. (Tr 42-44, 10-11-05).

May also testified that,

specialists, in the 360 series in particular, are expected to exercise a high degree of independent thought and judgment in executing their responsibilities. And where they find, upon leaving the office, situations that render the guide documents not useful, they are expected to revise their investigative approach, as well as make independent judgments about how to proceed, without being required to contact a supervisor to request authority to do so. (Tr 52, 10-11-05).

**Candace M. Tapscott**, Supervisory Equal Opportunity Specialist and second-line supervisor to Peggy Johannsen a GS-360 EOS, who testified in the Union's case, testified that she was familiar with and intricately involved in the work of GS-360 EOS investigators in both the enforcement and program sides of Miami program center. (Tr 61-97, 10-11-05). Tapscott described the flow of the GS-360 EOS investigative reports from the first-line supervisor through the Miami office general counsel to the Atlanta Regional office. (Tr 66, 10-11-05). Ms. Tapscott testified specifically about how independently Peggy Johannsen, a GS-360 EOS, grade 12, employee, worked saying,

She has a relatively free rein in terms of independence. She receives a case. She reviews the complaint. She determines whether it is -- makes a recommendation as to whether or not it is jurisdictional or not. She investigates and interviews the complainant and the respondent and all their witnesses.

She develops a comparative analysis to the documents she receives and makes a recommendation as to whether or not there is probable cause to believe that discrimination did or did not take place.

So she works relatively independent and makes her recommendations based on the facts as she sees them. (Tr 63-64, 10-11-05).

Tapscott testified that the GS-360 EOS investigators manage their own caseloads relatively independently, but they work very closely with their supervisor. (Tr 64, 10-11-05). As a supervisor, Tapscott makes sure that GS-360 EOS investigators' reports meet all the requirements through the use of checklists in the investigator's manual provided by the Atlanta office. (Tr 66-67, 10-11-05). She said, the checklists are very detailed and require limited independent discretion and judgment. (Tr 70, 10-11-05).

Tapscott testified that her office makes sure investigation close within 100 days and require by HUD's procedures, guidelines and the Investigator's Handbook. (Tr 69-70, 10-11-05). She said that the checklists and the Investigator's Handbook are very descriptive

of all phases of the investigation help GS-360 EOS “investigators to hone their skills, to make sure that they are investigating properly.” (Tr 70-71, 10-11-05).

Regarding independent discretion and judgment by Johannsen, Tapscott said that Johannsen “initiates a substantial amount of independence” and sets her own complaint-investigatory schedule, but her discretion to run the case is “based on the regulatory requirements in the handbook.” (Tr 72-73, 75-76, 10-11-05).

Tapscott said that she does not supervise grade GS-360 EOSs, grade 14 or 15, but her testimony about Johannsen applied to GS-360 EOS, grade 13. (Tr 78-79, 10-11-05). Tapscott said most investigations involved more than one issue. (Tr 86, 10-11-05).

She said GS-360 EOSs make no determinations with regard to whether or not a complaint involves any kind of discrimination, but they do make recommendations, based on the facts and the findings of their investigation, as to whether any kind of discrimination took place. (Tr 93-94, 10-11-05).

**James Sutton**, FHEO Regional Director, Atlanta, testified that the Act requires the department to complete investigations within 100 days. (Tr 98-121, 10-11-05). Sutton said he did not have any knowledge of the actual duties on a day-to-day basis of Mernie Mathis, a GS-360 EOS called by the Union to testify about her actual duties, but her work passes by his desk in “some form or fashion.” (Tr 102, 10-11-05). Sutton said GS-360 EOS make intellectual judgment calls or discretionary judgment when they review files to make determinations regarding HUD’s jurisdiction. (Tr 105, 10-11-05). He said that the investigator’s manual, also known as the Investigator’s Handbook, was recently revised by HUD and that GS-360 EOS investigators operate pursuant to handbooks and regulations. (Tr 109, 10-11-05). His testimony established that he is Mathis’ third-line supervisor. Because he was hired by HUD recently, Sutton could not testify on Mathis’ work prior to 2004.

**Barbara M. Knox**, Director, Office of Fair Housing and Equal Opportunity (FHEO), Region 5, testified that she has personal knowledge of the GS-360 EOS, grade 12, performance expectations because she worked in the series and supervised GS-360 EOS, grade 12, employees in 1977. (Tr 178-179, 9-29-05). The record established that she is currently a third-line supervisor of GS-360 EOS, grade 12, employees. Knox said that the GS-360 EOS, grade 12 employees are expected to have knowledge of fair housing and other civil rights law; theories of proof; be familiar with case law; apply theories to data and make “error free” recommendations whether there is cause to believe the law was violated. (Tr 181, 9-29-05). Knox said that GS-360 EOS, grade 12 investigators receive the most complex cases and while they report to a first-line supervisor and Branch Chief, they are expected to operate with minimal supervision. (Tr 185, 9-29-05). Specifically, she testified that GS-360 EOS, grade 12, investigators are:

supposed to be able to take any type of complaint, be able to plan the investigation, and we require a formal written investigation plan. They are

supposed to be able to plan the investigation, develop any requests for data that have to go out to the parties. They are expected, for instance, if they encounter a problem from the respondent in the case, they are supposed to be able to develop any subpoenas. We have subpoena power under the Fair Housing Act. They are expected also to be able to have skills in conciliation, and be able to recognize and have the skill to bring parties together to resolve complaints that can be resolved without going through the formal process. So it's a variety of meet and deal skills they are expected to have, analytical skills, data and research skills. And also they've got to have some administrative skill, because under the Fair Housing Act, we're required to complete our investigation process within 100 days, unless we can show as an agency that it's impractical to do so. And so our investigators have--and I always tell them that--they are expected to have management skill, the ability to manage a work load. And typically their investigative work load will have just a variety of complaints. It won't be one type of complaint that they are given. (Tr 185-186, 9-29-05).

Knox described the Investigator's Handbook as very general, but fairly detailed in terms of educating investigators on processing procedures. (Tr 187, 9-29-05). She said that the Investigator's Handbook calls for judgment by investigators because, for example, judgment is required when determining whether enough questions are asked of a witness. (Tr 188, 9-29-05). Knox said that data analysis, applying theories of proof and reading cases call upon the intellectual abilities of GS-360 EOSs. (Tr 190-191, 9-29-05).

**Vicki Ray**, Center Director, FHEO, Louisville, has held that position since May 2005. (Tr 32-64, 11-3-05). She said her primary duties were to: manage the regional FHEO offices in the region; act as the liaison between the regional director and employees, review the cases and compliance reviews of the 12 member staff team of GS-360 EOSs; provide guidance to GS-360 EOSs in carrying out their daily responsibilities and duties; ensure that local and national management goals are met; evaluate the performance of the staff; and monitor the center budget. (Tr 32-33, 11-3-05).

Ray testified that she was first-line supervisor of Mernie Mathis, a GS-360 and a Union witness. (Tr 35, 11-3-05). Ray said Mathis' primary duties and responsibilities were:

investigating housing discrimination complaints . . . conducting interviews with all parties – complainants, respondents, witnesses – speaking with attorneys . . . .

She collects data and documents from those persons. She assesses the data she collects, in order to come up with her final determination at the end of the case.

She assesses credibility of the witnesses.



She determines what documents she needs in order to complete her investigation as well. (Tr 35-36, 11-3-05).

Regarding the investigative plan Ray said,

An investigative plan . . . is a tool that we use that helps us guide us on things that we need to look for when we are planning our investigation. And that particular tool helps us identify the information – like documents we may need to collect from the respondents, what questions we may need to ask from respondents or complainants, questions we may ask the witnesses as well. And it keeps track of the investigation. (Tr 36-37, 11-3-05).

Ray said that the investigative plan is a one-size-fit-all document to a limited extent and is added to by the investigator throughout the investigation. (TR 37-38, 11-3-05). Ray said she did not review the investigative plan she got the completed case file in her office. (Tr 39, 11-3-05).

Regarding the Investigator's Handbook, Ray testified that it is an outline with instructions and guidelines on how to investigate complaints. (Tr 40-41, 11-3-05). Ray testified that the Investigator's Handbook is a guide that can be adapted to fit to particular situations. (Tr 39, 11-3-05). Ray said that the level of supervision of GS-360 EOSs "can be limited [and] . . . [d]epending on the grade level, they should be able to work independently and come to conclusions on the information they gather." (Tr 40-41, 11-3-05). Ray testified that GS-360 EOS, grade 12, should have limited supervision and their reports should be 100% complete. (Tr 41, 11-3-05).

Cross examination established that Ray had been Mathis's supervisor since May 2005 and that she currently supervises 12 employees throughout Kentucky, South Carolina, North Carolina and Tennessee including: Linda Hooper, a GS-360 EOS, grade 9, non-exempt investigator; Willie House-Bey, a GS-360 EOS, grade 12, non-exempt investigator. (Tr 44-46, 11-3-05). Ray testified that GS-360 EOSs use skills and knowledge to determine what needs to be investigated and the Investigator's Handbook which she said was a very detailed outline for the investigative plan which GS-360 EOS can deviate from without supervisory approval. (Tr 48-50, 11-3-05). Ray confirmed that the Investigator's Handbook refers to the templates for the investigative plan contained in TEAPOTS that investigators are expected to use.<sup>3</sup> (Tr 50-51, 11-3-05).

Ray said that the GS-360 EOS supervisors are supposed to review the investigative plan before beginning the investigation and that supervisors can access TEAPOTS at any time to determine changes needed to the investigative plan. (Tr 53-54, 11-3-05).

---

<sup>3</sup> *Title Eight Automated Paperless Office Tracking System* (TEAPOTS) is a comprehensive automated system used in the investigation and tracking of complaints and compliance reviews by HUD's FHEO offices.

However, Ray said the Investigator's Handbook is not strictly enforced in the real world and has very limited impact on the substance of an investigation while very few investigators have completed one on the TEAPOTS system. (Tr 57-58, 11-3-05). Ray said on-the-spot modifications to investigative plans "can occur often . . . [because] they may speak to one witness who would lead then to another witness [or] . . . a document . . . and things of that nature." (Tr 60-61, 11-3-05).

**Debra Bouziden**, Enforcement Branch Chief, FHEO, Miami, testified that her primary duties are to handle investigations in HUD's Miami, Florida office and that she has staff in Jacksonville, Orlando and Tampa. (Tr 65-120, 11-3-05). She said that she is the first-line supervisor of Johannsen, a Union witness. (Tr 66, 11-3-05). Bouziden testified that Johannsen's primary duties and responsibilities are to: conduct fair housing investigations, compliance reviews and conciliations, and respond to web inquiries concerning fair housing issues. (Tr 66-67, 11-3-05).

Bouziden described the investigative plan as a document that the GS-360 EOS drafts after conducting a preliminary analysis of the case and identifying what information is needed to investigate the complainant's allegations. (Tr 68-69, 11-3-05). She said that the investigator must determine: what evidence is needed; which witnesses will be interviewed; what comparative data is needed; what rules and regulations are pertinent and what on-site visits are necessary. (Tr 68-69, 11-3-05). She said the investigative plan is a roadmap to achieve the goal of completing the cases within 100 days and to help the GS-360 EOS stay on track. (Tr 70-71, 11-3-05). She said the investigative plan is required to be entered into the TEAPOTS for the case to go for closure by HUD's Atlanta office. (Tr 71, 11-3-05). She said that she did not assist GS-360 EOSs draft their investigative plans, but she might discuss questions regarding witness interviews or relevant evidence. (Tr 72, 11-3-05).

Regarding the Investigator's Handbook, Bouziden testified:

It provides guidance on what we have jurisdiction over.

It provides guidance for the areas of discrimination.

It also explains our intake process, how we process complaints.

It gives guidance on -- on planning an investigation, how you conduct an investigation.

It discusses types of closures, such as a cause case or a no-cause, or an admin closure, or a withdrawal of a case.

It also provides guidance, as far as how a case file is to be set up and it also provides guidance on conciliation, which is another way that a case can close. (Tr 73, 11-3-05).

Regarding independent thought by GS-360 EOSs and the Investigator's Handbook, Bouziden said that the Investigator's Handbook is only a tool, only a guide, each case is unique and GS-360 EOSs would make their own decisions on how to handle the case. (Tr 73-74, 11-3-05). Bouziden testified that, as Johannsen's first-line supervisor, she reviews each determination finding and conducts a weekly conference call with the Regional Office to report on each case's status. (Tr 74-75, 1-3-05). Bouziden said that she checks with the GS-360 EOSs on expected case-closure dates and obtains brief case status summaries and plans for the next week. (Tr 75, 11-3-05) Bouziden testified that she talks through cases with GS-360 EOSs and ideas on how to do better arise. (Tr 75, 11-3-05). Ms. Bouziden said that the goal is to close cases within 100 days so the GS-360 EOSs monitor the time. (Tr 76, 11-3-05). She said the final work product is expected to be complete including interviews, comparative data, applicable rules and regulations, and a recommendation on closure. (Tr 76-77, 11-3-05).

Bouziden said GS-360 EOS investigators encounter very diverse issues daily including, for example, conciliation attempts, interviews, document review and data collection. (Tr 77-78, 11-3-05). She said regarding production standards that there is no set amount of cases per year, per month or per week and not a guideline of production standards for cases that must be closed. (Tr 79-80, 11-3-05).

Cross examination established that Bouziden is the direct first-line supervisor for approximately four GS-360 EOSs since March 2005 and she has been supervising GS-360 EOSs, grade 12, 13 and 14 investigators only over the last year. (Tr 81-82, 89 11-3-05). While Bouziden said that the investigative plan and Investigator's Handbook are very detailed and include the 100-day guideline to close cases, she said that investigation process, as written in the Investigator's Handbook, it is not a "bible." (Tr 83-84, 11-3-05). However, she said nothing in writing informed supervisors or management that GS-360 EOSs do not have to follow the Investigator's Handbook. (Tr 84-85, 11-3-05). She said the Investigator's Handbook word "must" it is optional "because of the fact that we conduct investigations according to the particular uniqueness of that case." (Tr 84-85, 11-3-05).

Bouziden described the TEAPOTS system including the two documents the system generates: the final investigative report and the determination. (Tr 97-98, 11-3-05). She said if a case is going more than 100 days, known as aged cases, then a letter is issued to the complainant and respondent. (Tr 113, 11-3-05).

Cross examination established that Bouziden understood that the mission of FHEO was to eradicate discrimination in housing and that she agreed that the day-to-day FHEO function was to investigate, conciliate and close cases. She said that GS-360 EOS investigators "carry out duties that assist in meeting that function." (Tr 101-102, 11-3-05).

### **AFGE's Witnesses**

**Peggy Johannsen**, GS-360 EOS, grade 12, FHEO, Miami, Florida, testified that her primary duty is to investigate fair housing complaints and she spends roughly 90% of her

time on FHEO investigations and 10% of her time on compliance reviews, education and outreach. (Tr 108-111 9-29-05). She identified her supervisor as Deborah Bouziden, an Agency witness. (Tr 112, 9-29-05). She described the investigation of a fair housing complaint as involving interviewing complainants, respondents and witnesses, collecting documents and examining demographic information. (Tr 111-112, 9-29-05). She said then she makes a recommendation regarding reasonable cause to believe discrimination occurred and turns in the determination to Bouziden. (Tr 112, 9-29-05).

Johannsen testified that two other GS-360 EOS, grade 12, employees in the office perform these investigations, one the same as Johannsen and the other splits her time between FHEO investigations and checking compliance. (Tr 112-113, 9-29-05). Johannsen described a compliance review as when a team of investigators goes to a housing entity to see if the location is meeting housing standards. The team measures housing unit fixtures and components to see if they meet standards, for example: measuring grab bars; interviewing housing managers on policies and procedures; interviewing able and disabled tenants regarding their experiences. She explained that the compliance review may only involve race and no measurements are taken just interviews. A GS-360 EOS prepares a letter of findings that generally informs the housing entity of changes needed to comply with the law. (Tr 115-116, 9-29-05).

Johannsen described another work program that other GS-360 EOSs perform:

My understanding of it is that cities and counties that receive money under the CPD program have certain responsibilities under the Fair Housing Act. They have to affirmatively further fair housing, and they have to do studies in their communities to see if they are meeting the needs of that community. And they have to, when they put in their plans to HUD, their annual plans, they have to put in information about what they're doing to affirmatively further fair housing. And I believe that my colleagues check what these people write that they say they're doing against what their requirements are, and if they're not meeting their requirements, I believe they have to write back to these entities and let them know where they're deficient. (Tr 116-117, 9-29-05).

Johannsen testified that she did not formulate management policies, did not make any recommendations on policy changes and that recommending program improvements was not part of her job. She said that she did not prepare budget submissions, but her supervisor did make budget submissions and asked employees about supply needs or projected travel to formulate the budget request. She said that she was never asked to provide information about program effectiveness or prepare reports on improving HUD's performance. (Tr 119, 9-29-05). Johannsen said she is a line or production employee. (Tr 125, 9-29-05). Johannsen said that she knows how to do an investigation from the Investigator's Handbook, laws and regulations which she relies on, two investigator training sessions in her first year, training broadcasts and her supervisor's instructions. (Tr 117-118, 9-29-05).

Johannsen testified that the Investigator's Handbook and guidelines provided very explicit examples on how to do the job including examples of questions for complainants and respondents. In similar cases, she uses some of the same questions as well as a question format of questions that she amends based on the situation, but the questions are often the same from case to case. Johannsen testified that she has to follow the law and, while minor deviations may be made, major deviations require supervisory consent. (Tr 130-131, 9-29-05).

Johannsen said the investigative plan is a tool that GS-360 EOSs are to use to outline the discrimination allegations and the organizational map to prove or disprove the discrimination. She said that the investigator creates the plan using the outline in the Investigator's Handbook, with supervisory approval, including who will be interviewed, the questions to be asked, the documents needed, and the elements of the law violated. Two possible recommendations that can be made in an investigation, "either a finding that there is no reasonable cause to believe discrimination occurred, or there is a reasonable cause to believe discrimination occurred." The case could reach a settlement if it is independently conciliated. (Tr 121-123, 9-29-05).

She said the probable cause recommendation that discrimination occurred goes to her supervisor and, if approved, up-the-ladder to the General Counsel in Miami and the Regional Director in Atlanta. Johannsen said does not make final determinations. (Tr 123-125, 9-29-05). She said, depending on the time of year, for example when HUD is trying to reach organizational goals, she is closely supervised. (Tr 133, 9-29-05).

Cross examination established that when Johannsen faces a novel situation, she asks her supervisor for guidance or the General Counsel staff. (Tr 134, 9-29-05). She said she is rated against production standards which are based on closing cases within 100 days from the time the case was filed. (Tr 135, 9-29-05).

**Mernie Mathis**, GS-360 EOS, grade 12, HUD Region 4, testified that she received a PD dated July 14, 1997, on August 14, 2005, which is not completely accurate. Mathis said that the PD and is not completely accurate because it states that GS-360 EOSs develop technical assistance, but she uses only HUD's guidelines. (Tr 139-140, Ax 2, 9-29-05).

Mathis testified that her primary duties are to investigate discrimination complaints which she spends about 90% of her time on and 10% on program work. She said a case is assigned to investigators and they interview the complainant, respondents and witnesses, compile the data, draft a determination report. Mathis said she uses TEAPOTS and a generic investigative plan from guidelines which is reviewed by supervisors. The plans are updated as necessary, and reviewed by the supervisors. She said her program work involved team compliance reviews with a supervisor. (Tr 140-144, 9-29-05).

Mathis testified that GS-360 EOS investigators do not formulate management policies or programs and she does not prepare HUD's budget submissions or assess

program effectiveness or assess office performance. She said that the work is not varied and does not require creativity because investigators simply follow the guidelines in the Investigator's Handbook. (Tr 146-148, 9-29-05). Regarding the staff/line dichotomy, Mathis said of GS-360 EOS investigators, "we are the production side of the house . . . we are the one that puts forth the work to meet the national objectives and HUD's objectives." (Tr 149-150, 9-29-05).

She describe the Investigator's Handbook as about two inches thick, very comprehensive and GS-360 EOSs are not allowed to deviate from the Investigator's Handbook. When face with a novel or complicated issue, Mathis said GS-360 EOS go to regulations, then elevate the issue to their supervisor, then the program centers, and then the legal office. (Tr 148-149, 9-29-05).

On cross examination, Mathis testified that she did not have a thorough knowledge of: the rules, regulations, statutes, fair-housing court case precedent and decisions or expert knowledge of problem-solving techniques or high-level skill in interpreting laws, executive orders, regulations, and court decisions. She said she did have some skills in complex investigations and skills in fact-finding, analysis, formulating and presenting recommendations and negotiating resolutions, and in oral and written communications. Mathis said that she did not have detailed knowledge about local government and business institutions, as well as social and economic factors that apply to FHEO. She said she does have the ability to evaluate programs for compliance of civil rights in housing and draw conclusions and that her work does not affect enforcement policy. (Tr 152-156, 9-29-05).

Mathis said that there is no flexibility under the Investigator's Handbook except as the regulations require. She said that she does not independently plan, direct and conduct her own work assignments. (Tr 155-156, 9-29-05).

**Martin Kiebert** testified that he has been a GS-360 EOS, grade 13, Office of Fair Housing and Equal Opportunity, HUD headquarters, for 14 years and prior to this position, he was an EO Specialist and Investigator at the Equal Employment Opportunity Commission (EEOC). (Tr 162, 9-29-05). Kiebert said he was assigned to HUD's Enforcement Support Division, where his primary duties included reviewing cases from the field and appeals from no-cause determinations. However, he said that he recently joined the Systemic Unit, where his primary duties involve reviewing novel and complex cases. (Tr 162, 9-29-05). Kiebert said that in the last three years 10% of his time he has participated in management and quality assurance. (Tr 163-164, 9-29-05).

Kiebert testified that he has no role in formulating management policies; budget submissions; and "minorly" [sic] participates in assessing HUD program effectiveness. (Tr 164, 9-29-05). While he has done investigations in the past, Headquarters investigators have been "relegated" to review work and technical assistance. (Tr 165, 9-29-05). Kiebert said that his work has been fairly varied over the last four years because he does not "do 100% of the same thing each week." He started in the systemic unit on January, 25, 2005. (Tr 166, 9-29-05). Kiebert said he does not prepare reports or make recommendations

about improving HUD's performance. (Tr 167, 9-29-05).

He said his cause findings, which are the end product of his work, are reviewed by his supervisor. (Tr 166-167, 9-29-05). Kiebert uses guidelines, including the federal HUD guidelines and the Investigator's Handbook which he is not allowed to deviate from. (Tr 168, 9-29-05). Kiebert said that has a thorough knowledge of rules, regulations and statutes related to housing discrimination and he considers his work to be complex. (Tr 172-173, 9-29-05) Yet, Kiebert testified that at least one investigator in his office only has high school diploma. (Tr 169, 9-29-05). He described his as a liaison between headquarters and the field. He said his job was "more quality control than assembly line, [with] . . . a strong connections to the assembly line." (Tr 175, -29-05).

**Racesa Waheed**, GS-360 EOS, grade 12, Office of Fair Housing and Equal Opportunity, New York City, testified that she was promoted three or four weeks ago to a grade 12 exempt employee. The record established that she was GS-360 EOS, grade 9, and then grade 11, **nonexempt** employee until her promotion. Waheed said her primary duties, 90% or her time, involved helping with negotiations and monitoring of Fair Housing Initiative Program (FHIP) grants HUD awards to non-profit. (Tr 132-136, 144, Jx 6, 11-3-05). With regard to FHIP work, she said that she receives,

quarterly reports from the grantees, the organizations, and I look over their reports and the work they have conducted in the past quarter . . . based on that, and since we negotiate a contract, if they completed all the work products that were required for that quarter, I recommend the payment for that time for the work. (Tr 136-137, 11-3-05).

Waheed said that she received basic investigative training, including an on-line Government Technical Monitor (GTM) course, training in voluntary compliance agreements and she attended three FHIP/FHAP conferences. (Tr 138-139, 11-3-05).

Waheed said that she reviews and examines education and outreach events, testing, educational classes and tester training. (Tr 137, 11-3-05). Waheed has assisted with investigations, but mostly she said that she does FHIP and Fair Housing Assistance Program (FHAP) monitoring. (Tr 137-138, 11-3-05). As an assistant to a lead investigator in an investigation, Waheed said that she did word processing and input data into TEAPOTS. (Tr 143, 11-3-05). She said that her work is usually waiting on her desk or arrives by mail or e-mails which include questions from FHIP organizations involving technical assistance. (Tr 144-145, 11-3-05).

Waheed said she sees her first-line supervisor, Robert Norrington, every day. She seeks Norrington's guidance on any questions from FHIP organizations or the FHAP agencies. (Tr 144-146, 11-3-05). Waheed testified that other employees in her office do the same FHIP and FHAP work, including Maria Cestaro and Cristina Rodriguez. She said Dinorah Velez does the same FHIP and FHAP work in the New Jersey Office. (Tr 146-147, 11-3-05).

Waheed testified that she does not formulate any management programs or policies; is not involved with work on HUD's budget submissions or proposals for new programs; and does not assess program effectiveness. (Tr 138, 11-3-05).

Waheed testified that she uses various guidelines including the payment standard provided by HUD for FHAP monitoring and the negotiated contract in FHIP monitoring. She is allowed to deviate from the FHAP monitoring payment schedule to recommend higher payment, but only based on HUD guidance and supervisory approval. Any deviation requires her supervisor's approval, she said. Waheed testified that 100% of her recommendations are based on established procedures and precedents. (Tr 139-140, 11-3-05).

**Willie House-Bey**, a *nonexempt* GS-360 EOS, grade 12, FHEO, Baltimore, Maryland, testified his primary enforcement duties include investigation of discrimination complaints under Titles 8 and 6, § 504 of the Fair Housing Act while his program duties involve monitoring Voluntary Compliance Agreements (VCA) and reviews of housing authorities. (Tr 152-154, 11-3-05, Jx 5). House-Bey said that other employees in his office do the same work, including: Victoria Haines, Curtis McMeekin, Vonzell Cummings, Phyllis Weinstein, Tracy Barrington and Linda Gray. (Tr 158-159, 11-3-05). House-Bey stated that the full range of an investigation includes preparing an investigative plan, corresponding with the parties, conducting interviews, collecting documents and data, and completing the final investigation report with the finding or recommendation. (Tr 161-162, 11-3-05). He submits the final report to his supervisor and it goes to the Philadelphia Regional Office attorneys for the final determination. (Tr 162, 11-3-05, 11-3-05).

House-Bey has daily contact with Debra McGhee his first-line supervisor. He talks to her about investigations and she provides input or advice. (Tr 163, 11-3-05). House-Bey said that there is a 100-day time limit before cases become aged and while he notifies his supervisor of aged cases his supervisor is also notified by TEAPOTS which tracks case-times. (Tr 163-165, 11-3-05). House-Bey testified that he does not have any input into HUD's budget submissions; does not prepare reports on improving HUD's performance. (Tr 160, 11-3-05). He uses various guidelines in enforcement of Title 8 cases including laws and regulations, and the Investigator's Handbook. (Tr 159-160, 11-3-05). He said the Investigator's Handbook is very detailed and investigators are not allowed to deviate from the Investigator's Handbook and the guidelines and procedures. (Tr 160, 11-3-05).

**Vivienne Cardullo**, GS-360 EOS, grade 13, FHEO, Philadelphia, Pennsylvania, said that she has been employed at HUD since 1991 and a GS-13 for five or six years. Her first-line supervisor is Wayman Rucker. (Tr 42, 11-4-05). Cardullo said her primary duties were investigations of discrimination complaints under Title 8, ADA §§ 504 and 109. (Tr 43-44, 11-4-05). She said that the investigation of a complaint requires her to develop an investigative plan, it is submitted to her supervisor for review which is reviewed by legal. Thereafter, she conducts interviews of the respondent and witnesses, gathers evidence and analyzes the documents to determine whether there is cause to believe discrimination



took place. She compiles the data into a final investigative report and determination that is reviewed by her supervisor. The recommendation and final report are also reviewed by Rucker's supervisor and legal counsel. The report can be returned for more interviews or amendments or even if there is disagreement with the determination. (Tr 44-45, 11-4-05).

Cardullo testified that the difference between the work of a GS-360 EOS, grade 11 or grade 12, compared to the work of a GS-360 EOS, grade 13, is "[t]he complexity of the case . . . . number of issues . . . number of bases, or just the subject matter is more difficult." (Tr 46, 11-4-05). She said that all of the required investigation procedures are the same without regard to grade. (Tr 46-47, 11-4-05). Cardullo said that the 100-day goal for closing cases is strictly enforced for noncomplex cases, but is more difficult to meet with complex cases. (Tr 56-57, 11-4-05). She said that headquarters recently issued a target goal for complex cases of 180 days. (Tr 69-70, 11-4-05). She said that there are weekly and monthly reports reviewed by investigators at staff meeting regarding aged cases. (Tr 57, 11-4-05). According to her Employee Performance Evaluations (EPE), Ms. Cardullo said that for a rating of *fully successful* she must close an average of 1.5 cases per month or 18 per year and for a rating of *excellent* the investigator must close 2.5 cases per month, or 24 per year. (Tr 83-87, 11-4-05).

Cardullo testified that she did not formulate any management programs or policies does not work on budget submissions or proposals and does not assess any HUD programs for effectiveness. (Tr 45-46, 11-4-05).

Cardullo described the Investigator's Handbook as an extremely detailed guideline of procedures. She said that investigators are not allowed to deviate from the Investigator's Handbook without permission and her supervisor is a "stickler for doing things by the book." Cardullo said, for example, that if investigators do not exhaust all the ways to find a witness, then the supervisor will send back the report for corrections. (Tr 47-49, 11-4-05).

Cardullo testified that when formulating her investigative plan, she must decide what questions to ask for and what documents to request, "subject to review and change by the supervisor and up the line – chain of command, through legal." (Tr 49-50, 11-4-05). Cardullo testified that if she is conducting an on-site investigation and uncovers information that changes the direction of the case then she must call her supervisor and discuss the change because when it may cause put the case over 100-day deadline. (Tr 50, 11-4-05). Changes can include adding a basis or issue, allegation or a respondent. (Tr 54, 11-4-05). Cardullo testified that she must get supervisory approval for changes to the investigation. (Tr 55, 11-4-05). Cardullo said a grade 13 investigator's investigative plans are subject to the same approval chain. (Tr 45, 11-4-05).

Cardullo testified that the methods listed in the Investigator's Handbook for locating individuals is "pretty exhaustive." (Tr 63-65, 11-4-05). She said if the investigator does something different, "[y]ou can get in trouble." (Tr 64, 11-4-05). Cardullo explained that investigators are evaluated on conducting investigations, preparing final investigative

reports and case files. (Tr 64, 11-4-05). Cardullo said that the Investigator's Handbook section entitled "Time Frame for Completing the Investigation" includes the 100-day time limit which is based on the statute. (Tr 73-75, 11-4-05). In the Investigator's Handbook, she identified a series of checklists and fill-in-the-blank forms to help investigators track the progress of an investigation. (Tr 75, 11-4-05). There are sample investigative reports. (Tr 75, 11-4-05).

## CONTENTIONS OF THE PARTIES

### I. HUD's Contentions

HUD contends as follows:

The GS-360 EOS positions, grades 12 through 15 meet the *primary duties test* under the administrative exemption. HUD's classifier, Marlene Thrash, testified that she analyzed the headquarters and field GS-360 EOS position descriptions (PD) against the administrative exemption criteria in her FLSA evaluation. While she did not have an opportunity to interview incumbents or their supervisors, the supervisor's signature on the PD cover sheets verify that the GS-360 EOS PDs accurately reflect their actual duties. Thrash's testimony established that the GS-360 EOSs have the responsibility to develop recommendations and to change management policies and practices. Thrash said that the work performed by GS-360 EOS is of great significance because errors would be costly to HUD. For this reason, GS-306s' jobs are highly complex and highly demanding, and their decisions require a great deal of judgment and creativity.

Floyd O. May, General Deputy Assistant Secretary of the Office of Housing and Equal Opportunity (FHEO) testified that GS-360 EOSs' discrimination investigations have a profound impact on HUD's enforcement policy in matters involving zoning, pattern and practice and lending cases.

Therefore, pursuant to 5 CFR § 551.206, GS-360 EOSs significantly affect the execution of management programs or policies when their work involves obtaining compliance with HUD policies or when making significant determinations furthering HUD's operations and program objectives. This work fully supports the conclusion that GS-360 EOS work meets the *primary duties test* for FLSA exemption classification.

The record establishes that the GS-360 EOS positions meet the *nonmanual work test* because their work is office work or other nonmanual work which is intellectual and varied in nature or of a specialized or technical nature that requires considerable special training, experience and knowledge. Thrash testified that she classified GS-360 EOSs work as meeting the nonmanual work test because GS-360 EOSs are required to have expert skills in fact-finding, analysis, problem solving and writing.

Barbara Knox, Director, FHEO Region 5, testified on the intellectual nature of GS-360 EOSs' work. She described the special HUD investigator training and specialized

knowledge regarding case analysis that these employees must have.

Debra Bouziden, Enforcement Branch Chief, Miami, Florida, testified that GS-360 EOSs encounter diverse issues on a daily basis.

Floyd May, General Deputy Assistant Secretary, FHEO, testified that GS-360 EOSs are expected to possess analytical skills and to make critical judgments pertaining to fair housing investigations. May said GS-360 EOSs are expected to review complex data such as bank and computer records and witness testimony. Thus, there is no doubt the *nonmanual test* is met for GS-360 EOSs.

The record establishes that the GS-360 EOS positions meet the *discretion and independent judgment test* because these employees frequently exercise discretion and independent judgment under only general supervision. The FHEO Investigator's Handbook and the investigators' Investigation Plan that GS-360 EOSs use in performing their work constitute mere guidelines within which GS-360 EOSs continually exercise discretion and independent judgment within the meaning of the applicable CFR provisions.

Candace Tapscott, Supervisory Equal Opportunity Specialist, testified that the GS-360 EOSs, grade 12s, that she supervises, work independently and with a free rein as top level FHEO investigators.

Vicki Ray, FHEO Center Director, Louisville, Kentucky, testimony also verifying that GS-360 EOSs exercise discretion and independent judgment while working with limited supervision, and they complete investigations independently at the 100% level. Ray said that the Investigative Plan is a tool or guide, and not a "one size fits all" document, but a living document which changes during the investigation. Ray said each discrimination complaint is different and she does not see the Investigative Plan until she receives the investigator's complete file.

Bouziden testified that GS-360 EOSs work on their own time frames, set their own schedules and produce complete investigative files. Bouziden said the Investigative Plan is a roadmap or guide, and it is not a "bible." The Investigative Plan is developed by the investigator and subject to modifications, she said. She said investigators make their own decisions on how to handle investigations. She said the Investigator's Handbook is not a rigid document because each case is unique and requires a unique approach. She said the Investigator's Handbook's terms are not mandatory, but they are to be interpreted as optional.

These facts establish that the work of GS-360 EOSs meets the *discretion and independent judgment test*.

The evidence presented at hearing concerned GS-360 EOSs, grade 12, with only a minor amount of evidence concerning GS-360 EOSs, grade 13s, and none concerning GS-360 EOSs, grades 14 and 15. The evidence establishes that the GS-360 EOS, grade

13, position is exempt. Therefore, it follows that the GS-360 EOS, grades 14 and 15, must be exempt. The Parties agreed that if the GS-360 EOS, grade 12, position was found to be exempt, then the GS-360 EOS, grade 11 position must be exempt as well. The GS-360 EOS, grades 13, 14 and 15, PDs are in the record and verified by the supervisors' signatures. Since the record is devoid of evidence as regards grades 14 and 15, the Arbitrator may extrapolate the available evidence regarding the grade 13 position and find that the GS-360 EOS, grades 14 and 15 positions are nonexempt.

The facts make it clear that GS-360 EOS, grades 12 and 13 positions, are FLSA exempt. Accordingly, HUD requests that the Arbitrator deny AFGE's grievance and remedy in its entirety.

## II. AFGE's Contentions

The Union contends as follows:

**First**, AFGE argues, HUD failed to prove that it made a proper classification determination on GS-360 EOSs based on the employees' actual job duties. The burden of proof rests with DOL to show that each employee is properly classified and exemptions must be construed narrowly and only to employees who clearly fit the terms and spirit of the law. If there is reasonable doubt regarding an employee's FLSA exemption then the employee should be classified as nonexempt. The employee's actual job duties must be inspected, not just the employee's grade or PD. FLSA exemptions are an affirmative defense and must be pled and proved by HUD. The Union's burden to show reasonable doubt regarding an FLSA exempt classification is not heavy, especially since OPM regulations provide that an agency may designate an employee exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria.

Initially, HUD did not correctly determine that the GS-360 EOS, grades 11, 12, 13, 14 and 15, met one or more of the exemption criteria. Furthermore, HUD did not meet its burden of proving that GS-360 EOS employees are exempt under the Administrative exemption. In the instant grievance, HUD stipulated that it originally classified employees based solely on grade level, as *per se* FLSA violation. HUD stipulated that the agency classified employees in the exempt classification based solely on position descriptions which is also a *per se* FLSA violation. Position descriptions may not be relied on for FLSA determinations, but rather specific and day-to-day job duties must be analyzed and clearly support an exemption. HUD and the agency witnesses admitted that FLSA classification determinations were not based on GS-360 EOSs' actual job duties as required by OPM regulations and policy. For this reason, HUD never properly classified the GS-360 EOSs and the Arbitrator can very reasonably conclude that the employees are non-exempt during the time of the grievances.

The clear testimony revealed HUD classifiers never examined actual job duties, as required by OPM written guidance, another *per se* FLSA violation. HUD may not now claim

that reliance on OPM regulations or guidance to avoid liquidated damages. HUD's failure to review the challenged FLSA classifications during the pendency of the grievances amounts to a shirking of its responsibilities. The testimony of Marlene Thrash, HUD Classifier, establishes that HUD did not make a proper FLSA classification determination of GS-360 EOSs because she admitted that she did not interview any employees on their actual job duties compared to their PDs. Specifically, Thrash said that she never asked employees about their actual job duties and her determinations were based solely on PD's. HUD did not verify the accuracy of the PDs. Some PDs were created in anticipation of this litigation and one was created in February 2005 after Thrash's determinations. Thrash's testimony did not support a determination that the work of GS-360 EOS investigators, grade 12, satisfied any part of OPM and DOL's regulations concerning FLSA exemptions and she did not testify as to the actual day-to-day job duties of GS-360 EOSs. She relied on unverified and incorrect PDs in her determinations and she did not examine GS-360 EOS, grades 9, 11, 13, 14 and 15 at all.

Thrash had only been with HUD for 10 months when Louis Anderson, her supervisor, gave her the assignment to complete the GS-360 EOS FLSA classification determinations. She said she did not consult DOL regulations or review case law and she was not familiar with the document *How to Make Exemption Status Determinations Under the Fair Labor Standards Act*. She said that she did not verify the PDs' accuracy and she did not interview the incumbents and supervisors. Thrash said that GS-360 EOSs carry out HUD's mission including the HUD's function to make sure that housing is free of discrimination and affordable. She was familiar with the line/staff distinction and said that GS-360 EOSs could be considered line employees.

Thrash's testimony establishes that a proper classification determination for GS-360 EOSs was never made. Accordingly, HUD failed to prove that the GS-360 EOSs' primary duties fit within the Administrative exemption.

**Second**, AFGE argues, HUD failed to prove that GS-360 EOSs' actual job duties satisfy the Administrative exemption. It is HUD's burden to prove that these employees are exempt and that the exemptions are to be narrowly construed against the employer.

HUD failed to present any evidence regarding GS-360 EOS bargaining unit employee-grievants in grades 11, 14 and 15, and accordingly those positions are conceded by HUD for the entire grievance period and prospectively. HUD failed to present evidence about GS-360 EOS job duties during the last 5 years and instead limited its testimony to duties from the mid-1990s and earlier, and very recently. Therefore, all other time periods have been conceded by HUD.

AFGE's brief reiterates the testimony of HUD's witnesses Floyd O. May, General Deputy Secretary, FHEO; Candace M. Tapscott, Supervisory EOS, FHEO, Miami; James N. Sutton, Regional Director, FHEO; and Barbara M. Knox, Director, FHEO, Region 5. AFGE contends that this testimonial evidence has very limited or no probative value because HUD's witnesses are not currently GS-360 EOSs or GS-360 EOSs' first-line

supervisors with actual knowledge of GS-360 EOSs day-to-day job duties. Furthermore, every HUD witness testified that the GS-360 EOSs carry out HUD's mission and function. When employees perform activities that carry out the ongoing mission and day-to-day functions of the agency, rather than its management policies, such activities cannot be viewed as the types of duties contemplated by the regulations as the basis for an FLSA exemption. Therefore, these employees cannot be found to be FLSA exempt as a *bona fide* administrative employee under the FLSA. In this regard, HUD's witnesses May, Tapscott, Ray, Knox and Bouziden all testified that GS-360 EOSs perform activities which carry out HUD's mission and day-to-day functions.

AFGE's brief reiterates the testimony of HUD's witnesses Vicki Ray, Center Director, FHEO, Louisville and Debra Bouziden, Enforcement Branch Chief, FHEO, Miami. AFGE argues that these HUD first-line supervisor witnesses were not credible and did not testify that GS-360 EOSs performed any duties that satisfy the three-part Administrative exemption test.

**Third**, AFGE argues that it presented sufficient evidence to prove that the GS-360 EOSs' actual job duties do not fall under the Administrative exemption based on OPM and DOL regulations. Previous arbitration awards, involving challenges to other federal agencies' FLSA classifications, have examined: the meaning of 5 CFR § 551.206; the very clear line between production and administrative work; and the actual duties performed by the employees measured against the CFR standards.

The case *American Federation of Government Employees and Department of Health and Human Services, Social Security Administration, Baltimore, MD, May 3, 1991* (Segal, Arb.) (*Segal I*) held that following policies is not synonymous with executing policies, which is a higher level activity. GS-360 EOSs do not execute policy. They follow policy. The distinction between production and administrative work is defined in 29 CFR § 541.201(a). The regulation provides that production employee are involved in nonexempt work and performing activities to carry out the mission and day-to-day functions of the employer. In the instant case, GS-360 EOSs are carrying out HUD's mission and day-to-day functions.

The case *American Federation of Government Employees, AFL-CIO and Department of Health and Human Services, Social Security Administration, January 10, 1995* (Vaughn, Arb.) (*Vaughn*), involved the FLSA classification of Computer Specialists and was a continuation of *Segal I*. The Arbitrator found employees carrying out the mission of the agency inherently fail the primary duties test of the Administrative exemption.

Employees in similar positions have been found to be FLSA nonexempt under the primary duty test including municipal-government supervisory-housing inspectors based on the employees' time spent in production work which prevented the employees from being Administrative employees. These employees were found not to exercise discretion

and independent judgment because they were constrained in their power to act, without higher approval. Similarly, state bureaus of criminal-investigations investigators were found to perform the employer's production work and not the employer's Administrative work based on the employees' primary duties.

In other public and federal sector cases involving FLSA classifications, employees working as: Environmental Conservation Officers, Environmental Investigators, Forest Rangers, deputy United States Marshals and Border Patrol Agents have all been found by the courts as performing investigative work which was the business of the employer and not performing Administrative work under the FLSA. Similarly, the courts have found that investigative work is manual labor and not office or nonmanual work under the regulations. Likewise, HUD's GS-360 EOSs conduct on-site investigations which are manual work.

HUD stresses the GS-360 EOSs' compliance work as a basis for these employees' Administrative employee exempt classification, but OPM and the courts have specifically rejected HUD's use of the term. OPM regulations include definitions of the critical terms and establish that the employee must be engaged in program management to be FLSA exempt Administrative employee. GS-360 EOSs perform production functions which are distinct from management or general business functions.

The Arbitrator is allowed to consider similarly situated non-exempt employees. In this regard, GS-360 EOSs are like Background Investigators as discussed in *DOL Opinion Letter 2005-21* (August 19, 2005) and Equal Employment Opportunity Commission (EEOC) Equal Opportunity Specialists and Investigators reclassified in a 1995 settlement as FLSA nonexempt. In addition, the DOL PDs of nonexempt GS-360 EOSs describe duties very similar to the GS-360 EOS Grievants. HUD has already reclassified several GS-360 EOSs, grade 11 and 12, as FLSA non-exempt and the record demonstrates that these nonexempt employees are performing the same jobs as the GS-360 EOS now classified as exempt employees.

AFGE reiterates the testimony of Grievants Johannsen, Mathis, Kiebert, Waheed, House-Bey, Cardullo and Norton to support its claims regarding the actual job duties and day-to-day functions of HUD's GS-360 EOSs.<sup>4</sup> The Grievants' testimony establishes that GS-360 EOS investigators do not do any work that significantly affects the formulation or execution of management programs and policies. Furthermore, the testimony establishes that GS-360 EOS investigators do not do any work that involves management, or general business functions, or supporting services, or substantial importance to the organization serviced. Their testimony establishes they are line, not staff, employees who produce HUD's final product. Finally, their testimony establishes that their job duties do not satisfy the nonmanual work test because the work is not intellectual and varied, or specialized and technical. Even if their work is nonmanual work, GS-360 EOSs do not meet the

---

<sup>4</sup> Norton did not testify, but the parties stipulated that her testimony would be similar to the other GS-360 EOS, grade 12 who did testify. (Tr 209-210).

Administrative exemption because the tasks they accomplish do not meet the primary duty test.

GS-360 EOS investigators do not satisfy the discretion and independent judgment test because they do not exercise these job duties with respect to significant matters because GS-360 EOS investigators follow HUD guidelines, regulations and precedent.

**Fourth**, AFGE argues that the 10 PDs jointly submitted to the Arbitrator on February 8, 2006 establish that HUD evaluated the PDs and concluded that the incumbents were FLSA nonexempt and not FLSA exempt, as originally classified. These PDs establish a HUD admission of prospective and retroactive liability on the exemption status of these employees. The documents also establish that identical GS-360 EOS PDs are classified as FLSA exempt and non-exempt at the same time. Therefore, this evidence establishes that HUD's classification of the incumbents FLSA non-exempt is either binding on HUD or creates sufficient doubt to find that the incumbents in both positions are FLSA non-exempt, as provided by OPM and DOL regulations.

**Fifth**, AFGE argues that its exhibits Ux 1-35 exemplify the fact that GS-360 EOSs are improperly listed as FLSA exempt because GS-360 EOSs carry out HUD's mission and day-to-day functions, and GS-360 EOSs do not qualify as *bona fide* administrative employees under the FLSA.

**Sixth**, AFGE argues that HUD violated laws and policy on Record Retention when it shredded Thrash's notes and destroyed or spoiled other documents and information in anticipation of litigation. These documents and information are or were available to HUD, but HUD has not or cannot produce them now. These facts form the basis for an adverse inference against HUD. The destruction of records, by a party on notice that the records are required in litigation, is unauthorized and is grounds for sanction by a third party.

In conclusion, AFGE argues HUD has not met its burden of proof to show that the GS-360 EOSs are FLSA exempt. HUD's evidence is neither probative nor controlling and the Agency committed *per se* FLSA violations requiring a finding against the Agency pursuant to OPM regulations. Furthermore, HUD has conceded all GS-360 EOS, grade 11, 12 and 13, as FLSA nonexempt based on the after-acquired evidence reflected in the 10 PDs. Other documents compel a finding in AFGE's favor including: the extremely detailed investigatory guidelines GS-360 EOS must follow; HUD PDs which are nearly identical to DOL's non-exempt GS-360 EOSs investigators; and the wholesale reclassification as FLSA non-exempt of EEOC's Equal Employment Specialists who are similarly situated employees.

Therefore, AFGE concludes, the preponderance of evidence shows that all GS-360 EOSs are FLSA non-exempt and they are entitled to proper compensation. For the foregoing reasons, AFGE requests that the Arbitrator find in its favor on the grievances.



## DECISION AND ORDER

OPM's regulation at 5 CFR 551.202(c) provide that "the burden of proof rests with the agency that asserts the exemption." Therefore, the burden of proof to prove that GS-360 EOS, grades 11, 12, 13, 14 and 15 are FLSA exempt under the administrative employee criteria is on HUD. For the reasons discussed below, the Arbitrator finds that HUD has failed to meet its burden of proof that GS-360 EOS investigators are exempt from the FLSA under the administrative exemption. The Arbitrator also finds that the evidence supports the conclusion that GS-360 EOS, grades 12, 13, 14 and 15, are FLSA non-exempt based on actual duties and responsibilities that they perform.

## STATUTORY AND REGULATORY BACKGROUND

The Fair Labor Standards Act of 1938, 29 USC § 201, *et seq.* (FLSA or Act) provides for payment of overtime premium pay to a covered employee at the rate of not less than one and one-half times their straight time rate when the employee works in excess of 40 hours in an administrative workweek. Pursuant to the FLSA, employees are classified as exempt, that is not subject to the overtime premium pay requirements, or nonexempt, that is subject to the overtime premium pay requirements. Initially, the FLSA did not apply to Federal employees, but the Act's coverage was extended to Federal employees by Congress in 1974. As a result of the 1974 amendments, private sector and public sector (state, county and municipal) employees are subject to the administrative authority of the Department of Labor (DOL) for effectuation of the FLSA. However, the FLSA at 29 USC § 204(f) provides that the Office of Personnel Management "is authorized to administer the provisions of [the FLSA] . . . with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority)."

The legislative history of the 1974 Amendment indicates that the Committee on Education and Labor intended that the Civil Service Commission, now the OPM, "will administer the provisions of the [FLSA] in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." Based on the administrative responsibilities imposed by the FLSA, OPM has developed regulatory requirements and interpretive guidance for the classification of federal employees as exempt or nonexempt under the FLSA.

The FLSA does not define the scope of the exemptions, but instead authorizes the Secretary of Labor to do so by promulgation of regulations. The Department of Labor (DOL) has established a long test and a short test to determine whether an employee is Exempt from the overtime provisions of the FLSA. Satisfaction of the requirements of either test is sufficient to establish the employee's exempt status. Both tests focus on: the duties, responsibilities, and degree of independence from supervision (duties test); and the method and amount of payment (salary basis test).

As a practical matter, the salary basis test is rarely applied in recent years when determining whether the employee is exempt. This is because few employees considered for FLSA exemption earn less than the weekly minimum salary levels established in DOL's regulations. Instead, the employee's method of compensation (salaried or hourly) and the job duties are usually the focus of the determination of the employee's FLSA classification. The GS-360 EOS positions at issue in this proceeding receive compensation above the FLSA weekly salary minimums. Furthermore, neither Party has raised any issues regarding the FLSA weekly salary minimums. Thus, in the presentation of their cases, the Parties have focused on the analysis of the nature of the employees' day-to-day job duties.

The Arbitrator's review of HUD's classification of the GS-360 EOS positions as FLSA exempt is bounded by the applicable Code of Federal Regulations (CFR) promulgated by DOL and OPM, and guidance in OPM's directives, including, for example, in Federal Personnel Manual (FPM) System Letter No. 551-7 (FPM 551-7).<sup>5</sup> The OPM regulations and guidance establish that an agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria. (5 CFR § 551.201). Furthermore, each employee is presumed to be FLSA nonexempt and the exemption criteria must be narrowly construed and applied only to employees who are clearly within the terms and spirit of the exemptions. (5 CFR § 551.202(a) and (b)). The burden of proof rests with the agency that asserts the exemption. (5 CFR § 551.202(c)). If there is a reasonable doubt as to whether an employee meets the exemption criteria, then the employee must be classified nonexempt. (5 CFR § 551.202(d)). An agency's designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. (5 CFR § 551.202(l)).

The Act and OPM's regulations establish that an employee employed in a *bona fide* executive, administrative or professional capacity is exempt from the FLSA's provisions. (29 USC § 213(a)(1); 5 CFR §§ 551.205, 551.206 and 551.207). In the instant dispute, HUD asserts that the GS-360 EOS positions, grades 11 through 15, "meet the criteria for an Administrative Exemption from the coverage of the FLSA based on the duties that [the employees] . . . actually perform."<sup>6</sup> (HUD's Brief p. 1).

In this regard, an employee's exemption from the overtime provisions of the FLSA is determined by comparing the actual job duties and responsibilities performed by an employee to the FLSA exemption criteria for executive, administrative, and professional employees found in 5, CFR §§ 551.205, 551.206 and 551.207. HUD asserts that GS-360 EOSs, grade 11 through 15, are FLSA exempt based on the administrative employee

---

<sup>5</sup> Although the FPM has been abolished, OPM has maintained that the terms defined in FPM 551-7 have well-established interpretations that are still current. (See for example: OPM FLSA Decision No. F-0083-07-01, June 22, 1998).

<sup>6</sup> On September 28, 2005 the Parties entered into an agency-wide settlement regarding the FLSA classification of GS-10 and below employees.

criteria. Therefore, this analysis focuses on the scope of the administrative employee criteria for exemption at 5 CFR § 551.206, asserted by HUD as the basis for the exempt classification of GS-360 EOS bargaining unit employees in grades 11, 12, 13, 14 and 15.

DOL regulations define an employee employed in a *bona fide* administrative capacity as used in FLSA § 13(a)(1) at 29 CFR § 541.2. DOL's regulations detail the rules as to FLSA exemptions of these employees at 29 CFR § 541.201, *et seq.* The elements of the administrative employee exemption include: the performance of work directly related to management policies or general business operations (29 CFR § 541.205); focus on the employee's primary duties (29 CFR § 541.206); and the exercise by the employee of discretion and independent judgment (29 CFR § 541.207).

DOL regulations specifically touch on the FLSA classification of public sector investigators. (29 CFR 541.203(j)). The specific applicable DOL's regulation states, in pertinent part:

[p]ublic sector . . . investigators of various types . . . generally do not meet duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met. (29 CFR 541.203(j)).

OPM's regulations define an administrative employee as "an advisor or assistant to management, a representative of management or a specialist in a management or general business function or supporting service." (5 CFR § 551.206). In addition, to meet the exemption criteria, the employee's duties must also meet all four of the following criteria: *primary duty test*; *nonmanual work test*; *discretion and independent judgment test*; and *80-percent test*. (5 CFR § 551.206(a), (b), (c) and (d)).

The *primary duty test* is met if the employee's work:

. . . [s]ignificantly affects the formulation of management programs or policies; or . . . [i]nvolves management or general business functions or supporting services or substantial importance to the organization serviced; or . . . [i]nvolves substantial participation in the executive or administrative functions of a management official. (5 CFR § 551.206(a)(1), (2) and (3)).

The *nonmanual work test* is met if the employee performs office or other predominantly nonmanual work which is:

. . . [i]ntellectual and varied in nature; or . . . [o]f a specialized or technical

nature that requires considerable training, experience, and knowledge. (5 CFR § 551.206(b)(1) and (2)).

The *discretion and independent judgment test* is met if the employee:

frequently exercises discretion and independent judgment, under only general supervision in performing normal day-to-day work. (5 CFR § 551.206(c)).

The *80-percent test* is in addition to the *primary duties test* that applies to all employees and provides:

General Schedule employees in positions properly classified at GS-5 or GS-6 (or the equivalent level in other comparable pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test. (5 CFR § 551.206(d)).<sup>7</sup>

Specifically applicable to the GS-360 EOS investigator positions in dispute, OPM has stated, OPM's regulations rather than DOL's regulations govern the application of the FLSA to an employee's position, but to be valid, OPM's regulations must be consistent with DOL's regulations. (*Billings v. U.S.*, 332 F.3d 1328 (Fed. Cir. 2003)) (*Billings*). Furthermore, OPM's guidelines must harmonize with the FLSA's origin and purpose as well as DOL's regulations. (*Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985)).

#### **HUD'S FLSA CLASSIFICATION OF GS-360 EOS BASED ON GRADE**

The parties stipulated that,

1. Sometime in the past, prior to the filing of the grievance, the Agency made FLSA determinations solely on grade. (Tr 10-12, 9-29-05).

AFGE argues that reliance solely on grade is a *per se* violation of the FLSA based on *AFGE v. OPM*, 821 F.2d 761(D.C. Cir. 1987) (*AFGE v. OPM*). At hearing, HUD presented no evidence or testimony regarding Stipulation 1, that HUD made FLSA determinations based solely on grade. Furthermore, HUD's brief is silent on AFGE's assertion of a *per se* violation of the FLSA based on the Agency's FLSA determinations based solely on grade.

In *AFGE v. OPM*, a challenge was made to OPM's regulation providing that all

---

<sup>7</sup> The *80-percent test* is not applicable to the GS-360 EOS positions at issue and was not argued by either Party.

federal employees classified as GS-11 or above were presumptively FLSA exempt. The regulation conflicted with a Labor Department regulation that stated that all employees are presumptively FLSA non-exempt. In resolving the conflict, the D.C. Circuit stated,

OPM must defer to the [Fair Labor Standards Act] so that any employee entitled to overtime compensation under [the Fair Labor Standards Act] receives it under the civil service rules. (*AFGE v. OPM*, at 770-71).

Therefore, as discussed above, an employee's exemption from the overtime provisions of the FLSA is determined by comparing the actual job duties and responsibilities performed by an employee to the FLSA exemption criteria, in this case for the administrative exemption criteria, at 5 CFR § 551.206.

Stipulation 1 establishes HUD did not classify GS-360 EOS employees as FLSA exempt by comparing their actual job duties and responsibilities to the administrative exemption criteria. For this reason, the Arbitrator finds HUD did not properly exempt GS-360 EOSs, grade 11, 12, 13, 14 and 15, bargaining unit employees from the FLSA when it classified these employees as exempt based solely on grade.

However, the Arbitrator's analysis does not conclude here.

#### **HUD's FLSA CLASSIFICATION OF GS-360 EOS BASED ON POSITION DESCRIPTIONS**

The parties' Stipulation 2 establishes that,

2. After the filing of the instant grievances, the Agency made a second FLSA determination for a number of [job] series. Regarding the [GS-360 EOS, grade 12, job series] . . . , the Agency . . . based that determination on the . . . position description.

Stipulation 2 must be read with the parties' Stipulation 3, which establishes that,

3. The Agency did not rely upon actual job duties for either the determination referenced in Stipulation 1. or 2.

AFGE argues that based on these "admissions," all bargaining unit employees have been presumed to be non-exempt for the past years. However, AFGE argues, OPM regulations at 5 CFR § 551.202(d) which provides that if there is a reasonable doubt as to whether an employee meets the FLSA exemption criteria, then the employee should be designated FLSA nonexempt.

Apparently, in expectation of AFGE's argument at arbitration, that HUD's FLSA determinations based solely on PDs was a *per se* violation of the FLSA, HUD called Marlene Thrash, Human Resources Staffing and Classification Specialist. According to

her testimony, Thrash was assigned to analyze the FLSA classification of GS-360 EOSs, grade 12, by a Branch Supervisor in HUD's Personnel office. She obtained copies of the two GS-360 EOSs' PDs, one for the field (Civil Rights Analyst) and one for headquarters (Equal Opportunity Specialist) and "reviewed the position descriptions and determined what the major duties were for these employees, and compared it to the definitions" in 5 CFR §§ 551.201-551.207.<sup>8</sup> Thrash determined that the GS-360 EOSs, grade 12, were FLSA exempt based on the administrative employee criteria. In reaching her conclusion, she relied only on the PDs and OPM's regulations. She said she did not verify the accuracy of the PDs; she did not review the actual job duties of the employees; and she was unfamiliar with the OPM's requirement that FLSA exemption status must be based upon the duties the employee actually performs rather than the PDs alone. Furthermore, the record establishes that Thrash never asked any GS-360 EOS employees about their actual job duties and responsibilities. Her determination was solely based on two GS-360 EOS, grade 12, PDs from 1992 and 1997 which neither HUD nor Thrash verified as accurate.

Thrash's final decision, that GS-360 EOS employees, grade 12, were FLSA exempt, was completed in February 2005. The Introduction section of her decision states,

[a]n issue has been raised concerning the FLSA coverage determination of a group of employees performing work described in the positions descriptions covering Equal Opportunity Specialist (EOS), GS-356-12, in HUD headquarters and EOS (Civil Rights Analyst), GS-360-12, in HUD field offices. (Ax 1).

Coming in February 2005, Thrash's decision on the "group of employees" was arguably prepared in anticipation of this litigation. (Ax 1). The record establishes that Thrash's FLSA classification review of the GS-360 EOS, grade 12 positions was cursory, incomplete, and based solely on unverified PDs dated 1992 and 1997. For all these reasons, Thrash's testimony and FLSA classification of the GS-360 EOS, grade 12, position is without material value.

What remains then is the undisputed and unchallenged fact that when HUD made its determination that the GS-360 EOS positions, grade 11, 12, 13, 14 and 15 were FLSA exempt, the Agency did not correctly determine the employees met the administrative employee criteria exemption because the Agency did not rely upon the employees' actual job duties and responsibilities. For this reason, the Arbitrator finds HUD did not properly exempt GS-360 EOSs, grade 11, 12, 13, 14 and 15, bargaining unit employees from the FLSA when it classified these employees as exempt based solely on position descriptions.

---

<sup>8</sup> The record establishes that the **working titles** of GS-360 EOSs employees include the job titles of: Equal Opportunity Specialist, Civil Rights Analyst, Lead-Equal Opportunity Specialist (usually grades 13, 14), Senior-Equal Opportunity Specialist (usually grade 15); and Equal Opportunity Investigator. The master list of bargaining unit employees, prepared by HUD at AFGE's request, uses only the job title Equal Opportunity Specialist for grades 11, 12, 13, 14 and 15.

## THE FLSA CLASSIFICATION OF GS-360 EOS, GRADE 11, 12 AND 13

The Agency asserts that GS-360 EOS, grades 11, 12 and 13 are FLSA exempt based on the administrative employee exemption criteria.<sup>9</sup> The administrative employee criteria at 5 CFR 551.206 govern whether an employee's position should be FLSA exempt. The employee's position is exempt if it meets the criteria at (a)(1), (2) *or* (3), the primary duty test, *and* (b) through (d).

AFGE presented testimony from 6 employee-witnesses who were GS-360 EOS, grades 12 and 13. HUD presented testimony from 7 management witnesses including: a Human Resources Specialist who analyzed GS-360 EOS FLSA classifications; a Supervisory EOS, FHEO; a Branch Chief, FHEO; a Center Director, FHEO; two Regional Directors, FHEO; and the General Deputy Secretary, FHEO. AFGE's witnesses were all working in the job series GS-360 EOS, grade 12 and 13. HUD's witnesses were all management officials within HUD's FHEO organizational component in which GS-360 EOSs work, although not all directly supervised the work of GS-360 EOSs. The following analysis of the FLSA classification of the GS-360 EOS, grade 11, 12 and 13 positions is based on the testimony of AFGE's and HUD's witnesses and the exhibits introduced through these witnesses.

### ***Primary Duty Test***

The primary duty test is met if the employee's work meets criterion (a)(1), (2), or (3).

**Criterion (a)(1)** deals with work that significantly affects the formulation or execution of management policies or programs. Work that affects the formulation or execution of management programs and policies recognizes that management policies and programs range from broad national goals, expressed in statutes or Executive Orders, to specific objectives of a small field office. Employees may actually make policy decisions or participate indirectly, through developing proposals that others act on. Employees who significantly affect the execution of management policies or programs typically are those whose work involves obtaining compliance with such policies by individuals or organizations, both within or outside the Federal Government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of program management that is planning, developing, promoting, coordinating, controlling, or evaluating operating programs. The administrative exemption applies to work directly related to assisting with the running or servicing of the agency or its

---

<sup>9</sup> The parties agreed that if the GS-360 EOS, grade 12, position was found to be FLSA nonexempt, then it followed that the GS-360 EOS, grade 11, position must also be FLSA nonexempt since that position was in the career ladder progression of grades 9, 11, 12. For this reason, HUD argued in its brief that "[t]he scope of this case is properly in GS-360-12 positions." (HUD's Brief p. 5). Subsequently, HUD's *sua sponte* review of the GS-360 EOS, grade 11, position found the position to be nonexempt.

customers. (5 CFR § 551.104).

All AFGE's GS-360 EOS employee-witnesses testified that they were not engaged in formulation or execution of management policies or programs, including evaluating operating programs of the organization.<sup>10</sup> (Tr 119, 146-148, 164, 9-29-05; Tr 138, 152-154, 11-3-05; Tr 45-46, 11-4-05). This testimony was un rebutted and unchallenged by HUD. The GS-360 EOSs testified that they were not engaged in obtaining compliance with program policies or determining the accomplishment of program objectives. Rather, they all testified that they were responsible for conducting day-to-day investigative duties leading to the draft investigative reports, known as determinations, regarding housing discrimination claims. These determinations find cause or no cause to believe that discrimination has occurred based on the investigation conducted by GS-360 EOSs.

The determinations are subject to extensive review by several supervisory levels and HUD's legal counsel. Based on the investigator's determination, a decision is made by HUD management in coordination with HUD's legal counsel on whether to remedy the alleged discrimination through enforcement procedures administratively or in court. The record establishes that the GS-360 EOSs' work significantly contributes to, but is not determinative of HUD's decisions on housing discrimination cases, since the final decisions were made by higher-level HUD managers and senior executives, and the Agency's legal counsel. The decisions on discrimination, reasonable cause or no cause to find discrimination, are based on the factual information presented in the GS-360 EOS's investigative reports. In this regard, the GS-360 EOSs' duties are fact finding in nature. Nearly all the GS-360 EOS employee-witnesses testified investigative or work that indirectly involved investigative work accounted for 90% of their work time. Other GS-360 EOS work described by GS-360 EOS employee-witnesses and HUD management-witnesses includes, for example: intake of complaints; compliance inspections; monitoring and investigation of housing units for compliance with and enforcement of federal and state housing program laws, rules and regulations. This work is broadly known as "program" work. (Tr 83-84, 10-11-05).

The GS-360 EOS employee-witnesses testified that none of the GS-360 EOSs is involved in phases of program management. This testimony was un rebutted and unchallenged by HUD's witnesses.

### ***The Administration/Production-Staff/Line Distinction***

At hearing and on brief, there was an extensive discussion, testimony and argument about the administration/production or line/staff distinction with regard to FLSA classifications. AFGE maintained that GS-360 EOS work was production or line work and therefore, the work fails to meet the primary duty test in criteria 5 CFR 551.206(a).

---

<sup>10</sup> Kiebert a GS-360 EOS, grade 13, at HUD's headquarters testified he participates in assessing HUD program effectiveness in a minor way. (Tr 162, 9-29-05).



Floyd O. May, General Deputy Secretary, FHEO, provided a succinct, clear description of GS-360 EOSs' work. May testified that the function of HUD's FHEO "is . . . to receive complaints of allegations of discrimination, and to provide for the elimination, through investigations, and to resolve housing disputes of discrimination." (Tr 34, 10-11-05). He said the GS-360 EOSs "are some of the people who carry out that mission and function." (Tr 34, 10-11-05). May said "the great majority of the [discrimination] cases that the department receives for investigation are single issue cases." (Tr 55, 10-11-05). He said the work of GS-360 EOSs "graduates to a greater degree of complexity the higher the grade level the specialist occupies." (TR 30, 10-11-05). He described the GS-360s work in relation to the statute and regulations they enforce as "ministerial" rather than "discretionary." (Tr 56, 10-11-05).

Debra Bouziden, Enforcement Branch Chief, FHEO, Miami, provided a simple, succinct testimony on GS-360 EOS work. She agreed that the mission of FHEO, to eradicate housing discrimination, was carried out by the GS-360 EOS and she agreed the GS-360 EOS duties were "[t]o investigate, conciliate, and close out cases is the day-to-day function of FHEO." (Tr 101, 11-3-05). With similar clarity, Marlene Thrash, Human Resources Specialist, who is a trained FLSA classifier, testified that the GS-360 EOSs are carrying out HUD's mission. (Tr 66, 9-29-05).

The GS-360 EOSs employee-witnesses testified that they carried out HUD's mission and that they were production or line employees. For its part, HUD never refuted this testimony.

The evidence establishes that GS-360 EOSs' primary duties and responsibilities are those of a production or line worker carrying out HUD's mission. The evidence also establishes that in carrying out HUD's mission to eradicate housing discrimination, GS-360 EOS employees do not significantly affect the formulation or execution of management programs or policies as described in 5 CFR § 551.206(a)(1).

Therefore, for these reasons and based on the record developed by the parties, the Arbitrator finds that the GS-360 EOSs' work does not meet criterion (a)(1).

**Criterion (a)(2)** involves general management or business functions or supporting services of substantial importance to the organization serviced.

In addition to the difficult and complex analytical functions involved in general management, that is budgeting or financial management, general management, support services include services ranging from automated data processing to the procurement and distribution of supplies. Support may also entail providing expert advice in a specialized subject-matter field; assuming facets of the overall management function; or, representing management in business functions such as determining the acceptability of goods or services, or authorizing payments. The organizational location does not change service functions into non-exempt production functions.

To warrant an FLSA exemption, such work must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced. (5 CFR § 551.104).

The GS-360 EOSs' work in HUD's civil rights programs in the areas of investigation, enforcement, compliance and operations are, in the broadest sense, staff support functions in that their work assists management in achieving the HUD's mission to increase home ownership, support community development and increase access to affordable housing free from discrimination. The GS-360 EOSs' work, especially in the performance of investigations, entails the application of specialized subject-matter knowledge and skills regarding investigative techniques. GS-360 EOS investigative work is fundamentally fact-finding. For the reasons discussed in criterion a(1) their day-to-day work *accomplishes* the HUD's mission. This work is production or line work.

The record establishes that the GS-360 EOSs' work is difficult and complex and involves analytical functions of substantial importance to HUD. However, their work is not administration or staff work that involves HUD's general management or business functions or supporting services.

Therefore, the Arbitrator finds that the GS-360 EOSs' work does not meet criterion (a)(2).

**Criterion (a)(3)** involves substantial participation in the executive or administrative functions of a management official.

Work involving participation in the functions of a management official includes employees, such as secretaries and administrative assistants, who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such assistants must have knowledge of the policies, plans, and views of the supervisor and must be delegated and exercise substantial authority to act for the supervisor. (5 CFR § 551.104).

HUD does not argue that GS-360 EOSs, at any grade level, perform work involving participation in the functions of a management official. None of HUD's witnesses testified that GS-360 EOSs, any at grade, perform this type of work. The testimony of the AFGE employee-witnesses establishes that none of the GS-360 EOSs, at any grade, perform this type of work.

Therefore, for these reasons, the Arbitrator finds that the GS-360 EOSs' work does not meet criterion (a)(3).

### ***Nonmanual duty test***

The nonmanual work test is met when the employee performs office or other predominantly nonmanual work which meets either criterion (b)(1) or (b)(2).

**Criterion (b)(1)** covers work that is intellectual and varied in nature. Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work involving mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized procedures, or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting or innovating techniques and procedures, interpreting findings, and selecting and recommending the best alternative from among a broad range of possible actions. (5 CFR § 551.104).

The testimony of AFGE's GS-360 EOS employee-witnesses and HUD's management and supervisor witnesses and the exhibits established the following regarding GS-360 EOS criterion (b)(1).

Most GS-360 EOS investigative work is based on standardized guidelines, procedures, guidelines and/or precedents. For example, every witness testified that the basic tool of the GS-360 EOS is HUD's Title 8 Handbook (Investigator's Handbook). In particular, the Investigator's Handbook contains the specifics and details of the requirements of housing discrimination investigations, including references to the statutory 100-day deadline for investigations to be completed. This deadline for the completion of investigation supports the conclusion that GS-360 EOSs are production workers. Furthermore, the Investigator's Handbook requires that GS-360 EOSs prepare an Investigative Plan at the start of each case. The enforcement of the details of this work requirement vary from office to office, but according to the Investigator's Handbook and the testimony of several witnesses, both AFGE's and HUD's, the Investigative Plan is subject to supervisory approval and must be input to TEAPOTS for supervisory tracking. In addition, the progress of the investigation must be continually updated for supervisory review. In practice, some HUD offices may stray from this requirement and the work processes of the GS-360 EOS in those offices may vary from the requirement, but the clear intent of the Investigator's Handbook is to provide supervisory oversight of all aspects of GS-360 EOSs' investigations. For the most part, the record establishes that GS-360 EOS investigative work, as well as other program work, is subject to supervisory oversight and scrutiny through TEAPOTS.

The record also establishes that GS-360 EOSs must remain current and aware of changing conditions and interpreting the fact and evidence they uncover during an investigation, including, for example: identifying leads, new witnesses, new issues and documents. In the conduct of investigations, the GS-360 EOS must continually explore the facts presented in the case by piecing together the information gathered, but the selection of courses of action are driven by established standards and guidelines in law, rule, regulation and the Investigator's Handbook. In this regard, the GS-360 EOS work is performed within the confines of well-established techniques and does not require or permit

selecting, adapting, and applying novel principles or approaches. Much of the GS-360 EOS work is standardized in both the approach to investigations and the drafting of the determinations by the GS-360 EOSs.

The determinations, cause or no cause to believe there has been discrimination, are subject to extensive review by several layers of management and HUD's legal counsel. The testimony established draft determinations are often revised by these higher levels of management. While requiring the application of a high degree of skill and knowledge, the GS-360 EOSs have little discretion or opportunity to adapt innovative techniques, approaches and procedures. In this context, May's testimony, that the work of GS-360 EOS is "ministerial," best describes the distilled essence of their day-to-day duties. (Tr 56, 10-11-05).

Therefore, while GS-360s EOS day-to-day duties may be intellectual and varied in nature based on the diversity of housing discrimination investigations issues they are assigned, they rely on standardized procedures, guidelines and precedents and they do not adapt or innovate techniques and procedures. Furthermore, their investigative findings, reported in draft-determinations subject to higher level approval, recommend that there is either cause or no cause to believe discrimination has occurred.

Therefore, for these reasons, the Arbitrator finds that the GS-360 EOSs' work does not meet criterion (b)(1).

**Criterion (b)(2)** covers work of a specialized or technical nature that requires considerable specialized training, experience, and knowledge.

Work meeting criterion (b)(2) requires specialized knowledge of a complex subject matter and of the principles, techniques, practices and procedures associated with that subject-matter field. This knowledge characteristically is acquired through considerable on-the-job training and experience in the specialized subject-matter field, as distinguished from professional knowledge characteristically acquired through specialized academic training. (5 CFR § 551.104).

Several AFGE GS-360 EOS employee-witnesses testified that the principles, techniques, practices and procedures for the conduct of their housing investigations, which constituted 90% of their work time, were contained in the Investigative Manual. The record established that other work performed by GS-360 EOSs, known as program work, includes, for example: complaint intake, a docketing function; housing-facility compliance inspection, an inspection function; interviewing witnesses, an investigatory function; collection and examination of documents and other evidence, an investigatory/research function; and enforcement of federal and state housing program laws, rules and regulations, an enforcement function. These day-to-day GS-360 EOS job duties require specialized knowledge of complex subject matters and of the principles, techniques, practices and procedures associated with eradicating housing discrimination.

Regarding specialized knowledge, the testimony of both of AFGE's GS-360 EOS employee-witness and HUD's supervisors and managers established that the GS-360 EOS work requires knowledge of: Title VI of the Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1968; Section 504 of the Rehabilitation Act; Section 3 of the Housing and Urban Development Act of 1968; Section 109 of the Housing and Community Development Act of 1974; relevant Executive Orders, and regulations concerning fair housing compliance and enforcement; and knowledge of investigative techniques and procedures. This knowledge coupled with investigative skills is applied to the full range highly sensitive, specialized housing discrimination investigations. The in-depth practical knowledge required to perform the full range of work, especially the investigative work, typically comes from several years of on-the-job training and experience. Over the years that span the GS-360 EOS career ladder and competitive promotions, the GS-360 EOS learns, develops and sharpens his or her knowledge of the principles, techniques, practices and procedures to be applied to housing discrimination investigations. The testimony of both AFGE and HUD's witnesses established that the complexity of investigations and other work increases with the GS-360 EOS's grade level.

Therefore, for these reasons, the Arbitrator finds that the GS-360 EOSs' work meets criterion (b)(2).

### ***Discretion and independent judgment test***

Work meeting **Criterion (c)** requires the employee to frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

Under this criterion, discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decisions are not necessary to support exemption. The decisions made as a result of the exercise of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and that on occasion the decisions are revised or reversed after review, does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption. Work reflective of discretion and independent judgment must meet the three following criteria:

- (1) The work must be sufficiently complex and varied so as to customarily and regularly require discretion and independent judgment in determining the approaches and techniques to be used, and in evaluating results. This precludes exempting an employee who performs work primarily requiring skill in applying standardized techniques or knowledge of established procedures, precedents, or other guidelines which specifically govern the employee's action;

(2) The employee must have the authority to make such determinations during the course of assignments. This precludes exempting trainees who are in a line of work which requires discretion but who have not been given authority to decide discretionary matters independently; and

(3) The decisions made independently must be significant. The term "significant" is not so restrictive as to include only the kinds of decisions made by employees who formulate policies or exercise broad commitment authority. However, the term does not extend to the kinds of decisions that affect only the procedural details of the employee's own work, or to such matters as deciding whether a situation does or does not conform to clearly applicable criteria. The exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making a decision after considering the various possibilities.

Decisions made as the result of independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decisions are subject to review, and may be revised or reversed, does not mean an employee is not exercising discretion. (5 CFR § 551.104).

The record establishes that GS-360 EOSs' work independently for the most part and are only occasionally teamed up with another GS-360 EOS or work in larger teams for compliance inspections. However, as described under criterion (b)(2), they apply approved procedures, guidelines and techniques following, among other guidelines the Investigator's Handbook and their Investigative Plan for the case, and they have limited discretion within those approved procedures, guidelines and techniques. For example, the Investigator's Handbook states, "[o]ne of the most important decisions an investigator makes in planning an investigation is determining the scope of the investigation." (Section 8024.1, Chapter 7, page 8). Furthermore, the Investigator's Handbook states, "[t]he investigator must make these decisions on a case-by-case basis in consultation with his or her supervisor." These provisions establish the decisions with regard to the Investigative Plan and the ongoing conduct of the investigation must be made in consultation between the GS-360 EOS and the supervisor. In another section, the Investigator's Handbook states,

[i]n consultation with his or her supervisor, the investigator must consult with regional counsel at all stages of the processing of a fair housing complaint. These consultations must occur frequently during the process.

\* \* \*

These consultations must include significant involvement at complaint intake and determinations of jurisdiction, in investigation plan development, in conducting investigations, in the effort to resolve the case informally through conciliation, and in making determinations of reasonable cause. (Section 8024.01, Chapter 7, p. 5).

Therefore, the record establishes that the decisions that GS-360 EOSs make are not significant within the meaning of the law and regulation in that the final actions to enforce antidiscrimination housing laws rests with higher level managers and HUD's legal counsel. The decisions that GS-360 EOSs make affect the procedural details of their work, for example, as testified to by employee-witnesses said, how to balance work on the multiple investigations assigned at any time and how to conclude an investigation within the 100 days permitted by law. As discussed under criterion (b)(2), the GS-360 EOS work involves the use of skills and the application of known standards or established procedures and guidelines, as distinguished from work requiring the exercise of discretion and independent judgment.

Other factors to consider include: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; and whether the employee has authority to waive or deviate from established policies and procedures without prior approval. The work of GS-360 EOSs is significant and important in accomplishing HUD's mission, however, the record is clear that GS-360 EOSs do not perform any of these duties on a day-to-day basis.

Therefore, for these reasons, the Arbitrator finds that the GS-360 EOSs' work does not meet criterion (c).

#### ***Criterion (d)***

In addition to the primary duty criterion, GS employees in positions classified at the GS-5 or GS-6 grade level must spend 80 percent or more of the work time in a representative work week on administrative functions and work that is an essential part of those functions. (5 CFR § 551.206(d)).

Because all GS-360 EOS positions are classified above these grade levels, criterion (d) does not apply to the Grievants' work.

#### **DOL Regulations at 29 CFR § 541.203 Administrative examples:**

DOL regulations provide,

[p]ublic sector . . . investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities

in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

In OPM decision number F-1810-12-02, October 16, 2006, referring to *Zumerling v. Devine*, 769 F.2d 745, 750 (Fed. Cir. 1985), OPM specifically states that OPM guidelines must, "harmonize with the statute's 'origin and purpose,' . . . as well as the Secretary of Labor's regulations." (internal citations omitted).

These DOL regulations and OPM decision number F-1810-12-02 form a separate grounds to conclude, based on the totality of the record, that the GS-360 EOS, grade 11, 12 and 13 employees are FLSA nonexempt.<sup>11</sup>

## **Summary**

HUD has already determined that the GS-360 EOS, grade 11, positions are FLSA nonexempt. Based on the entire record developed by the parties and for all these reasons discussed above, the Arbitrator finds that for the GS-360 EOS, grade 12 and 13, positions the administrative employee exemption: criteria (a)(1), (2), (3); (b)(1) and (c) are not met; criterion (b)(2) is met; and criterion (d) is not applicable.

## **THE FLSA CLASSIFICATION OF GS-360 EOS, GRADE 14 AND 15**

As discussed above, OPM regulations and guidance establish that an agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria. (5 CFR § 551.201). Furthermore, each employee is presumed to be FLSA nonexempt and the exemption criteria must be narrowly construed and applied only to employees who are clearly within the terms and spirit of the exemptions. (5 CFR § 551.202(a) and (b)). The burden of proof rests with the agency that asserts the exemption. (5 CFR § 551.202(c)). If there is a reasonable doubt as to whether an employee meets the exemption criteria, then the employee must be classified nonexempt. (5 CFR § 551.202(d)). An agency's designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. (5 CFR § 551.202(l)).

Neither HUD nor AFGE presented evidence regarding the day-to-day duties of GS-360 EOS, grade 14 and 15. No GS-360 EOS, grade 14 or 15, testified and no direct, first-level supervisors of any GS-360 EOSs, grade 14 and 15, testified. The record is without

---

<sup>11</sup> The record also established that a number of GS-360 EOSs are already classified as FLSA nonexempt, House-Bey for example and others. AFGE argues, with merit, that inconsistency among GS-360 EOSs establishes a doubt as to whether HUD has classified any of the GS-360 EOSs correctly. However, based on the Arbitrator's findings overall, it is unnecessary to address AFGE argument.



testimonial or material documentary evidence regarding the day-to-day duties of GS-360, grade 14 and 15.

Regarding the FLSA classification of GS-360 EOSs, grade 14 and 15, HUD argues in its brief in pertinent part,

The scope of this case is properly the GS-360-12 positions. Only a minor amount of evidence is in the record regarding the GS-13 positions and none for those GS-14-15. (footnote omitted). Since the GS-13 level evidence supports a finding FLSA exempt, by extension the GS-14-15 positions must also be found properly exempt. This is the only logical conclusion based on the premise that, as grade levels increase so does the complexity and level of responsibility. Equitably speaking, this is also in accord as a converse, with an agreement between the parties at the outset of this case. That agreement provided that GS-11 positions would be held nonexempt if the GS-12s were found to be nonexempt. (footnote omitted). The GS-13-15 position descriptions are in the record, and have been signed by the supervisors which verifies the accuracy of the duties. There is no prohibition from considering the contents of position descriptions in the context of an FLSA determination. This is particularly true if there is no dispute as to their accuracy. (citations omitted). There is no such dispute here.

In light of the above, noting particularly that the record is devoid of pertinent testimony, it is proper for the arbitrator to employ an extrapolation approach and find that the GS-14-15 positions should be considered nonexempt. (HUD's Brief p. 5).

In response, AFGE asserts that OPM regulations establish "that the designation of an employee as FLSA exempt ultimately rests upon the duties actually performed by the employee." AFGE argues that there is no evidence that the PDs are accurate and the Union never agreed that the PDs are accurate.

The Arbitrator is constrained by OPM regulations discussed above when determine whether HUD properly classified GS-360 EOS, grades 14 and 15, as FLSA exempt. The record establishes that HUD has presented no evidence on the duties actually performed by GS-360 EOSs, grades 14 and 15. Therefore, HUD has not met its burden of proof to support its assertions of the FLSA exemption for the GS-360 EOSs, grade 14 and 15 and, pursuant to 5 CFR § 551.202(a), these employees are presumed to be FLSA nonexempt.

For these reasons, the Arbitrator finds that GS-360 EOSs, grade 14 and 15, are FLSA nonexempt.

## SUMMARY AND ORDER

For all the reasons discussed above, the Arbitrator makes the following findings and conclusion:

1. HUD did not properly exempt GS-360 EOSs, grades 11, 12, 13, 14 and 15 bargaining unit employees from the FLSA when it classified these employees as exempt based solely on grade;
2. HUD did not properly exempt GS-360 EOSs, grades 11, 12, 13, 14 and 15 bargaining unit employees from the FLSA when it classified these employees as exempt based solely on position descriptions;
3. While HUD has already determined *sua sponte* that the GS-360 EOSs, grade 11, are FLSA nonexempt, the Arbitrator finds that for the GS-360 EOSs, grade 12 and 13, regarding the administrative employee exemption: criteria (a)(1), (2), (3); (b)(1) and (c) are not met; criterion (b)(2) is met; and criterion (d) is not applicable;
4. HUD has not met its burden of proof to support an FLSA administrative employee exemption for the GS-360 EOS, grades 14 and 15 and, pursuant to 5 CFR § 551.202(a), these employees are FLSA nonexempt.
5. HUD must immediately: reclassify GS-360 EOS, grade 11, 12, 13, 14 and 15 as FLSA nonexempt; correct all applicable personnel records, including electronic records, to reflect this reclassification; and compensate these employees according to the applicable law, rule and regulations.
6. Pursuant the parties' collective bargaining agreement, **Section 23.04 – Arbitration Fees and Expenses**, I find that HUD is the losing party. Therefore, HUD shall pay the Arbitrator's fees and expenses.
7. The back-pay owed to these bargaining unit employee grievants, if any, will be the subject of a subsequent Opinion and Award, absent settlement.

## AWARD

HUD's GS-360 Equal Opportunity Specialists, grade 11, 12, 13, 14 and 15 are FLSA nonexempt. The American Federation of Government Employees, Council 222's June 18, 2003 and December 24, 2003 Grievances of the Parties regarding the FLSA classification of these bargaining unit employees are sustained.

A handwritten signature in cursive script, appearing to read "Sean J. Rogers", is written over a horizontal line.

Sean J. Rogers, Esq.  
Leonardtown, Maryland  
July 17, 2007